

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

AWA Docket 15-0146

In re:)
)
 STEARNS ZOOLOGICAL RESCUE)
 & REHAB CENTER, INC., a Florida)
 corporation doing business as DADE CITY)
 WILD THINGS,)
)
 Respondent.)

DECISION AND ORDER

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

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

I. Identification of Animals

The Regulations provide:

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

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

(2) By identifying each dog or cat with:

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

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

(iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.” 9 C.F.R. § 2.50(c).

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

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

A Because Mrs. Stearns told us when we asked her. Transcript (Vol. 2), 133:19-134:2.

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

II. Access for Inspection

The Act provides:

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

The Regulations provide:

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.²

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

Ms. Stearns admitted that she was not available for the inspection on January 26, 2012. She was at a doctor's appointment. (Tr. 4, 184) She argues that because the inspector never reached her, Complainant cannot say that she denied them access. This position is not supportable.

¹ 7 U.S.C. § 2146(a).

² 9 C.F.R. § 2.126(a).

It is well settled that the failure of an exhibitor either to be available to provide access for inspection or to designate a responsible person to do so constitutes a willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Accordingly, this violation is **sustained**.³

On September 9, 2013, Dr. Brandes was unable to conduct an inspection at Stearns Zoo's facility because no one was available to accompany him. In his inspection report, Dr. Brandes wrote: "A responsible adult was not available to accompany APHIS Officials during the inspection process at 1:00 P.M. on 09/09/2013." CX 18. At the hearing, Dr. Brandes testified that he rang the bell at the facility, and called Ms. Stearns, who told him that the facility was closed on Monday and she was busy. In support of Respondent's position that the attempted inspection was not made during normal "business hours" as required to establish the alleged violation, Ms. Stearn's testified that the Zoo is a public facility that is closed on Mondays (See Transcript (Vol. 4), 215:2-14). However, the Regulations provide:

"Business hours means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holiday, each week of the year, during which inspections by APHIS may be made." 9 C.F.R. § 1.1.

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

"I reject Mr. Perry and PWR's contention that Dr. Bellin and Mr. Watson did not attempt to conduct an inspection during "business hours," as that term is used in 9 C.F.R. § 2.126, merely because Mr. Perry and PWR's business was not open to the public at the time Dr. Bellin and Mr. Watson attempted to conduct the inspection. The time of the attempted inspection was 10:00 a.m., Thursday, January 20, 2005, which was not a holiday, and Mr. Perry was present loading animals to be moved to La Crosse, Wisconsin, for exhibition....I find, under these circumstances, Dr. Bellin and Mr. Watson attempted to conduct an inspection of Mr. Perry and PWR's business during business hours, even though the business was not open to the public at that time. Therefore, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on January 20, 2005."

In re Craig Perry, supra, 71 Agric. Dec. at 880.

³ Transcript (Vol. 2), 164:12-20.

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

III. Handling

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

"Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort."⁴

"Physical abuse shall not be used to train, work, or otherwise handle animals."⁵

"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."⁶

"Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."⁷

"Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being."⁸

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

⁴ 9 C.F.R. § 2.131(b)(1).

⁵ 9 C.F.R. § 2.131(b)(2)(i).

⁶ 9 C.F.R. § 2.131(c)(1).

⁷ 9 C.F.R. § 2.131(c)(3).

⁸ 9 C.F.R. § 2.131(d)(1).

⁹ 9 C.F.R. § 1.1.

A. Respondent's Baby Tiger Swim Program

Despite credible testimony from Respondent that Respondent attempted to develop its baby tiger swim program with care and attention to the well-being of its animals, and despite my finding that Respondent did not use physical abuse to train, work, or otherwise handle its animals; for the reasons discussed more fully herein below, it is my determination that Stearns Zoo's baby tiger swim sessions failed to provide sufficient distance and/or barriers between the animals and the public as required by the applicable regulations at 9 C.F.R. §§ 2.131(b)(1)), 2.131(b)(2)(i), 2.131(c)(1),¹⁰ and, further, that the baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."¹¹ Therefore, this practice must **cease and desist**.

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

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

¹⁰ Complaint at ¶8b, ¶9a, ¶10c.

¹¹ C.F.R. § 2.131(c)(3).

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

Further, Respondent's veterinarian, Dr. Don Woodman, had no concerns about undue stress so long as the protocol was followed. (RX 13).¹² Signs of undue stress would include abnormal stools, abnormal feeding patterns, growling, listlessness, changes in sleep/wake cycles, changes in gross physical appearance such as a dull sheen to the hair coat or dull look to the eyes or other marked changes in physical condition or mentation. (RX 13; Tr. 3, 48-54). It is undisputed that Respondent's tigers are quite healthy and active and have shown no signs of undue stress, abuse or neglect. (Tr. 3, 42-43). Similarly, Vernon Yates, a humane officer who investigates animal abuse and who owns and trains tigers, testified that he has seen how Respondent's tigers are trained and he has not found any instances of animal cruelty. (Tr. 3, 157).

