# AGRICULTURE DECISIONS

**Volume 64**

January - June 2005
Part One (General)
Pages 1 - 854

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

*Agriculture Decisions* is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions.*

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions.* However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 59 (circa 2000) through the current volume of *Agriculture Decisions* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk (CD) of *Agriculture Decisions* will be available for sale at the US Government Printing Office On-line Bookstore at http://bookstore.gpo.gov/ .

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

## LIST OF DECISIONS REPORTED

## JANUARY – JUNE 2005

## AGRICULTURAL MARKETING AGREEMENT ACT

### COURT DECISION

J.W. DeWITT FARMS, INC., DeWITT FAMILY FARMS, INC., AND DON NELSON, d/b/a QUALITY WILD RICE v. MINNESOTA CULTIVATED WILD RICE COUNCIL AND MINNESOTA DEPARTMENT OF AGRICULTURE.
No. Civ.03-3264 JNE/JGL.. ..... 1

LAMERS DAIRY, INC. v. USDA.
No. 04-766.. ..... 10

## AGRICULTURAL MARKETING AGREEMENT ACT

### DEPARTMENTAL DECISION

LION RAISINS, INC., A CALIFORNIA CORPORATION, AND BOGHOSIAN RAISIN PACKING CO., INC., A CALIFORNIA CORPORATION.
2003 AMA Docket No. F&V 989-7.
Decision and Order.. ..... 11

LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-1.
Decision and Order.. ..... 27

## ANIMAL QUARANTINE ACT

### DEPARTMENTAL DECISIONS

JOSZET MOKOS.
A.Q. Docket No.03-0003.
Decision and Order.. ..... 47

MARLA GARCIA GONZALEZ.
A.Q. Docket No. 05-0004.
Decision and Order.. ..... 49

**ANIMAL WELFARE ACT**

**DEPARTMENTAL DECISIONS**

ERICA NICOLE deHAAN, formerly known as, ERICA NICOLE MASHBURN, formerly known as, ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; AND RICKY deHAAN, AN INDIVIDUAL.
AWA Docket No. 04-0004.
Decision and Order as to Erica Nicole deHaan.. ..... 70

DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.
AWA Docket No. 04-0012.
Decision and Order. ..... 91

NELLIE L. BABB, a/k/a NELLIE L. STANBAUGH or STAMBAUGH.
AWA Docket No. 03-0026.
Decision and Order.. ..... 153

RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Decision and Order as to Ricky M. Watson and Cheri Watson.. ... 159

FOR THE BIRDS, INC., AN IDAHO CORPORATION; JERRY L. KORN AND SUSAN F. KORN, INDIVIDUALLY AND d/b/a FOR THE BIRDS; AND BEN KORN.
AWA Docket NO. 04-0033.
Decision and Order.. ..... 199

DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.
AWA Docket No. 05-0003.
Decision and Order.. ..... 223

BODIE S. KNAPP, AN INDIVIDUAL, d/b/a WAYNE'S WORLD SAFARI.
AWA Docket No. 04-0029.
Decision and Order.. ..... 253

FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.
AWA Docket No. 04-0033.
Decision and Order as to For The Birds, Inc., and Jerry L. Korn. . 306

MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL; AND DEBORAH ANN MILETTE, AN INDIVIDUAL.
AWA Docket No. 04-0023.
Decision and Order as to Deborah Ann Milette.. ..... 364

**HORSE PROTECTION ACT**

**DEPARTMENTAL DECISIONS**

TIM GRAY.
HPA Docket No. 01-D022 (formerly HPA Docket No. 01-A022, formerly HPA Docket No. 01-0022.
Decision and Order.. ..... 395

CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.
HPA Docket No. 03-0005.
Decision and Order.. ..... 401

SAND CREEK FARMS, INC.
HPA Docket No. 01-C022 formerly HPA Docket No. 01-A022; formerly HPA Docket No. 01-0022.
Decision and Order Upon Admission of Facts.. ..... 423

MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Decision and Order.. ..... 429

JACKIE McCONNELL, AN INDIVIDUAL; CYNTHIA McCONNELL, AN INDIVIDUAL; AND WHITTER STABLES, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
HPA Docket No. 99-0034.
Decision and Order.. ..... 436

**ORGANIC FOODS PRODUCTION ACT**

**COURT DECISION**

ARTHUR HARVEY v. USDA.
No. 04-1379.. ..... 500

**PLANT QUARANTINE ACT**

**COURT DECISION**

THE CALIFORNIA AVOCADO COMMISSION, ET AL. v. USDA.
No. CVF016578RECSMS.
Decision and Order. ..... 526

## PLANT QUARANTINE ACT

### DEPARTMENTAL DECISION

MIGUEL A. HIDALGO.
P.Q. Docket No. 03-0008.
Decision and Order.. ..... 531

## SUGAR MARKETING ALLOTMENT

### DEPARTMENTAL DECISIONS

AMALGAMATED SUGAR COMPANY, L.L.C.
SMA Docket No. 04-0003.
Decision and Order.. ..... 549

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE.
SMA Docket No. 03-0001.
Decision and Order.. ..... 580

CARGILL, INC.
SMA Docket No. 03-0002.
Decision and Order.. ..... 614

### MISCELLANEOUS ORDERS

BOGHOSIAN RAISIN PACKING CO., INC.
2004 AMA Docket No. F&V 989-1.
Dismissal Order.. ..... 633

LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-1.
Order.. ..... 633

MARK MCDOWELL; JIM JOENS; RICHARD SMITH; AND THE CAMPAIGN FOR FAMILY FARMS, INCLUDING IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, LAND STEWARDSHIP PROJECT, MISSOURI RURAL CRISIS CENTER, ILLINOIS STEWARDSHIP ALLIANCE, AND CITIZENS ACTION COALITION OF INDIANA ON BEHALF OF THEIR PORK CHECKOFF-PAYING HOG FARMER MEMBERS.
AMA PPRCIA Docket No. 05-0001.
Dismissal Without Prejudice.. ..... 635

LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-2.
Order Dismissing Petition With Prejudice.. ..... 637

DAVID McCAULEY.
AWA Docket No. 02-0010.
Order Denying Late Appeal.. ..... 639

JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Ruling Denying Complainant's Motion for Shortened Time for John F. Cuneo, Jr., and The Hawthorn Corporation to File a Response to Complainant's Appeal Petition.. ..... 648

DAVID McCAULEY.
AWA Docket No. 02-0010.
Order Denying Petition for Reconsideration.. ..... 650

DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.
AWA Docket No. 05-0003.
Order Vacating Decision and Order.. ..... 654

RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson.. ..... 655

DELTA AIR LINES, INC.
AWA Docket No. 00-0033.
Order Dismissing Case.. ..... 663

JAMES B. GARRETSON d/b/a JUNGLE PARADISE ZOO.
AWA Docket No. D-05-0001.
Order Dismissing Case.. ..... 664

RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Order Granting Motion to Withdraw Appeal Petition and Vacate Decision.. ..... 664

FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.
AWA Docket No. 04-0033.
Remand Order as to Susan F. Korn.. ..... 667

CITETEC.
CRPA Docket No. 04-0001.
Order Dismissing Case.. ..... 670

ALLEN SPRENGER.
FCIA Docket No. 05-0004.
Order. ..... 671

PLATINUM FOODS OF FLORIDA, INC., AND JOSEPH CANOSSA, SR.
FMIA Docket No. 04-0001.
PPIA Docket No. 04-0001.
Order To Terminate Stipulation and Consent Order.. ..... 671

STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.
FSP Docket No. 02-0004.
Order Dismissing Case.. ..... 673

STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.
FSP Docket No. 03-0004.
Order Dismissing Case.. ..... 673

TIM GRAY, an individual.
HPA Docket No. 01-D022 (formerly
HPA Docket No. 01-A022 (formerly
HPA Docket No. 01-0022)
Confirmation of Oral Decision and Order.. ..... 674

PATTI MAGEE AND MICHAEL MAGEE.
HPA Docket No. 02-0004.
Ruling Dismissing Complainant's Motion to Abrogate Consent Decision. . ..... 676

ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Order Lifting Stay Order..... 678