After reviewing a segment of ABC's "Good Morning America" video footage at the hearing, Dr. Gage testified that "[i]t appeared to me to be an animal in the water that does not want to be in the water and was trying to find the easiest place to get out of the water, and that

¹² In addition to his veterinary qualifications, Dr. Woodman has treated and raised tigers. In raising tigers, he trained them to get used to humans, including by taking them in his pool. (Tr. 3, 40-41).

seemed to be the reporter.”¹³ However, unlike Dr. Gage, who only saw the broadcast video, both Kathy and Randy Stearns were present during the entire interaction. (Tr. 4, 130-135). Contrary to Gage’s view that the tiger was in distress and did not want to swim, Kathy Stearns testified that the tiger was not under any distress and just wanted to play. (Tr. 4, 134-135). Randy Stearns also testified that the tiger was not under distress and simply wanted to play and swim. (Tr. 3, 213, 216-217).

Dr. Gage also noted that there were several occasions in the segment where the trainer pulled or held the smaller cub by the tail while it was in the water.¹⁴ It is undisputed that Respondent’s employees are trained to hold the base of the tiger’s tail to provide balance and support while the tiger learns to swim. (RX 22; Tr. 4, 151). Although Dr. Gage admitted that she had never trained a tiger to swim, she testified, “If you’re supporting it under the base of the tail, it’s truly support, and that may be acceptable, but I feel that pulling on the tail is just a rotten thing to do.” (Tr. 2, 274, 277). She added, “just support, I don’t really see that as being a big issue, but I watched quite a number of these videos and pictures where it looked like the trainer was pulling the animal by the tail.” (Tr. 2, 278). She did not specify which videos or pictures depicted pulling the animal by the tail, and she actually only saw two videos prior to her testimony, neither of which showed a tiger being pulled by the tail.

Randy Stearns adamantly denied pulling or yanking a tiger’s tail. He testified that he would never do that because he works with these cats throughout their lives, “So I don’t want bad blood between a tiger that’s going to be five, 600 pounds later. So it’s kind of a mutual respect. So we do have a good bond. So I wouldn’t want to do anything – you know, especially

¹³ Transcript (Vol. 2), 206:16-20.

¹⁴ CX 6 at 2.

anything to harm an animal, let alone make it upset.” (Tr. 3, 28). Consistent with this testimony, one picture from Seiler’s encounter shows Randy Stearns directing a customer not to grab the tiger’s tail. (Tr. 3, 199). Randy Stearns explained that in the pictures Ms. Seiler presented, he was not actually pulling the tiger’s tail. In the pictures taken on land, he was simply supporting the tiger by its belly with his hand on the tiger’s tail to ensure that the animal did not flip over and fall on his head. The cat was not vocalizing when he had his hand on the tail. (Tr. 3, 29). In one of the water photographs, Stearns’s hand was on the very tip of the tail. He was moving it away after letting the tiger go to swim on its own. In another picture, Stearns had his hand on the tail as the tiger was getting out of the water to keep the tiger from falling back into the water and going under. At the same time, he was moving his right hand under the tiger to support him. (Tr. 3, 33-34). As for holding a tiger by the neck, this allegation apparently was taken from Seiler’s affidavit, which she corrected during the hearing to reflect that the tiger was being held by the scruff of the neck and not strangled. (Tr.1, 85). Dr. Gage testified that scruffing is a common practice, and tigers will relax when held by the scruff, as the mother would do. (Tr. 2, 218, 267).

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

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

Despite credible testimony from Respondent that Respondent attempted to develop its baby tiger swim program with care and attention to the well-being of its animals, and despite my finding that Respondent did not use physical abuse to train, work, or otherwise handle its animals; for the reasons discussed more fully herein below, it is my determination that Stearns Zoo’s baby

tiger swim sessions failed to provide sufficient distance and/or barriers between the animals and the public as required by the applicable regulations at 9 C.F.R. §§ 2.131(b)(1)), 2.131(b)(2)(i), 2.131(c)(1),¹⁵ and, further, that the baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that “(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being.”¹⁶

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

The evidence shows that on September 30, 2011, Barbara Keefe paid for a “tiger swim session” at Stearns Zoo’s facility.¹⁷ In a letter to APHIS and an affidavit, Ms. Keefe described in detail what she observed at the facility.¹⁸ She recalled that at least three separate groups participated in three tiger swim sessions that day.¹⁹

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

“The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come

¹⁵ Complaint at ¶8b, ¶9a, ¶10c.

¹⁶ 9 C.F.R. § 2.131(c)(3).

¹⁷ CX 9.

¹⁸ CX 9 at 1.

¹⁹ CX 9 at 2; Transcript (Vol. 2), 17:2-6, 75:3-8, 78:1-14.

into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.”

In re Tri-State Zoological Park of Western Maryland, Inc. 72 Agric. Dec 128, 138 (2013). See also, *In re Mary Jean Williams, et al.* 64 Agric. Dec. 1347, 1361 (2005).