ROBERT RAYMOND BLACK, II, AN INDIVIDUAL; CHRISTOPHER B. WARLEY, AN INDIVIDUAL; BLACK GOLD FARM, INC., A TEXAS CORPORATION; ROBBIE J. WARLEY, AN INDIVIDUAL, d/b/a BLACK GOLD FARMS; AND HERBERT DERICKSON AND JILL DERICKSON, INDIVIDUALS, d/b/a HERBERT DERICKSON TRAINING FACILITY, a/k/a HERBERT DERICKSON STABLES, a/k/a HERBERT DERICKSON BREEDING AND TRAINING FACILITY.
HPA Docket No. 04-0003.
Order Dismissing Interlocutory Appeal as to Robert Raymond Black, II, and Remanding the Proceeding to the ALJ.. ..... 681

CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.
HPA Docket No. 03-0005.
Stay Order.. ..... 685

PATTI MAGEE and MICHAEL MAGEE.
HPA Docket No. 02-0004.
Order.. ..... 686

LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 03-0001.
Remand Order.. ..... 687

GALLO CATTLE COMPANY, A CALIFORNIA LIMITED PARTNERSHIP.
NDPRB Docket No. 05-0001.
Order Denying Interim Relief.. ..... 689

SHI-E CHIANG and FU-TSEND CHEN.
P.Q. Docket No. 05-0010.
Order Dismissing Case.. ..... 692

ALPHA OMEGA IMPORT and EXPORT, INC.
P.Q. Docket No. 04-0009.
Order.. ..... 692

NICLAS MAGNUSSON.
P.Q. Docket No. 05-0013.
Order.. ..... 693

ISSAM ZIEN. CHARRI.
P.Q. Docket No. 05-0011.
Order Dismissing Case.. ..... 693

ABX AIR, INC, a/k/a AIRBORNE EXPRESS.
P.Q. Docket No. 05-0022.
AQ. Docket No. 05-0009.
Order Dismissing Case.. ..... 693

AMALGAMATED SUGAR COMPANY, L.L.C
SMA Docket No. 04-0003.
Order Denying Motions to Dismiss.
Petitioner and Motion For Summary Judgment..... 694

PACIFIC NORTHWEST SUGAR COMPANY, INC. (Appeal of Southern Minnesota Beet Sugar Cooperative of Reconsidered Opinion of Beet Sugar Marketing Allotment Allocation Transfer From Pacific Northwest Sugar Company By Executive Vice President, Commodity Credit Corporation).
SMA Docket No. 04-0004.
Order.. ..... 704

## DEFAULT DECISIONS

## AGRICULTURAL MARKETING AGREEMENT ACT

JAMES L. QUINN, d/b/a GOOD EARTH FARMS.
AMAA Docket No. 04-0001.
Decision and Order Upon Admission of Facts
by Reason of Default.. ..... 707

MEDHAT MAHMOUD, an individual d/b/a MEDHAT MAHMOUD PRODUCE, a soleproprietorship; JOSE LUIS TORRES, an individual; and FERNANDO TORRES, an individual d/b/a TORRES DATES, a sole proprietorship,
AMAA Docket No. 04-0003.
Decision and Order as to MEDHAT MAHMOUD, an individual d/b/a MEDHAT MAHMOUD PRODUCE, a sole proprietorship.. ..... 712

## DEFAULT DECISIONS

## ANIMAL QUARANTINE ACT

VIRGILIO VASQUEZ VARELA.
A.Q. Docket No. 03-0001.
PQ. Docket No. 04-0007.
Decision and Order.. ..... 716

SUVIT ASAWAPORNSNIT d/b/a VEGASRACE.COM.
A.Q. Docket No. 05-0001.
Decision and Order.. ..... 721

MARLA GARCIA GONZALEZ.
A.Q. Docket No. 05-0004.
Decision and Order.. ..... 728

DARIO CORTEZ.
A.Q. Docket No. 05-0002.
Decision and Order.. ..... 730

## DEFAULT DECISIONS

## ANIMAL WELFARE ACT

LISA R. WHITEAKER, AN INDIVIDUAL d/b/a MONKEYS-N-MORE; MONKEYS-N-MORE, INC., A Nevada domestic corporation, and; SHANE LOGAN, an individual.
AWA Docket No. 04-0026.
Decision and Order as to Lisa R. Whiteaker.. ..... 734

CHRIS MCDONALD AND DONIA MCDONALD AS TO CHRIS MCDONALD d/b/a MCDONALDS FARM, AND DONIA MCDONALD
AWA Docket No. 03-0012.
Decision and Order by Reason of Admission of Facts. ..... 738

BODIE S. KNAPP, an individual d/b/a WAYNE'S WORLD SAFARI.
AWA Docket No. 04-0029.
Decision and Order.. ..... 756

PATRICIA MORRIS d/b/a PATS PETS KENNEL.
AWA Docket No. 04-0006.
Decision and Order.. ..... 773

MICHAEL PITTMAN, AN INDIVIDUAL, a/k/a "SLICK" PITTMAN, WAYNE PITTMAN, and ROGER TRENT PITTMAN.
AWA Docket No. 04-0022.
Decision and Order as to Michael Pittman.. ..... 780

SUSAN DEFRANCESCO and EAST COAST EXOTICS, INC., a CONNECTICUT CORPORATION.
AWA Docket No. 04-0010.
Decision and Order.. ..... 784

ERICA NICOLE DEHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE d/b/a BUNDLE OF JOY KENNEL AND RICKY DEHAAN, AN INDIVIDUAL, ERICA NICOLE AVERY, AN INDIVIDUAL.
AWA Docket No. 04-0004
Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, d/b/a Bundle of Joy Kennel.... 788

ERICA NICOLE DEHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; and RICKY DEHAAN, AN INDIVIDUAL.
AWA Docket No. 04-0004.
Second Decision and Order as to Erica Nicole Dehaan, f/k/a Erica Nicole Mashburn, f/k/a Erica Nicole Avery, an Individual, d/b/a Bundle of Joy Kennel. ..... 798

LARRY DARRELL WINSLOW d/b/a BEAR BREEDERS, INC., and BETH THOMPSON-WINSLOW, d/b/a BEAR BREEDERS, INC.
AWA Docket No. 04-0035.
Decision and Order.. ..... 803

MARY JEAN WILLIAMS, AN INDIVIDUAL;
JOHN BRYAN WILLIAMS, AN INDIVIDUAL;
and DEBORAH ANN MILETTE, AN INDIVIDUAL
AWA Docket No. 04-0023.
Decision and Order ..... 809

RICHARD MIELKE, AN INDIVIDUAL; KAYE MIELKE, AN INDIVIDUAL; AND MIELKE'S PEKE PATCH, AN UNINCORPORATED ASSOCIATION.
AWA Docket No. 05-0006.
Decision and Order as to Richard and Kaye Mielke.. ..... 813

DEBRA D. TETER, AN INDIVIDUAL d/b/a LUV ME KENNEL; and,
MELISSA D. ADAMS, a/k/a MELISSA TETER, AN INDIVIDUAL.
d/b/a LUV ME KENNEL.
AWA Docket No. 05-0008.
Decision and Order as to Debra D. Teter and Melissa D. Adams
by Reasons of Admission of Facts..... 820

**DEFAULT DECISION**

**FEDERAL CROP INSURANCE ACT**

DARRELL J. MEIDINGER.
FCIA Docket No. 05-0003.
Decision and Order.. ..... 835

**DEFAULT DECISION**

**FEDERAL MEAT INSPECTION ACT**
**POULTRY PRODUCTS INSPECTION ACT**

KIRKLAND'S CUSTOM MEATS AND SLAUGHTER, INC.
PPIA Docket No. 05-0001.
FMIA Docket No. 05-0001.
Default Decision and Order.. ..... 837

**DEFAULT DECISIONS**

**PLANT QUARANTINE ACT**

SHANTE MARIE NEWHOUSE.
P.Q. Docket No. 04-0012.
Decision and Order.. ..... 841

ALLIANCE AIRLINES.
P.Q. Docket No. 04-0009.
Decision and Order.. ..... 843

MELE TAUFA.
P.Q. Docket No. 05-0018.
Decision and Order.. ..... 845

HECTOR PINTO.
P.Q. Docket No. 05-0017.
Decision and Order.. ..... 847

ANA ASO.
P.Q. Docket No. 05-0016.
Decision and Order. ..... 849

**Consent Decisions**. ..... 852

This page intentionally left blank.

## AGRICULTURAL MARKETING AGREEMENT ACT

## COURT DECISIONS

**J.W. DeWITT FARMS, INC., DeWITT FAMILY FARMS, INC., AND DON NELSON, d/b/a QUALITY WILD RICE v. MINNESOTA CULTIVATED WILD RICE COUNCIL AND MINNESOTA DEPARTMENT OF AGRICULTURE.**
**No. Civ.03-3264 JNE/JGL.**
**Filed March 14, 2005.**

**(Cite as: 393 F. Supp.2d 847).***

**AMA – Check-off – Rice, cultivated wild – First Amendment – "Color of law".**

J.W. DeWitt, wild rice producer and distributor in Minnesota, brought this action against the Minnesota Consolidated Wild Rice Counsel alleging that "check-off" fees from sales are an unconstitutional abridgement of the first Amendment of free speech. Court denied DeWitt's claim and distinguished this case from *United Foods* 533 U.S. 405 (2001) in finding DeWitt failed to prove that any of the collected funds were used for generic advertisement or that any of Producer's first amendment rights were abridged by Wild Rice council.

**United States District Court**
**D. Minnesota.**

## ORDER

ERICKSEN, District Judge.

J.W. DeWit Farms, Inc., DeWit Family Farms, Inc. (collectively, DeWit Farms), and Don Nelson d/b/a Quality Wild Rice (collectively, Plaintiffs) brought this action against Minnesota Cultivated Wild Rice

---

*Claims originating in U.S. District Courts relating to abridgement of Constitutional rights do not come within the original jurisdiction of the Office of Administrative Law Judges (OALJ), however the issues surrounding the matter of "check-off" fees impact multiple cases decided by the OALJ.

Council (Council) and Gene Hugoson, in his capacity as the Commissioner of the Minnesota Department of Agriculture (collectively, Defendants), alleging that check-off fees collected pursuant to the Agricultural Commodities Promotion Act (the Act), Minn.Stat. §§ 17.51-.69 (2002), are unconstitutional. The case is before the Court on Defendants' motions for summary judgment. For the reasons set forth below, the Court grants the motions.

## I. BACKGROUND

DeWit Farms is a producer of cultivated wild rice in the State of California. Nelson is a Minnesota purchaser of wild rice who purchases and ships wild rice produced in Minnesota, California and elsewhere, including wild rice produced by DeWit Farms.

The purpose of the Act is to promote and stimulate the use, sale and consumption of agricultural commodities and to improve the methods of production, processing and marketing of such commodities. *See* Minn.Stat. § 17.52. Hugoson, as the Commissioner of the Minnesota Department of Agriculture, administers and oversees the enforcement of the Act. The Council is an organization formed in Minnesota pursuant to the Act.[1]

The Council operates pursuant to the Minnesota Cultivated Wild Rice Promotion Order, the purpose of which is:

> to generate funds equitably from cultivated wild rice (Zizania Palustris L.) producers for the establishment of a program for promotion, advertising, production, market research and market development to benefit the Minnesota cultivated wild rice industry in the growing, processing, distributing, sale and handling of its product....

*See* Affidavit of Stephanie A. Riley, Ex. 1.

---

[1]Under the Act, a commodity research and promotion council may be created for the producers of each agricultural commodity as a means to accomplish the objectives of the Act. *See* Minn.Stat. §§ 17.52, 17.54, subd. 1.

More than 65% of the Council's funding for fiscal years 2000-01 through 2002- 03 was derived from federal and state grants.[2] The Council also received private donations and royalties from the sale of seed. In addition, the Council is authorized to and does charge a check-off fee to growers and importers of cultivated wild rice. Presently, the fee is 2.5 cents per finished pound of wild rice delivered into, stored within, or sold in Minnesota. Plaintiffs began paying checkoff fees in fiscal year 2002-03.

## II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party satisfies its burden, Rule 56(e) requires the non-moving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

---

[2] Most of the facts regarding the Council's collection and expenditure of funds referred to in this Order are supported by the unrebutted affidavit testimony of the President of the Council, Beth Nelson. The Court notes that Plaintiffs did not conduct any discovery in this action and, in particular, did not depose Nelson.

**A. Section 1983**

In their Complaint, Plaintiffs allege a claim under 42 U.S.C. § 1983 (2000) against Defendants based on a violation of their First Amendment right to free speech. To prevail on this claim, Plaintiffs must establish: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived Plaintiffs of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *See Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *See also DuBose v. Kelly,* 187 F.3d 999, 1002 (8th Cir.1999).[3] The parties only dispute the second element.

Plaintiffs allege that the collection of check-off fees from Plaintiffs to fund speech-related activities violates their First Amendment rights under *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). In *United Foods,* the United States Supreme Court invalidated a federal statute that imposed fees upon mushroom handlers to fund generic mushroom advertising. 533 U.S. at 412-13, 416, 121 S.Ct. 2334. The statute involved allowed for the assessments to be used for projects for mushroom promotion, research, consumer information, and industry information. *Id.* at 408, 121 S.Ct. 2334. Importantly, however, the assessments in *United Foods* were primarily used to fund generic advertising. *Id.* at 408, 412, 121 S.Ct. 2334 (explaining that "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising"). *See also Livestock Mktg. Ass'n v. United States Dep't of Agric.,* 335 F.3d 711, 725-26 (8th Cir.2003), *cert. granted in part by Veneman v. Livestock Mktg. Ass'n,* 541 U.S. 1062, 124 S.Ct. 2389, 158 L.Ed.2d 962 (2004) and *Nebraska*

---

[3]Section 1983 does not create substantive rights; instead, it provides a remedy for the violation of a federal constitutional or statutory right. *See Baker v. McCollan,* 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

*Cattlemen, Inc. v. Livestock Mktg. Ass'n,* 541 U.S. 1062, 124 S.Ct. 2390, 158 L.Ed.2d 962 (2004).

The Supreme Court has also addressed the issue of compelled payments for generic commodity advertising that was a part of a larger regulatory scheme in *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). There, the Supreme Court rejected a First Amendment challenge to a series of agricultural marketing orders that required producers of certain fruit to pay assessments for product advertising. *Id.* at 477, 117 S.Ct. 2130. In *Glickman,* the challenged assessments were part of a regulatory scheme that restricted market autonomy by displacing aspects of independent business activity. *Id.* at 469, 117 S.Ct. 2130. The Supreme Court reasoned that the purpose of the generic advertising at issue was legitimate and consistent with the regulatory goals of the statutory scheme. *Id.* at 476, 117 S.Ct. 2130.

As a threshold matter, the Court must determine whether Plaintiffs have demonstrated that their First Amendment rights are implicated. Defendants argue that Plaintiffs' objection to paying the check-off fees does not raise a First Amendment concern because the undisputed facts demonstrate that the Council has not used any check-off fees to fund either generic advertising or non-advertising promotion. Hugoson argues further that there is no evidence that Plaintiffs disagree with a message conveyed by any activity undertaken by the Council. Plaintiffs, on the other hand, contend that all of the Council's activities are speech-related activities. As such, Plaintiffs argue the Council's activities are objectionable because they are funded by check-off fees. The Court will consider the categories of the Council's activities separately.

*1. Generic Advertising*

There is no question that assessments used to fund generic advertisements promoting the sale of a particular agricultural product may violate the First Amendment if the party being compelled to pay the assessment disagrees with the message of the advertisement. *See*

*United Foods,* 533 U.S. at 416, 121 S.Ct. 2334. Here, however, the undisputed factual record demonstrates that the Council has not spent any funds on advertising (generic or otherwise) since fiscal year 1999-2000, approximately two years before Plaintiffs began paying check-off fees. *See* Affidavit of Beth Nelson ¶¶ 5, 7, 13. Plaintiffs argue that it is "from the Council's perspective only" that the Council has spent no money on advertising, and they attempt to create a factual issue by citing to and explaining the Council's budgets for fiscal years 2001- 02 and 2002-03. Plaintiffs' speculative interpretation of the Council's budgets, however, is not based on personal knowledge and will not be considered by the Court.[4] *See* Fed.R.Civ.P. 56(e) ("[O]pposing affidavits shall be made on personal knowledge...."). Accordingly, the only admissible evidence in the record regarding the Council's expenditures is the sworn and unrebutted statements of the President of the Council. Based on that evidence, the Court concludes that the Council spent no money on advertisements during the time period Plaintiffs paid check-off fees and therefore, Plaintiffs' objection to advertising cannot form the basis of a First Amendment claim.