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

On October 10, 2012, Stearns Zoo exhibited two tigers at Stearns Zoo’s facility on a segment of ABC’s “Good Morning America”. Video footage of the event shows an ABC reporter directly handling two tigers in the pool.²⁰ Dr. Laurie Gage testified regarding the younger tiger (Tony), that “...the size of the animal, the age of the animal...it’s an animal which...should be in the nursery...They should be fully vaccinated, because people can carry a virus that’s very tough in the environment, hard to kill, and lives for a long time and can be carried on people’s clothing and their hands and brought into a situation like this...you’re putting this animal in an unusual situation for its age.”²¹ Dr. Gage noted that adding members to the public that are not trained to handle the animal causes an issue as, “[t]hey don’t necessarily understand how to respond if it misbehaves, or they’re not trained to handle baby tigers.”²² In her declaration (and in her testimony), Dr. Gage noted that APHIS Animal Care considers news reporters, such as the one in the video, to be members of the public.²³

²⁰ CX 4 at 00:18

²¹ Transcript (6/28/16), 197:7-198:7.

²² Transcript (6/28/16), 198:19-199:9.

²³ CX 6 at 1.

Later in the footage, an additional tiger-a large juvenile (Tarzan) - was brought into the pool, where the reporter was in direct contact with the juvenile.²⁴ Dr. Gage testified that, "...this is a large tiger that should not be anywhere close to a member of the public. This is an animal that's too big and too strong, too fast. It could cause damage not only to his handler, but to a member of the public."²⁵ She noted that the animal was 60 pounds, if not more.²⁶ Even Stearns Zoo's attending veterinarian would agree, "[o]ver 40 pounds, at that point, I think that they could start becoming dangerous to the public. They can start causing bites that would be significant or scratches that would be significant."²⁷

"Respondents' lions and tigers are simply too large, too strong, too quick, and too unpredictable for a person (or persons) to restrain the animal or for a member of the public in contact with one of the lions or tigers to have the time to move to safety."

In re: International Siberian Tiger Foundation, et. al., 61 Agric. Dec. 53, 78 (2002).

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

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

In re Tri-State Zoological Park of Western Maryland, Inc. 72 Agric. Dec 128, 138 (2013). See also. *In re Mary Jean Williams, et al.* 64 Agric. Dec. 1347, 1361 (2005).

²⁴ CX 4 at 02:50.

²⁵ Transcript (6/28/16), 204:13-18.

²⁶ Transcript (6/28/16), 211:12.

²⁷ Transcript (6/28/16), 211:12.

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

The evidence reflects that on October 13, 2012, Ms. Jayanti Seiler participated in a “tiger swim” at Stearns Zoo. Ms. Seiler, along with five to seven other people²⁸, were shuttled to the area where the animals were kept. Randy Stearns was the trainer during her session, and the juvenile tiger, Tony was brought out to interact with the customers.²⁹ While there was quite a bit of testimony from various witnesses opining as to whether the baby tigers were in distress or enjoyed the swim sessions, the dispositive point to be made here is that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both section 2.131(c)(1) and 2.131(b)(1):

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

In re Tri-State Zoological Park of Western Maryland, Inc. 72 Agric. Dec 128, 138 (2013). See also, *In re Mary Jean Williams, et al.* 64 Agric. Dec. 1347, 1361 (2005).

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

On October 18, 2012, Stearns Zoo exhibited a young tiger, Tony, in a simulated swim encounter staged in New York, which was presented on “Fox and Friends”.³⁰ The video footage

²⁸ Transcript (Vol. 1), 35:18-20.

²⁹ CX 8 at 1.

³⁰ This was the same tiger depicted in the ABC show a week earlier. Tony was ten weeks old and weighed about 22 pounds. (Tr. 4, 140).

shows Randy Stearns handling “Tony” in front of a public crowd pressed in tightly to the make shift pool in an effort to see the baby tiger.³¹ Contrary to Respondent’s request, a kiddie pool had been provided, and so Tony was unable to swim properly. (Tr. 4, 139). Randy Stearns testified that the tiger made noises indicating that he was excited by the cameras, and that the flimsiness of the pool was a problem for him. (Tr. 4, 140)(Tr. 3, 227). According to Mr. Stearns, the camera was too close to the tiger, and the tiger wanted to play with it. (Tr. 3, 226). He was following the camera until he became distracted by a toy moose. (Tr. 3, 227). The tiger was not under distress or even scared of the camera. He wasn’t doing anything abnormal. (Tr. 3, 228). After this swim, Mr. Stearns testified that “Tony” was perfectly healthy. (Tr. 4, 141-142).

Based on her observation of the video evidence, Dr. Gage concluded that the baby tiger did not want to swim under those circumstances. (CX 6; Tr. 2, 263). While she admitted that it was possible that the tiger wanted to leave the pool because he was curious about something on the outside, Dr. Gage stated that “the animal did not appear to enjoy being in the water...it made numerous and consistent attempts to exit the water but was held in the pool by its handler holding the leash.”³²

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

“The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in

³¹ CX 5.

³² Tr. 2, 264; CX 6 at 2.

attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.”

In re Tri-State Zoological Park of Western Maryland, Inc. 72 Agric. Dec 128, 138 (2013). See also, *In re Mary Jean Williams, et al.* 64 Agric. Dec. 1347, 1361 (2005).

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

Further, and perhaps more importantly, Stearns Zoo’s baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that “(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being.”³³

As referenced *supra*, Dr. Laurie Gage testified regarding the younger tiger (Tony), “...the size of the animal, the age of the animal...it’s an animal which...should be in the nursery...They should be fully vaccinated, because people can carry a virus that’s very tough in the environment, hard to kill, and lives for a long time and can be carried on people’s clothing and their hands and brought into a situation like this...you’re putting this animal in an unusual situation for its age.”³⁴ This testimony is equally applicable to all of the baby tiger swim sessions.

B. Macaque Monkey

The complaint alleges that on or about July 27, 2011, Stearns Zoo willfully violated the Regulations (9 C.F.R. § 2.13(c)(1)), by exhibiting a macaque without sufficient distance and/or

³³ 9 C.F.R. § 2.131(c)(3).

³⁴ Transcript (6/28/16), 197:7-198:7.

barriers between the macaque and the public so as to minimal the risk of harm to the animals and the public.³⁵ Dr. Navarro testified that he received an incident report dated July 21, 2011, from a representative from State Department of Health with respect to an individual who sought treatment for injuries from a monkey bite at Stearns Zoo.³⁶ According to the report, during an encounter with a monkey, the monkey slapped the victim's face and repeatedly bit the victim's arm, breaking the skin.³⁷ Dr. Navarro included this information in an inspection report dated, July 27, 2011.³⁸

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

Ms. Stearns testified that she personally handled the monkey and interacted with the customer. She testified that the monkey was on a leash and did not bite the customer. (Tr. 4, 174-175). The FWC also investigated the complaint, and Ms. Stearns provided the agency with photos of the session; however, nothing came of it. She similarly told the USDA inspector that the incident did not happen and offered to show pictures. (Tr. 4, 176-177, 181). Ms. Stearns

³⁵ Complaint at ¶ 10.a.

³⁶ Transcript (Vol. 2), 119:15-120:1; 120:14-21.

³⁷ CX 21.

³⁸ CX 14.

believed that she appealed the inspection report but she did not keep the paperwork. She felt that the issue had been put to bed since the FWC had found no violation. The first she heard of it again was in this case.³⁹ (Tr. 4, 183).

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

IV. Standards

Section 2.100(a) of the Regulations provides:

Each exhibitor . . . shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals. . .⁴⁰

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

A. May 1, 2013 (Drainage)

Section 3.127(c) of the Standards provides:

“Drainage. A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.”⁴¹

³⁹ The incident was not included in Respondent’s May 31, 2012 official warning. (CX 3).

⁴⁰ 9 C.F.R. § 2.100(a). This Regulation applies to all of the alleged noncompliance with the standards promulgated under the Act (Standards).

⁴¹ 9 C.F.R. § 3.127(c).

The evidence shows that on May 1, 2013, Stearns Zoo's tiger enclosures had an accumulation of mud and water.⁴² In his inspection report, Dr. Navarro wrote:

“A few of the Tiger enclosure[s] had water and mud accumulation due to rainy weather during the night. The owner recognized the problem and started working on it by putting new substrate on the ground inside the enclosure. According to the owner cement is going to be pour[ed] within the next month.”⁴³

Dr. Navarro testified that more than one enclosure had “a lot of mud, and the tigers were muddy, and there was a drainage issue...”⁴⁴ His photographs show two separate enclosures: (1) a tiger laying on the ground with mud in one enclosure⁴⁵ and; (2) another enclosure with muddy ground and drainage issues.⁴⁶ The accumulation of water and mud caused mud to get on the tigers because, “...I don't see anywhere where they can lay down without being muddy”.⁴⁷ Dr. Navarro testified that the mud contains bacteria that could create an infection of the skin and intestinal problems if it were consumed.⁴⁸

Stearns Zoo's asserts that, “it was really wet from the bad storms.”⁴⁹ Inspections of outdoor facilities conducted on rainy days will often reveal pools of water; however, the Standard requires a suitable method to rapidly eliminate excess water.⁵⁰ Stearns Zoo had no method to rapidly eliminate excess water on May 1, 2013. Although Stearns Zoo asserts that it corrected the problem

⁴² Complaint at ¶12a.

⁴³ CX 17 at 1.

⁴⁴ Transcript (Vol. 2), 129:18-22.

⁴⁵ CX 17 at 2, 3; Transcript (Vol. 2), 130:6-10.

⁴⁶ CX 17 at 4, 5; Transcript (Vol. 2), 130:15-18.

⁴⁷ Transcript (Vol. 2), 131:9-12.

⁴⁸ Transcript (Vol. 2), 131:15-19.

⁴⁹ Transcript (Vol. 4), 204:20.

⁵⁰ *In re Gus White*, AWA Docket No. 12-0277, 2014 WL 4311058, at *10 (U.S.D.A. May 13, 2014).

after the inspection,⁵¹ again, subsequent correction does not obviate violations.⁵² Accordingly, the violation is **sustained**.

B. September 6, 2012 (lion enclosure)

Section 3.125(a) of the Standards provides:

“Structural strength. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.”⁵³

As alleged in the complaint, the evidence shows that on September 6, 2012, Stearns Zoo failed to maintain the lion enclosure in good repair as there was a loose electric wire hanging inside the enclosure.⁵⁴ In his inspection report, Dr. Navarro wrote:

“The electric wire inside the lion enclosure was hanging loose due to a tree limb that fell and hit the horizontal holding wire clamp.”⁵⁵

At the hearing, Dr. Navarro testified that the purpose of the electric wire, which goes around the lion enclosure, was to have a continuous, “...electrical circuit that it prevents the animals from going over it because they receive like an electrical shock. It has impulses, and that prevents the

⁵¹ Transcript (Vol. 4), 208:13-209:2.