*2. Promotional Activities*

Defendants acknowledge that the Council engages in non-advertising promotional projects, such as operating a booth at the Minnesota State Fair, designing its website, holding cooking contests, organizing and attending trade shows, and issuing press releases. Even though these activities do not constitute generic advertising, Plaintiffs nonetheless claim that they are speech-related activities that cannot be funded with check-off fees under *United Foods.*

The Court need not decide whether activities other than generic advertising are governed by the holding of *United Foods* because

---

[4]The Court notes that by failing to conduct discovery, Plaintiffs have forfeited the opportunity to appropriately inquire into the meaning of the documents they now purport to cite as evidence.

Plaintiffs have failed to meet their initial evidentiary burden. First, Plaintiffs have not submitted any evidence demonstrating that check-off fees fund these promotional activities. Indeed, the only admissible evidence in the record indicates that these activities are funded without check-off fees. *See* Nelson Aff. ¶¶ 3, 16. Second, Plaintiffs have submitted no evidence demonstrating that they disagree with the message of any of the promotional activities.[5] *Compare United Foods,* 533 U.S. at 405, 121 S.Ct. 2334 (noting that the party challenging the assessments claimed that mushroom advertisements conflicted with their message that its brand of mushrooms is superior). For these reasons, the Court concludes that Plaintiffs' objection to these activities cannot form the basis of a First Amendment claim.

*3. Research and Other Expenditures*

Finally, Plaintiffs hope to extend the fact-specific holding of *United Foods* to cover all of the Council's remaining activities. In particular, Plaintiffs claim that activities, such as research, staff salaries, rent and office equipment, grower activities, and regulatory and legislative work are speech-related and therefore subject to First Amendment scrutiny. Plaintiffs argue generally that:

> Research is useless without the publication of the results, the publication of proposals, discussions about the proposals, etc. That is all communication-speech activity. The amounts spent for "grower activities," as described by Ms. Nelson involve "newsletters, field days, and annual conferences," which are nothing but speech related activities. The amounts spent for

[5]Indeed, Plaintiffs have not demonstrated that any of these activities convey a message, let alone one with which they disagree. Plaintiffs do allege in the Complaint that the Council "primarily promotes and advertises rice produced in the State of Minnesota, and never advertises rice produced in the State of California, or anywhere outside the State of Minnesota." Comp. ¶ 8. However, Plaintiffs have introduced no evidence to support this allegation and therefore have failed to meet their burden at this stage in the litigation. *See Anderson,* 477 U.S. at 256, 106 S.Ct. 2505 (a party opposing summary judgment may not rest on mere allegations).

> "regulatory and legislative work" are also speech related activity. Ms Nelson describes it as "working with executive agencies to establish programs and policies favorable to wild-rice growers," which is nothing but communication. Furthermore, the $289,000 spent for "contract staff, rent, and office equipment" is all money spent to support the speech related activities as described by Ms. Nelson.

Pls.' Opp'n Mem. at 13-14 (citations omitted).

The Court declines to consider either the issue of whether these activities are speech-related activities or whether they are governed by *United Foods* because Plaintiffs have failed to submit any evidence to support their claim. While the Court acknowledges that many of the Council's research, regulatory, and grower activities could conceivably be used to convey a particular message that would be speech-related, the Court also recognizes that it is equally possible that these activities do not convey any particular message. At this stage of the litigation, particularly after Plaintiffs have been afforded ample opportunity to conduct discovery, the Court will not presume that the above-described activities involve speech. The Court notes once again that it is Plaintiffs' burden to bring forth specific facts establishing not only that these activities involve speech, but that they convey a message with which they disagree. *See, e.g., Celotex,* 477 U.S. at 322-23, 106 S.Ct. 2548 (explaining that Rule 56 mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Plaintiffs have failed to do so.

For the reasons explained above, and viewing the record in the light most favorable to Plaintiffs, the Court concludes that as a matter of law, Plaintiffs cannot make the necessary showing of a First Amendment violation to sustain their § 1983 claim. Therefore, summary judgment is appropriate.

**B. Declaratory Relief**

Plaintiffs also allege a cause of action for declaratory relief. Specifically, Plaintiffs request a declaration from the Court that the check-off fees violate their First Amendment rights. This claim is governed by the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (2000). The Declaratory Judgment Act is not an independent source of federal jurisdiction. *See Schilling v. Rogers,* 363 U.S. 666, 677, 80 S.Ct. 1288, 4 L.Ed.2d 1478 (1960). Because the Court has already determined that Plaintiffs' § 1983 claim fails, the Court dismisses Plaintiffs' claim for declaratory relief for lack of jurisdiction. *See id.* Even if the Court retained jurisdiction over this claim, it would necessarily fail on the merits because, on the record before the Court, Plaintiffs cannot demonstrate that a federal right has been violated. *See id*. (explaining that the availability of relief under the Declaratory Judgment Act presupposes the existence of a judicially remediable right).

## III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The Council's motion for summary judgment [Docket No. 15] is GRANTED.
2. Hugoson's motion for summary judgment [Docket No. 23] is GRANTED.
3. Plaintiffs' Complaint [Docket No. 1] is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

———————

**LAMERS DAIRY, INC. v. USDA.**
**No. 04-766.**
**Filed May 2, 2005.**

**(Former decision, 125 S.Ct. 1592)**

**AMAA – Assessments, unpaid – De-pooling, option available to Class III handlers – equal protection – Legitimate governmental interest to regulate – Breadth of regulatory scheme – targeting of suspect class, when not – Price inversion.**

**Supreme Court of the United States**

Petition for rehearing denied.

_____

## AGRICULTURAL MARKETING AGREEMENT ACT

## DEPARTMENTAL DECISIONS

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION, AND BOGHOSIAN RAISIN PACKING CO., INC., A CALIFORNIA CORPORATION.**
**2003 AMA Docket No. F&V 989-7.**
**Decision and Order.**
**Filed October 19, 2004.***

**AMAA – Agricultural Marketing Agreement Act – Raisin order – Petition contents – Cognizable claim – Dismissal with prejudice.**

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's Order Dismissing Petition with Prejudice. The Judicial Officer stated proceedings under 7 U.S.C. § 608c(15)(A) do not afford a forum to debate questions of policy, desirability, or effectiveness of a marketing order. Moreover, arguments that competitors fare better than Petitioners are not appropriate for consideration in a proceeding under 7 U.S.C. § 608c(15)(A). The Judicial Officer concluded that Petitioners did not state a legally cognizable claim.

Colleen A. Carroll, for Respondent.
Brian C. Leighton and Howard A. Sagaser for Petitioners.
Order Dismissing Petition with Prejudice issued by Victor W. Palmer, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation, and Boghosian Raisin Packing Co., Inc., a California corporation [hereinafter Petitioners], instituted this proceeding by filing a petition[1] on September 10, 2003.

---

*This case was inadvertently left out of *63 Agric. Dec. Jul-Dec. (2004)*. Editor

[1]Petitioners entitle their Petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of the USDA's Processed Products Inspection (continued...)

Petitioners instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the "Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders" (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioners request: (1) that the requirement in sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) that United States Department of Agriculture inspectors inspect incoming and outgoing raisins be eliminated; (2) that the United States Department of Agriculture charge "by the hour per inspector" for inspection of incoming and outgoing raisins; and (3) that the United States Department of Agriculture "update its outgoing standards to meet the needs of today's market and consumers" (Pet. ¶ 20).

On October 10, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the petition should be dismissed with prejudice because the Petition does not contain: (1) the corporate information required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)); (2) the specific provisions of the Raisin Order that Petitioners claim are not in accordance with law, as required by section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)); (3) a full statement of the facts upon which the Petition is based, as required by section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)); and (4) the grounds on which the terms or provisions of the Raisin Order are challenged as not in accordance with law, as required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) (Mot. to Dismiss Pet.). On November 7, 2003, Petitioner Lion Raisins, Inc., filed "Petitioner Lion Raisins,

---

[1](...continued)
Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, and to Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

Inc.'s Opposition to Respondent's Motion to Dismiss Petition", and on December 3, 2003, Petitioner Boghosian Raisin Packing Co., Inc., filed "Petitioner Boghosian Raisin Packing Co., Inc.'s Opposition to Respondent's Motion to Dismiss Petition."