⁵² *In re Lorenza Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

⁵³ 9 C.F.R. § 3.125(a).

⁵⁴ Complaint at ¶12b.

⁵⁵ CX 16 at 1.

animals from climbing out of the enclosure.”⁵⁶ Dr. Navarro’s photographs show the clamp facing down, allowing the electric wire to touch the fence.⁵⁷ The electric wire was not operating as it was designed to operate because “it was too close to the chain link...if an animal decided to climb over it, it could walk over it because it didn’t have enough separation from the chain-link fence.”⁵⁸ Accordingly, the violation is **sustained**.

C. May 1, 2013 (baboon enclosure)

The evidence shows that on May 1, 2013, Stearns Zoo failed to maintain an enclosure for two baboons in good repair.⁵⁹ Section 3.75(a) of the Standards provides:

“Structure: construction. Housing facilities for nonhuman primates must be designed and constructed so that they are structurally sound for the species of nonhuman primates housed in them. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.”⁶⁰

In his inspection report, Dr. Navarro wrote:

“The enclosure housing the 2 male baboon[s] had a detached welded pole on the side and front panel area of the enclosure in which the primates are exhibited. The constant pushing and pulling on the chain link by the primates on the side and front area of the enclosure may result in a debilitated structure and makes the enclosure vulnerable to escape of the animals.”⁶¹

Photographs taken during the inspection show detached poles on the side panels of the enclosure, caused by the primates banging on the chain-link fence.⁶² Given the strength of the nonhuman primates, Dr. Navarro testified that the issue with the detached poles lay in the danger

⁵⁶ Transcript (Vol. 2), 125:13-16.

⁵⁷ CX 16 at 3, 4; Transcript (Vol. 2), 126:18-126:1.

⁵⁸ Transcript (Vol. 2), 125:14-18.

⁵⁹ Complaint at ¶12c.

⁶⁰ 9 C.F.R. § 3.75(a).

⁶¹ CX 17 at 1.

⁶² CX 17 at 6, 7; Transcript (Vol. 2) 128:20-129:3.

for escape if the chain-link fence became unattached by the nonhuman primates.⁶³ The purpose of the enclosure is to protect the animals from injury and to contain them securely.⁶⁴ The photographic evidence demonstrates the effect of the baboons' strength,⁶⁵ and that the enclosure was structurally compromised due to the detached pole. Accordingly, the violation is **sustained**.

D. November 21, 2013 (pig enclosure)

The evidence shows that on November 21, 2013, Stearns Zoo failed to maintain an enclosure for a pig so as to protect the animal from injury.⁶⁶ Section 3.125(a) of the Standards provides:

“Structural strength. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.”⁶⁷

In his inspection report, Dr. Navarro wrote: “The enclosure housing the pig had a rusted pipe with jagged edges.”⁶⁸ His photographs depict a rusty vertical pipe that was used to close the door of the pig enclosure.⁶⁹ The rust's location-at the bottom edges-posed a risk of harm to the pig as, “...the jagged edges, along with the rust...if he uses his snout, like some of the pigs do, he could cut his snout on the jagged edges.”⁷⁰ Accordingly, the violation is **sustained**.

⁶³ Transcript (Vol. 2), 128:6-9.

⁶⁴ See 9 C.F.R. § 3.75(a).

⁶⁵ Transcript (Vol. 2), 128:20-129:3.

⁶⁶ Complaint at ¶12d.

⁶⁷ 9 C.F.R. § 3.125(a).

⁶⁸ CX 19 at 1.

⁶⁹ Transcript (Vol. 2), 134:13-16.

⁷⁰ Transcript (Vol. 2), 134:9-12.

E. November 21, 2013 (shelter for tigers)

The evidence shows that on November 21, 2013, Stearns Zoo failed to provide tigers with adequate shelter from inclement weather.⁷¹ Section 3.127(b) of the Standards provides:

“Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals.....”⁷²

Exhibitors are required to provide each animal housed outdoors with adequate shelter from the elements.

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

In re Big Bear Farm, Inc., et al., 55 Agric. Dec. 107, 122-23 (1996).⁷³

In his inspection report, Dr. Navarro wrote: “One tiger enclosure had a shelter that was not tall enough for the tigers to go into it and make normal postural movements.”⁷⁴ Dr. Navarro’s photographs show a shelter that, “was not high or tall enough for the animals to get in there in case there was rain and they wanted to get shelter from the elements.”⁷⁵ He testified that the opening

⁷¹ Complaint at ¶12e.

⁷² 9 C.F.R. § 3.127(b).

⁷³ *In re Lorenza Pearson*, 68 Agric. Dec. 685, 709 (2009) (“On or about September 9, 1999, Mr. Pearson housed a bobcat in an enclosure with a damaged roof that did not provide the animal with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations....”); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000) (“Mr. Curren testified that he observed a tiger in an enclosure that had a roof but had no protection on its sides from wind or blowing rain....Respondent states that he completed the repairs necessary to comply with 9 C.F.R. § 3.127(b) by April 20, 1997.... I conclude that on April 9, 1997, Respondent willfully violated section 3.127(b) of the Standards...by failing to provide an animal shelter from inclement weather.”).