On July 15, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Dismissing Petition with Prejudice" in which the ALJ concluded the Petition did not state a legally cognizable claim and dismissed the Petition with prejudice (Order Dismissing Pet. with Prejudice at 4).

On August 13, 2004, Petitioners appealed the ALJ's Order Dismissing Petition with Prejudice to the Judicial Officer. On August 27, 2004, Respondent filed "Respondent's Response to Petition for Appeal Filed by Petitioners Lion Raisins, Inc., and Boghosian Raisin Packing Co., Inc." On September 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I find the ALJ reached the correct result in dismissing the Petition with prejudice. Therefore, I adopt, with minor modifications, the ALJ's Order Dismissing Petition with Prejudice as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Order Dismissing Petition with Prejudice as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE—7 AGRICULTURE

. . . .

### CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

**§ 608c. Orders regulating handling of commodity**

. . . .

**(6) Other commodities; terms and conditions of orders**

In the case of agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

. . . .

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

. . . .

**(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal

place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(6)(F), (15).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

. . . .

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

. . . .

**CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS),**

## DEPARTMENT OF AGRICULTURE

## PART 900—GENERAL REGULATIONS

. . . .

### SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

**§ 900.52 Institution of proceeding.**

(a) *Filing and service of petition*. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition*. A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and

the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*–(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all

papers which have been filed in connection with the motion to the Judge for consideration.

(2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

## PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

### SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

**§ 989.58 Natural condition raisins.**

. . . .

(d) *Inspection and certification*. (1) Each handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by him. . . . The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products

Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

. . . .

**§ 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.**

. . . .

(d) *Inspection and certification*. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, and unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

7 C.F.R. §§ 900.52(a)-(c)(2); 989.58(d), .59(d).

**ADMINISTRATIVE LAW JUDGE'S**

## ORDER DISMISSING PETITION WITH PREJUDICE (AS RESTATED)

Petitioners request elimination of the requirement that the raisins they handle be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioners contend the cost to them of these inspections at the $9-per-ton-applicable-rate is too high. Petitioners allege their plants have fast-moving processing equipment that results in their paying $108 to $135 per hour for United States Department of Agriculture inspection. Petitioners allege the hourly rate they pay for United States Department of Agriculture inspection is excessive and unfair since the United States Department of Agriculture employs at their plants only one inspector and never more than two. Additionally, Petitioners assert the resultant hourly charges to Petitioners by the United States Department of Agriculture are higher than the United States Department of Agriculture charges Petitioners' less efficient competitors with slower processing equipment. Petitioners contend they can obtain cheaper and superior inspection privately, albeit their products would not be "USDA inspected." Petitioners claim most of their customers do not want raisins that are inspected by the United States Department of Agriculture, but, instead, prefer Petitioners' quality control inspection certificate. (Pet. ¶¶ 8-14, 15B.)

The handling of California raisins, at the behest of the California raisin industry, is subject to the requirements of the Raisin Order. Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) require inspection and certification of raisins by the United States Department of Agriculture. Petitioners contend these inspection and certification provisions of the Raisin Order and "related order provisions and regulation provisions mandating USDA Inspection Service . . . are arbitrary, capricious, not in accordance with the law, and . . . over-priced" and request their elimination or modification (Pet. ¶ 17).

Federal marketing orders regulating the handling of various fruits and vegetables come into being only when specifically requested by the industry. Upon industry request, a rulemaking hearing is held

which may result in the formulation of a proposed marketing order. Grower members of the affected industry then must vote on whether they wish the handling of their fruits or vegetables to be subject to the terms of the proposed marketing order. Upon a favorable vote by two-thirds of the growers, the marketing order is promulgated and is then administered, subject to oversight by the Secretary of Agriculture and approval by an industry committee.[2] Under section 989.26 of the Raisin Order (7 C.F.R. § 989.26), the Raisin Administrative Committee was established to consist of 47 members, 35 of whom represent producers (growers), 10 represent handlers, one represents the Cooperative Bargaining Association, and one is a public member. This section of the Raisin Order, together with sections 989.27 through 989.39 of the Raisin Order (7 C.F.R. §§ 989.27-.39), describe the way in which members are selected, their eligibility, term of office, powers, duties, obligations, and other aspects of the Raisin Administrative Committee.

Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) provide that the Raisin Administrative Committee may seek to have inspection of raisins performed by another agency because it would improve the administration of the subpart (7 C.F.R. §§ 989.1-.95). The Raisin Administrative Committee has not sought to have another agency perform raisin inspections. Apparently, the Raisin Administrative Committee finds the inspectors employed by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch to be trustworthy and the certificates they issue to afford industry members and their customers a valuable form of protection that promotes the image of the product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. The Raisin Administrative Committee is so empowered by section 989.35(a) of the Raisin Order (7 C.F.R. § 989.35(a)). The Processed Products Standardization and Inspection Branch, operated by the Agricultural Marketing Service, is authorized to enter into an

---

[2]*See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

agreement regarding inspection charges by 7 C.F.R. § 52.51(b), a regulation promulgated through notice-and-comment rulemaking. The resulting Memorandum of Understanding between the Raisin Administrative Committee and the United States Department of Agriculture is attached as Exhibit B and the fee schedule established pursuant to the Memorandum of Understanding is attached as Exhibit C to Respondent's Motion to Dismiss Petition. Also, attached to Respondent's Motion to Dismiss Petition is a declaration by Mickey Martinez, the Officer in Charge of the United States Department of Agriculture's Processed Products Branch Inspection Service, Agricultural Marketing Service (Exhibit A).

Compared with these fees negotiated by the Raisin Administrative Committee, which was selected to represent the California raisin industry, Petitioners simply allege the fees are too high and disadvantage them in comparison to their competitors. But whether inspections could be performed more cheaply or more efficiently by others and better assure the quality of California raisins are not matters that may be decided in proceedings instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions.[3]

Moreover, Petitioners' arguments that competitors fare better than Petitioners are not appropriate for consideration in these proceedings. As stated in *In re Daniel Strebin*, 56 Agric. Dec. at 1136, *citing Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997):

> Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]"

---

[3]*In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

Simply put, none of Petitioners arguments can be said to show that the Raisin Order, any regulation pertaining to the Raisin Order, or any action taken under the Raisin Order or in its respect are "not in accordance with law" as section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires for Petitioners' Petition to be successful.

There are also technical deficiencies with the Petition which would require its dismissal and replacement by an amended petition. But the failure to state a legally cognizable claim is the fatal flaw that leads me to dismiss the Petition with prejudice. Petitioners' attorneys are experts in the laws that apply to the legal world of marketing orders. If Petitioners had some legally cognizable claim, I am sure it would have been coherently expressed. To allow future amended petitions on this subject would be a waste of resources.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners raise five issues in "Petitioners' Appeal Petition to the Judicial Officer from the ALJ Order Dismissing Petition with Prejudice (7 C.F.R. § 900.65(a))" [hereinafter Appeal Petition]. First, Petitioners assert the ALJ erroneously and inadequately summarized Petitioners' claims (Appeal Pet. at 7). Petitioners identify six ALJ statements that Petitioners assert are erroneous and inadequate. However, a comparison of the Petition with the ALJ's Order Dismissing Petition with Prejudice reveals that the ALJ accurately and adequately summarized Petitioners' claims.

Second, Petitioners contend the ALJ erroneously concluded that proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions and that Petitioners' arguments that competitors fare better than Petitioners are not appropriate considerations in proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) (Appeal Pet. at 7).

I disagree with Petitioners' contention that the ALJ's conclusions are error. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) only provides a forum in which a handler may seek modification of, or exemption from, an order (or any provision of, or any obligation imposed in connection with, an order) that is "not in accordance with

law." Questions of policy, desirability, or effectiveness of an order (or any provision of, or any obligation imposed in connection with, an order) are not appropriate considerations in proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[4] Moreover, arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in collective action.[5]

Third, Petitioners contend the ALJ erroneously determined Petitioners' claims merely concern questions of Raisin Order policy, desirability, or effectiveness (Appeal Pet. at 8).