⁷⁴ CX 19 at 2.

⁷⁵ CX 19 at 6, 7; Transcript (Vol. 2), 135:22-136:4.

in the enclosure was two feet by two feet, not sufficient for both of the tigers.⁷⁶ Accordingly, the violation is **sustained**.

V. FINDINGS OF FACT

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

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

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

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

E. In 2011, Stearns Zoo represented to APHIS that it held 61 animals; in 2012, Stearns Zoo represented that it held 97 animals; in 2013, Stearns Zoo represented that it held 126 animals; in 2014, Stearns Zoo represented that it held 98 animals; and in 2015, Stearns Zoo represented that it held 139 animals. Complaint at ¶ 2; CX 1.

⁷⁶ Transcript (Vol. 2), 136:13-21.

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

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

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

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

J. On July 27, 2011, it was alleged that Stearns Zoo during exhibition, allowed members of the public to have direct contact with a macaque, without any distance and/or barriers between the macaque and the public; however, this alleged violation was based solely on unsubstantiated third party information which was directly rebutted by the sworn testimony of Ms. Stearns at hearing based on her personal knowledge. CX 14, 21; Tr. 2, 147-148; Tr. 4, 174-175.

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

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

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

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

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

P. On September 6, 2012, Dr. Navarro conducted a compliance inspection at Stearns Zoo. CX 16. He observed and documented in an inspection report that there was a loose electrical

wire hanging inside the lion enclosure and accessible to the lion. CX 16; Transcript (Vol. 2), 124:13-127:19 (Navarro); Stipulations at 1-2 ¶ H.

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

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

VI. CONCLUSIONS OF LAW

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

B. On or about January 26, 2012, and September 9, 2013, Stearns Zoo willfully violated the Act and the Regulations by failing to have a responsible person available to provide

access to APHIS officials to inspect its facilities, animals and records during normal business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

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

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

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

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

- i. September 6, 2012. Loose electric wire inside lion enclosure. 9 C.F.R. § 3.125(a).
- ii. May 1, 2013. No method to rapidly eliminate excess water from tiger enclosures. 9 C.F.R. § 3.127(c).
- iii. May 1, 2013. Detached support pole for enclosure housing two baboons. 9 C.F.R. § 3.75(a).
- iv. November 21, 2013. Rusted pipe with jagged edges in pig enclosure. 9 C.F.R. § 3.125(a).

v. November 21, 2013. Inadequate shelter from inclement weather for tigers.

9 C.F.R. § 3.127(b).

V. Sanctions

The evidence establishes that, *inter alia*, Stearns Zoo repeatedly handled animals in a manner that placed the animals (and people) at risk of harm, and repeatedly failed to provide access for inspection, in willful violation of the Regulations. For these reasons alone, Complainant requests that license 58-C-0883 be revoked. The Complainant also requests that Stearns Zoo be ordered to cease and desist from future violations, and that a civil penalty be assessed. APHIS believes that the evidence supports a finding that Stearns Zoo committed 23 violations and seeks the assessment of a civil penalty of \$23,000. (The maximum civil penalty that could be assessed under the Act is \$230,000.)

The Secretary may revoke an AWA license following a single, willful violation. U.S.C. § 2149(a); *Pearson v. U S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011)("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act"), citing *Cox et al. v. U S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.1991). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *In re Jeffrey W. Ash*, __ Agric. Dec.), slip op. at 16-17 (Sept. 14, 2012); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), appeal dismissed, No. 10-1138 (8th Cir. Feb. 14, 2010); *In re D&H Pet Farms Inc.*, 68 Agric. Dec. 798-812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec 92, 107 (2006), *aff'd per curium*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). However, as reflected in *In re Samuel Esposito*, 38 Agric. Dec. 613,

633 (1979), different degrees of seriousness of violations are recognized by the Judicial Officer and, of course, mitigating circumstances are always considered in determining the sanction to be issued and may be grounds for imposing a lesser sanction.

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

A. Size of the business

Respondent operates a zoo on 22 acres with approximately 300 animals. Respondent has been in business for 16 years and has grown from nothing to being open six days a week. (Tr. 4, 6-9, 13). Therefore, Stearns Zoo operates a large business exhibiting animals. *In re Michael A. Huchital, Ph.D.*, 58 Agric. Dec. 763, 816-17 (1999) (finding the respondent, who held approximately 80 rabbits, operated a large business); *In re Cecil Browning*, 52 Agric. Dec. 129, 151 (1993) (finding the respondent, who held 75-80 animals, operated a moderately large business), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994).

B. Gravity of the violations

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

C. Respondent's Good Faith

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

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

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

In Re: Judie Hansen., 57 Agric. Dec. 1072 (U.S.D.A. Dec. 14, 1998).

Further, a closer look at the May 31, 2012 Official Warning does not support a finding of bad faith. There are seven alleged violations listed on the official warning. (CX 3). Complainant presented evidence on five of them.⁷⁷

⁷⁷ Complainant's counsel stated on the record that it was not contending that an allegation of failure to provide adequate veterinary care to Cleo the black leopard was evidence of bad

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

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

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

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

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

During the tiger swim session the cub #2 (blue collar, black leash) was reluctant to move to the edge of the pool and the handler pulled him by the leash. The cub was later passed from the side of the pool to the handler inside the pool and the cub was apparently under distress by vocalizing and moving around when handled inside the pool in apparent discomfort. After swimming for a short distance the cub swam towards the handler located at the pool wall and extended his paws towards the edge of the pool apparently wanting to get out of the pool. Instead of pulling the cat out of the water and stopping the encounter the handler decided to continue the swimming.

(CX 3, p. 53)

Respondent videotaped the inspection, and strongly contends that the video tells a different story from the subjective allegations contained in the inspection report regarding the

faith. (Tr. 3, 103-104). Complainant also abandoned the alleged prior violation of May 4, 2010 (perimeter fence).

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

Dr. Willems wrote to Respondent again on February 24, 2012, stating that after review of the video, "it appears that the cub pictured is not the same one for which the citation was written. The cub in the video you submitted appears to be the other cub that was swimming in the pool at the time of the inspections. This was the cub we acknowledged was not distressed." (RX 27). Stearns was positive that she sent the agency video of cub two. (Tr. 4, 128). The video that Dr. Willems reviewed shows a cub that he admitted was not in distress. (Tr. 4, 129). After receiving the letter, Stearns called Dr. Willems and sent him the full version of the video with both cubs. She has yet to hear back. (Tr. 4, 126-127). Thus, Respondent was not advised of any violation on September 14, 2011 regarding its tiger swim encounter

Even more importantly, for purposes of considering Complainant's request to *revoke* Respondent's license, is that fact that the full nature and scope of the dangers posed by the Respondents swim program to the baby tigers were not clearly communicated to the Respondent even at the time of the inspections giving rise to the subject violations. The record reflects that the USDA investigators were not particularly concerned with the fact that the baby tigers weighed

only about 20 pounds and were only about 8 weeks old and should not have been in the unnatural and unprotected environment of a chlorinated swimming pool at all or that there were members of the public swimming in the pool with these wild animals. Luis Navarro, a veterinarian medical officer for the United States Department of Agricultural, APHIS Animal Care, and Mr. Gregory S. Gaj, testified as follows:

Testimony of Dr. Navarro:

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8 BY MR. JOCKEL:

9 Q. Let's look at Complainant's Exhibit 3,
10 page 53. Are you there?

11 A Yes.

12 Q. And can you identify this document?

13 A Yes. This is an inspection report
14 conducted September 14, 2011.

15 Q. Where did this inspection occur?

16 A At the facility on Blanton Road. That's
17 the site 1 facility.

18 Q. And where in that facility particularly
19 did that occur?

20 A. Let me read it here. The swim with the
21 tiger session happens usually at the pool that's
22 on the facility. At the time, there was one pool,

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1 I think, and now they have two pools; but I don't
2 think they use this other pool anymore.

3 Q. Was there a facility representative
4 present?

5 A. Yes. Mrs. Stearns was present.

6 Q. And was anyone else from APHIS present?

7 A. Yes. Dr. Gaj was with me during that
8 inspection. He's my supervisor.

9 Q. Okay. What can you recall was the
10 problem that you observed with the tiger-swim
11 session?

12 A. There were two tigers -- young tigers.
13 The first tiger that did the swim session, we
14 didn't notice too much issues with the tiger going
15 into the water or during the swim session. At the
16 end, he was getting tired, and I believe he was
17 trying to reach for the border of the pool to get
18 out.

19 The second tiger is the one that -- was
20 the one we had an issue with, and it was because
21 he was kind of reluctant to go into the water, and
22 the handler had to pick him up, take him to the

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

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9 Q. Let's start from the beginning. Were
10 there members of the public present?

11 A. Yes.

12 Q. How many?

13 A. There were approximately two to four. I

14 can't recall the exact number.

15 Q. And were they located in the pool with

16 the tiger?

17 A. Yes. They would go into the pool with

18 the tiger.

19 Q. And you just testified that there were

20 two different tigers. What was the size of those

21 tigers?

22 A. These tigers were approximately -- I

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1 would have to say approximately because I didn't

2 weigh them, but they were approximately 20, 22

3 pounds of weight, and I asked the owner, and she

4 told me it was around eight weeks of age

5 approximately.

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1 BY MR. JOCKEL:

2 Q. How large was the pool?

3 A. Approximately like 20 feet by 15, I

4 would say, and they would use just half the pool

5 for exhibition. I guess they would use the lower

6 end where it was shallower.

7 Q. And how close did the patrons get to the

8 tigers?

9 A. They got close enough to take pictures

10 with them, and they could pet the tigers.

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6 Q. Have you conducted inspections along
7 with VMO Dr. Navarro at this particular facility?

8 A. Yes, I have.

9 Q. And did you conduct an inspection with
10 Dr. Navarro in September of 2011 that involved a
11 tiger swim?

12 A. Yes, I did.

13 Q. What happened during that inspection?

14 A. When we were doing the inspection for
15 the tiger swim, we went to the pool, which was at
16 Mrs. Stearns' home and that's where they were
17 doing the tiger swim. We watched them take the
18 first tiger, approximately eight weeks, and take
19 it and put it into the pool to swim with the
20 public.