Petitioners allege the United States Department of Agriculture's appointment of "its very own inspectors to inspect all incoming and outgoing raisins" is not in accordance with law (Pet. ¶ 15). However, section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) requires that each agricultural commodity marketing order, other than milk marketing orders, contain a term requiring the inspection of the agricultural commodity subject to the marketing order. Petitioners cite section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) (Pet. ¶ 5) and appear to contradict their allegation that the United States Department of Agriculture's appointment of "its very own inspectors to inspect all incoming and outgoing raisins" is not in accordance with law, as follows:

> 7. Thus, *pursuant to the AMAA*, the Secretary required mandatory incoming inspections and outgoing inspections on all raisins covered by the Raisin Marketing Order, and appointed its very own Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service of the United States Department of Agriculture to provide the "Inspection Service[.]"

---

[4] *See* note 3.

[5] *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1136 (1997) (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997)).

Pet. ¶ 7 (emphasis added).

In light of the plain language of section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) and Petitioners' allegation in paragraph 7 of the Petition, I conclude Petitioners do not state a legally cognizable claim in paragraph 15 of the Petition.

In addition, Petitioners state the facts alleged in paragraphs 1 through 16 of the Petition show that sections 989.58(d) and 989.59(e) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(e))[6] are not in accordance with law (Pet. ¶ 17). After carefully reviewing the factual allegations in the Petition, I agree with the ALJ's conclusion that the facts alleged in the Petition merely raise questions of Raisin Order policy, desirability, or effectiveness and Petitioners have not alleged facts that support a legally cognizable claim in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Fourth, Petitioners contend their claims that the United States Department of Agriculture negligently conducted inspections of their raisins and negligently recorded results of those inspections are legally cognizable claims in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) and the ALJ erroneously failed to address these claims (Appeal Pet. at 9-10).

I disagree with Petitioners' contention that the ALJ erroneously failed to address their claims of United States Department of Agriculture negligence. The ALJ addressed all of Petitioners' allegations, as follows:

> Simply put, none of the arguments set forth by Petitioners can be said to show that the Marketing Order, any regulation pertaining to it, or any action taken under it or in its respect are "not in accordance with law" as the Act requires for their

---

[6]Petitioners state their reference to section 989.59(e) of the Raisin Order (7 C.F.R. § 989.59(e)) in the Petition is a typographical error and Petitioners meant to refer to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) (Petitioner Lion Raisins, Inc.'s Opposition to Respondent's Motion to Dismiss Petition at 4; Petitioner Boghosian Raisin, Packing Co., Inc.'s Opposition to Respondent's Motion to Dismiss Petition at 3).

Petition to be successful.

Order Dismissing Petition with Prejudice at 4.

Moreover, I conclude Petitioners' allegations of United States Department of Agriculture negligence raise questions of inspector performance, which is not a claim legally cognizable in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Fifth, Petitioners contend the Petition contains two succinct cognizable claims and, if the ALJ did not understand Petitioners' claims, he should have allowed Petitioners to amend the Petition to make the claims more succinct (Appeal Pet. at 10).

The ALJ's Order Dismissing Petition with Prejudice indicates that the ALJ understood Petitioners' claims. Moreover, Petitioners do not cite, and I cannot locate, any portion of the ALJ's Order Dismissing Petition with Prejudice indicating that the ALJ dismissed the Petition because Petitioners' claims were not succinctly stated.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Petitioners' Petition, filed September 10, 2003, is dismissed with prejudice.

2. This Order shall become effective on the day after service on Petitioners.

## RIGHT TO JUDICIAL REVIEW

Petitioners have the right to obtain review of this Order in any district court of the United States in which district Petitioners are inhabitants or have their principal places of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of

Agriculture.[7] The date of entry of this Order is October 19, 2004.

---

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.**
**2005 AMA Docket No. F&V 989-1.**
**Decision and Order.**
**Filed April 25, 2005.**

**AMAA – Agricultural Marketing Agreement Act – Raisin order – Premature amended petition – Petition contents – Cognizable claim – Dismissal with prejudice.**

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ's) Order striking Petitioner's Amended Petition and dismissing Petitioner's Petition. The Judicial Officer stated, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the administrative law judge's order dismissing the petition (7 C.F.R. § 900.52(c)(2)). The Judicial Officer struck Petitioner's Amended Petition as premature because Petitioner filed it 33 days prior to being served with the ALJ's Order dismissing Petitioner's Petition. The Judicial Officer dismissed Petitioner's Petition with prejudice because it did not state a legally-cognizable claim. In addition, the Judicial Officer found Petitioner's Petition did not contain the information required by 7 C.F.R. § 900.52(b).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a petition[1] on November 10, 2004. Petitioner

---

[7] *See* 7 U.S.C. § 608c(15)(B).

[1]Petitioner entitles its petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to (continued...)

instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the "Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders" (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioner requests: (1) that the requirement in sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) that United States Department of Agriculture inspect raisins be eliminated and that handlers be allowed to inspect their own raisins or to hire other qualified persons to inspect their raisins; (2)(a) that qualified companies or associations be allowed to conduct processed product inspection, or (b) that each handler be allowed to conduct its own processed products inspection under the observation and supervision of a qualified company or association, or (c) that handlers be allowed to use a program recognized by the United States Department of Agriculture for processed products inspection; and (3) that a finding be made that the United States Department of Agriculture's failure to permit the Dried Fruit Association to conduct raisin inspections is arbitrary and capricious (Pet. ¶ 17).

On December 29, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends Petitioner's Petition should be dismissed with prejudice because: (1) Petitioner seeks to re-litigate issues decided in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), and the doctrine of *res judicata* bars re-litigation of those issues; (2) the Judicial Officer's Order dismissing with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), bars Petitioner from

---

[1](...continued)
Eliminate as Mandatory the Use of USDA Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, to Exempt Petitioners [sic] from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

bringing further suit on the same claim; and (3) Petitioner's Petition does not contain (a) the corporate information required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), (b) reference to provisions of the Raisin Order Petitioner claims are not in accordance with law, as required by section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)), (c) a full statement of the facts upon which Petitioner's Petition is based, as required by section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)), or (d) the grounds upon which the terms or provisions of the Raisin Order are challenged as not in accordance with law, as required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) (Mot. to Dismiss Pet.).

On February 9, 2005, Petitioner filed an amended petition.[2] On February 14, 2005, Respondent filed a "Motion to Strike Amended Petition, or in The Alternative, Motion for Extension of Time" [hereinafter Motion to Strike Amended Petition].

On March 3, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) granting Respondent's Motion to Strike Amended Petition; (2) granting Respondent's Motion to Dismiss Petition; and (3) stating Petitioner may file an amended petition within 20 days of service of the Order (ALJ's March 3, 2005, Order at 3).

On March 11, 2005, Respondent appealed the ALJ's March 3, 2005, Order. On March 30, 2005, Petitioner filed "Petitioner's Response to Respondent's Appeal Petition." On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the

---

[2]Petitioner entitles its amended petition "Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Amended Petition].

ALJ's dismissing Petitioner's Petition and striking Petitioner's Amended Petition; however, I find some of the ALJ's discussion irrelevant. Therefore, while I dismiss Petitioner's Petition and strike Petitioner's Amended Petition, I do not adopt the ALJ's March 3, 2005, Order.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE—7 AGRICULTURE

. . . .

### CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

**§ 608c. Orders regulating handling of commodity**

. . . .

**(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the

President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

. . . .

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

. . . .

## CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

## PART 900—GENERAL REGULATIONS

. . . .

### SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

**§ 900.52 Institution of proceeding.**

(a) *Filing and service of petition*. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition*. A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof,

which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*–(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion

including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the Judge for consideration.

(2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

## PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

### SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

**§ 989.58 Natural condition raisins.**

. . . .

(d) *Inspection and certification*. (1) Each handler shall cause an inspection and certification to be made of all natural

condition raisins acquired or received by him. . . . The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

. . . .

**§ 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.**

. . . .

(d) *Inspection and certification*. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval

of the Secretary, in appropriate rules and regulations.

7 C.F.R. §§ 900.52(a)-(c)(2); 989.58(d), .59(d).

## DECISION

*Respondent's Motion to Strike Amended Petition*

Section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) provides, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the administrative law judge's order dismissing the petitioner's petition or any portion of the petitioner's petition. Petitioner filed the Amended Petition on February 9, 2005, 33 days prior to the date the Hearing Clerk served Petitioner with the ALJ's March 3, 2005, Order dismissing Petitioner's Petition.[3] Therefore, Petitioner's Amended Petition should be stricken as premature.

*Respondent's Motion to Dismiss Petition*

Petitioner's Petition raises the same claims Petitioner raised in the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). I dismissed with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). A dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant and bars future suits brought by the plaintiff on the same cause of action.[4] A dismissal with prejudice constitutes a final judgment with the preclusive effect of *res judicata*

---

[3] *See* United States Postal Service Domestic Return Receipt for Article 7004 1160 0001 9221 3106 establishing the Hearing Clerk served Petitioner with the ALJ's March 3, 2005, Order on March 14, 2005.

[4] *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *FEC v. Al Salvi For Senate Comm.*, 205 F.3d 1015, 1020 (7th Cir. 2000); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Wainwright Securities, Inc. v. Wall Street Transcript*, 80 F.R.D. 103, 105 (S.D.N.Y. 1978).

not only as to all matters litigated and decided by the dismissal, but as to all relevant issues that could have been raised and litigated in the suit.[5] Therefore, Petitioner's Petition is barred by *res judicata* and should be dismissed with prejudice.

Moreover, Petitioner's Petition does not comply with the requirements of section 900.52(b)(1)-(2), (4) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(2), (4)). Specifically, section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) requires that a petition contain the names, addresses, and respective positions held by a corporate petitioner's officers. Petitioner identifies one officer, its president Alfred Lion, Jr. (Pet. ¶ 1A). Petitioner's Amended Petition identifies multiple officers, each officer's position, and each officer's address (Amended Pet. ¶ 2). Therefore, I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)).

Section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) requires that each petition contain a reference to the specific terms or provisions of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains. Petitioner "challenges §§ 989.58(d) & 989.59(d) and any corollary marketing order provisions or regulation provisions that depend upon §§ 989.58(d) & 989.59(d), such as 989.102" (Pet. ¶ 6). I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) because the Petition does not specifically reference all of the "corollary" Raisin Order terms or provisions which Petitioner challenges.

Section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) requires that each petition contain a statement of the grounds upon which the terms or provisions of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains, are challenged as not in accordance

---

[5]*Heiser v. Woodruff*, 327 U.S. 726, 735 (1946); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Teltronics v. L M Ericsson Telecommunications, Inc.*, 642 F.2d 31, 35 (2d Cir. 1981).

with law.

Petitioner requests elimination of the requirement that the raisins it handles be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioner contends the cost of United States Department of Agriculture inspections, at the $10-per-ton rate, is too high. Petitioner alleges it processes about 15 tons of raisins per hour resulting in the payment of approximately $135 per hour for United States Department of Agriculture inspection. Petitioner alleges the hourly rate it pays for United States Department of Agriculture inspection is excessive and unfair since the United States Department of Agriculture generally provides two inspectors and, on many occasions, one inspector for the inspection of Petitioner's raisins. Additionally, Petitioner asserts the resultant hourly charges to Petitioner by the United States Department of Agriculture are higher than the United States Department of Agriculture charges "consumer-pack oriented" processors and handlers. Further still, Petitioner contends the United States Department of Agriculture provides better inspection service to Petitioner's competitors, the United States Department of Agriculture negligently performs inspections, and Petitioner's quality control program is better than the inspection service provided by the United States Department of Agriculture. (Pet. ¶¶ 8-14.)

The handling of California raisins, at the behest of the California raisin industry, is subject to the requirements of the Raisin Order. Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) require inspection and certification of raisins by the United States Department of Agriculture. Petitioner requests elimination of these inspections and certification provisions of the Raisin Order (Pet. ¶ 17A).

Marketing orders regulating the handling of various fruits and vegetables come into being only when specifically requested by the industry. Upon industry request, a rulemaking hearing is held which may result in the formulation of a proposed marketing order. Grower members of the affected industry then must vote on whether they wish the handling of their fruits or vegetables to be subject to the terms of the proposed marketing order. Upon a favorable vote by

two-thirds of the growers, the marketing order is promulgated and is then administered, subject to oversight by the Secretary of Agriculture and approval by an industry committee.[6] Under section 989.26 of the Raisin Order (7 C.F.R. § 989.26), the Raisin Administrative Committee was established to consist of 47 members, 35 of whom represent producers (growers), 10 represent handlers, 1 represents the Cooperative Bargaining Association, and 1 is a public member. This section of the Raisin Order, together with sections 989.27 through 989.39 of the Raisin Order (7 C.F.R. §§ 989.27-.39), describe the way in which members are selected, their eligibility, term of office, powers, duties, obligations, and other aspects of the Raisin Administrative Committee.

Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) provide that the Raisin Administrative Committee may seek to have inspection of raisins performed by another agency because it would improve the administration of the subpart (7 C.F.R. §§ 989.1-.95). The Raisin Administrative Committee has not sought to have another agency perform raisin inspections. Apparently, the Raisin Administrative Committee finds the inspectors employed by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch to be trustworthy and the certificates they issue to afford industry members and their customers a valuable form of protection that promotes the image of the product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. The Raisin Administrative Committee is so empowered by section 989.35(a) of the Raisin Order (7 C.F.R. § 989.35(a)). The Processed Products Standardization and Inspection Branch, operated by the Agricultural Marketing Service, is authorized to enter into an agreement regarding inspection charges by 7 C.F.R. § 52.51(b), a regulation promulgated through notice-and-comment rulemaking.

Compared with these fees negotiated by the Raisin Administrative Committee, which was selected to represent the California raisin

---

[6]*See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

industry, Petitioner simply alleges the fees are too high, disadvantage Petitioner in comparison to its competitors, have not been properly adopted, and are arbitrary and capricious. But whether inspections could be performed more cheaply or more efficiently by others and better assure the quality of California raisins are not matters that may be decided in proceedings instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions.[7]

Moreover, Petitioner's argument that competitors fare better than Petitioner is not appropriate for consideration in these proceedings. As stated in *In re Daniel Strebin*, 56 Agric. Dec. at 1136, *citing Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997):

> Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]"

Simply put, none of Petitioner's arguments can be said to show that the Raisin Order, any regulation pertaining to the Raisin Order, or any action taken under the Raisin Order, or in its respect, are "not in accordance with law" as section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires for Petitioner's Petition to be successful. The failure to state a legally-cognizable claim is the fatal flaw that leads me to dismiss Petitioner's Petition with prejudice.

**RESPONDENT'S APPEAL PETITION**

---

[7]*In re Lion Raisins, Inc.*, 64 Agric. Dec. 11, 22-3, (2004); *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

Respondent raises five issues in Respondent's Appeal Petition. First, Respondent contends "[t]he ALJ erred in assuming an 'oversight or omission' in the Rules of Practice" (Respondent's Appeal Pet. at 2).

Section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that a pleading may be amended, as follows:

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

7 C.F.R. § 1.137(a).

The ALJ correctly states the Rules of Practice does not include a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). The ALJ asserts the absence of such a provision in the Rules of Practice is "an apparent oversight or omission." (ALJ's March 3, 2005, Order at 2.)

I find irrelevant the reason for the absence in the Rules of Practice of a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). Therefore, I do not adopt the ALJ's assertion regarding the apparent reason for the absence of a provision in the Rules of Practice identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)).

Second, Respondent contends the ALJ erroneously refers to the

Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130-.151) as "the usual provisions of the rules" and erroneously characterizes the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders as "obscure" (Respondent's Appeal Pet. at 2-3).

The ALJ refers to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137), under which a party may amend a pleading, as "the usual provisions of the rules" and characterizes the provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" (ALJ's March 3, 2005, Order at 2).

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) are applicable to adjudicatory proceedings instituted under more than 40 statutes.[8] The Rules of Practice (7 C.F.R. §§ 900.50-.71) are only applicable to proceedings instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) to modify or to be exempted from marketing orders. United States Department of Agriculture administrative law judges conduct substantially more proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes than they conduct in accordance with the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders. I infer the ALJ's reference to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137) as "the usual provisions of the rules" and the ALJ's characterization of provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" merely reflect the frequency with which the ALJ conducts proceedings under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various

---

[8]7 C.F.R. § 1.131.

Statutes as compared to the frequency with which the ALJ conducts proceedings under the Rules of Practice. Therefore, while I do not adopt the ALJ's references to "the usual provisions of the rules" and "the more obscure provisions," I reject Respondent's contention that the ALJ's reference to "the usual provisions of the rules" and "the more obscure provisions" are error.

Third, Respondent contends the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition: namely, the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), and should be dismissed with prejudice (Respondent's Appeal Pet. at 4-5).