21 JUDGE McCARTHY [*sic*]: Can I ask you a few
22 questions about the pool. Is that a chlorinated?

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1 pool?

2 THE WITNESS: Yes, I believe it is.

3 JUDGE McCARTHY [*sic*]: Is that a standard-size
4 pool for residential purposes, or was it a pool
5 constructed specifically for the utilization of
6 display with these animals?

7 THE WITNESS: It appeared to be just a
8 standard pool for, you know, the owner. I don't
9 think it was specifically designed in any way for

10 exhibition.
11 JUDGE McCARTHY [*sic*]: All right, thank you.
12 THE WITNESS: So, we watched the first
13 juvenile tiger do the swim with the tiger program,
14 and what they did was they led him to the pool,
15 picked up the tiger, handed it to a trainer, put
16 it into the pool, and with the first juvenile
17 tiger, they did have a momentary, you know,
18 uncomfortableness in my opinion with him being put
19 in the water, but the animal appeared to calm down
20 fairly quickly. And then they proceeded to do the
21 swim program, which allowed a member of the public
22 to swim next to the tiger as it was swimming from

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1 one handler across the pool to the other.
2 When they did the first swim with the
3 tiger, I did not feel that there was enough of a
4 problem to -- to say that it was dangerous for the
5 public at that point. The animal seemed to calm
6 down and be acclimated enough to the water to do
7 the program.

8 JUDGE McCARTHY [*sic*]: When you say it swam

9 from one handler to the other, was the animal
10 restrained by a leash at all times?
11 THE WITNESS: I think there was a leash
12 dangling behind the tiger, but it wasn't one that
13 it was actually -- the tiger was actually swimming
14 on its own. There may have been a leash behind it
15 dragging in the water, but I don't think so.

The record reflects that it was not until the hearing that compelling testimony provided by USDA expert witness Dr. Laurie Gage fully demonstrated that Respondent's baby tiger swim program is simply not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."⁷⁸ Dr. Gage provided detailed testimony in support of her position on this issue including, but not limited to, testimony that "...the size of the animal, the age of the animal...it's an animal which...should be in the nursery...They should be fully vaccinated, because people can carry a virus that's very tough in the environment, hard to kill, and lives for a long time and can be carried on people's clothing and their hands and brought into a situation like this...you're putting this animal in an unusual situation for its age."⁷⁹

⁷⁸ 9 C.F.R. § 2.131(c)(3).

⁷⁹ Transcript (6/28/16), 197:7-198:7.

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

4. History of previous violations.

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

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

Complainant also requests that license 58-C-0883 be revoked. The Secretary may revoke an AWA license following a single, willful violation. U.S.C. § 2149(a); *Pearson v. U S. Dep't of Agric.*, 411 F. App'x 866, 872 (6th Cir. 2011)("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act"), citing *Cox et al. v. U S. Dep't of Agric.*, 925 F.2d 1102, 1 105 (8th Cir.199 1). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *In re Jeffrey W. Ash*, __ Agric. Dec.), slip op. at 16-17 (Sept. 14, 2012); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), appeal dismissed, No. 10-1138 (8th Cir. Feb. 14, 2010); *In re D&H Pet Farms Inc.*, 68 Agric. Dec. 798-812-13

(2009): *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). However, as reflected in *In re Samuel Esposito*, 38 Agric. Dec. 613, 633 (1979), different degrees of seriousness of violations are recognized by the Judicial Officer and, of course, mitigating circumstances are always considered in determining the sanction to be issued and may be grounds for imposing a lesser sanction.

It is my determination that the lack of clear communication to the Respondent regarding the full nature and scope of the problems with its baby tiger swim program, the most serious of the subject violations, demonstrates mitigating circumstances which are appropriate for consideration of the imposition of a lesser sanction than revocation. The Judicial Officer has held that "[i]f the remedial purpose of the Animal Welfare Act is to be achieved, the sanction imposed must be adequate to deter Respondent and others from violating the Animal Welfare Act, the Regulations, and the Standards." *In re Volpe Vito*, 56 Agric. Dec. 166 (1997). The assessment of a \$21,000.00 civil money penalty and a sixty (60) day suspension is supported by the record and will ensure address the Secretary's legitimate enforcement concerns without putting Respondent out of business.⁸⁰

⁸⁰ The agency's regulations provide that no license may be issued to any applicant whose license has been revoked, and any person whose license has been revoked shall not be licensed. See 9 C.F.R. § 2.11(a)(3); 9 C.F.R. § 2.10(b); *see also In re Jeffrey W. Ash*, 72 Agric. Dec. ___ AWA Docket No. 12-0296 (Remand Order, May 3, 2013) ("[R]evocation of a person's Animal Welfare Act license bars that person from obtaining an Animal Welfare Act license at any time in the future.")

ORDER

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

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

C. Stearns Zoo is assessed a **civil penalty of \$21,000.00**, to be paid by check made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000, or by overnight delivery addressed to:

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

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

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

Done at Washington, D.C.,
this 15th day of February, 2017


Bobbie J. McCartney
Chief Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776