The ALJ did not directly address Respondent's argument that the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). However, I infer from the ALJ's March 3, 2005, Order that he found the Petition in the instant proceeding was not the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), because the ALJ refers to the "ultimate resolution of this case" and states Petitioner may, consistent with section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)), "file any amended petition" (ALJ's March 3, 2005, Order at 3). Therefore, I reject Respondent's contention that the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition.

Fourth, Respondent contends, although the ALJ agreed with Respondent that the Petition did not comply with the requirements of the Rules of Practice, the ALJ erroneously failed to clearly state his reasons for the March 3, 2005, Order (Respondent's Appeal Pet. at 5).

I disagree with Respondent. The ALJ granted Respondent's Motion to Strike Amended Petition, granted Respondent's Motion to Dismiss Petition, and clearly stated the reasons for granting Respondent's motions. I find no reason to reiterate the ALJ's reasons for the March 3, 2005, Order here.

Fifth, Respondent contends the ALJ erroneously refers to procedures applicable in other jurisdictions or forums and erroneously states Respondent sought strict compliance with procedural

requirements. Respondent states the Secretary of Agriculture promulgated the Rules of Practice which apply exclusively to petitions to modify or to be exempted from marketing orders and requires petitions initiating proceedings under the Rules of Practice to contain certain specified information. (Respondent's Appeal Pet. at 5.)

The ALJ references "other forums" and states Respondent sought strict compliance with procedural requirements, as follows:

> The Petitioner failed to directly respond to the Motion to Dismiss, but rather sought to correct the deficiencies with the Amended Petition. Such a failure likely would not be fatal in other forums or for that matter in most federal practice; however, strict compliance with procedural requirements has been sought by the Respondent.

ALJ's March 3, 2005, Order at 3.

I agree with Respondent's contention that the Secretary of Agriculture promulgated the Rules of Practice to apply to proceedings to modify or to be exempted from marketing orders and rules of practice applicable in other forums are not relevant to this proceeding. Moreover, I agree with Respondent that each petition to modify or to be exempted from a marketing order must comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) because the Rules of Practice state that each petition "shall" contain certain specified information, not because strict compliance with procedural requirements has been sought by a respondent. However, I do not find the ALJ erred. I agree with the ALJ that Respondent's Motion to Dismiss Petition sought strict compliance with the Rules of Practice. Moreover, I agree with the ALJ that Petitioner's filing an Amended Petition, rather than a response to Respondent's Motion to Dismiss Petition, would not be fatal in all forums. Therefore, while I do not adopt the ALJ's discussion, I do not conclude the ALJ's references to other forums and Respondent's request in Respondent's Motion to Dismiss Petition, are error.

## PETITIONER'S RESPONSE TO RESPONDENT'S APPEAL PETITION

Petitioner filed very helpful responses to each of the specific issues raised by Respondent in Respondent's Appeal Petition. In addition, Petitioner raises two fundamental issues regarding the Respondent's Appeal Petition. First, Petitioner contends Respondent's Appeal Petition should be dismissed because "Respondent, in an effort to waste judicial (and party) resources, has filed an appeal from the ruling in Respondent's favor" (Petitioner's Response to Respondent's Appeal Pet. at 1).

The ALJ's March 3, 2005, Order is favorable to Respondent. Nonetheless, Respondent disagreed with parts of the ALJ's March 3, 2005, Order. Section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) provides "[a]ny party who disagrees with a judge's decision *or any part thereof*, may appeal the decision to the Secretary" (emphasis added). Further, nothing on the record before me establishes that Respondent filed Respondent's Appeal Petition in an effort to waste judicial and party resources, as Petitioner asserts. Therefore, while I find some of Respondent's disagreements with the ALJ's March 3, 2005, Order trivial, I find no basis upon which to dismiss Respondent's Appeal Petition merely because it is an appeal from a ruling favorable to Respondent.

Second, Petitioner contends Respondent's Appeal Petition should be dismissed because Respondent did not number each issue set forth in the appeal petition, as required by section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) (Petitioner's Response to Respondent's Appeal Pet. at 4-5).

I agree with Petitioner that Respondent did not properly number each of Respondent's issues in Respondent's Appeal Petition. However, I find Respondent's Appeal Petition substantially conforms to the requirements of section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)); therefore, I reject Petitioner's request that I

dismiss Respondent's Appeal Petition.[9]

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Petitioner's Amended Petition, filed February 9, 2005, is stricken.

2. Petitioner's Petition, filed November 10, 2004, is dismissed with prejudice.

3. This Order shall become effective on the day after service on Petitioner.

## RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of this Order in any district court of the United States in which district Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[10] The date of entry of this Order is April 25, 2005.

---

[9]Generally, appeal petitions which do not remotely conform to the requirements of the applicable rules of practice are dismissed. *E.g., In re Kermit Breed*, 50 Agric. Dec. 675, 676 (1991); *In re Bihari Lall*, 49 Agric. Dec. 895 (1990). However, requests to dismiss appeal petitions which do not precisely, but substantially, conform to the requirements of the applicable rules of practice are rejected *See, e.g., In re Norea Ivelisse Abreu*, 61 Agric. Dec. 259, 265-66 (2002) (rejecting the complainant's request that I dismiss the respondent's appeal petition on the ground that the respondent failed to number the issues raised in the appeal petition).

[10]7 U.S.C. § 608c(15)(B).

## ANIMAL QUARANTINE ACT

## DEPARTMENTAL DECISIONS

**In re: JOSZET MOKOS.**
**A.Q. Docket No. 03-0003.**
**Decision and Order.**
**Filed April 25, 2005.**

**A.Q. – Importation of Processed meats – False declaration.**

James A. Booth for Complainant.
Respondent (no appearance).
*Decision and Order filed by Chief Administrative Law Judge, Marc. R. Hillson.*

### Decision

This is a proceeding under the Animal Health Protection Act, initiated by a complaint filed November 18th, 2002, by the Administrator of APHIS.

Following presentation of evidence in an oral hearing today, April 28th, 2005, I am granting Complainant's motion pursuant to Section 1.142(c)(1) of the Rules of Procedure for an Oral Decision.

I find that on September 3rd, 2000, Respondent, Jozset Mokos, committed violations of the regulations that were then encoded at 9 CFR 94.9B, 94.13, 94.13A, and 94.13B.

Under the Civil Penalty Assessment Authority in 7 USC § 8313B, I find that a penalty of $500.00 per violation, for a total of $2,000.00 is appropriate. My findings of fact are as follows:

[1] Jozset Mokos (Respondent) is a United States citizen currently residing in Oakland Park, Florida

[2] Respondent returned to the United States at Miami International Airport, from a trip to Hungary on September 3rd, 2000.

[3] Respondent's Customs Declaration indicated that he was not bringing in any meat products to the United States.

[4] [I]nspection by Noel Colon, C-o-l-o-n, as U.S. Department of

Agriculture employee, disclosed that Respondent had an approximately five kilogram pork salami in his suitcase.
[5] The salami, a product of Hungary, did not bear any certificate or other indications of compliance with the cited regulations.
[6] Inspector Colon seized the salami, which was subsequently incinerated.
[7] Respondent was given the option of paying a $50.00 penalty to close the matter. He told Inspector Colon he would go to an ATM and get the cash. He never returned, abandoning his passport, which was subsequently returned to Immigration.
[8] After the filing of the complaint, Respondent filed an answer which was received by the Hearing Clerk's office on December 18th, 2002.
[9] Respondent has refused to cooperate in these proceedings. In several instances he hung up on my Secretary, Diane Green, when she had tried contacting him to attempt to schedule a hearing in this matter.
He has also refused to cooperate when Counsel for Complainant has attempted to contact him. At 8:45 this morning he told Ms. Green that he would not participate in this hearing.

## Conclusions of Law

[1] Respondent has violated the meat importation portions of the Animal Health Protection Act, 7 USC § 8301, *et seq.* In particular, Respondent's actions on September 3, 2000, violated 9 CFR § 94.9B, 94.13, 94.13A, and 94.13B, as they were in effect on that date.
[2] [T]he Respondent's actions in making a false declaration and making a false promise to pay the original penalty and repeatedly refusing to cooperate in these proceedings merit a significant civil penalty.
[3] I find that a penalty of $500.00 per violation, for a total of $2,000.00 is appropriate.

## Order

Respondent is assessed a $2,000.00 civil penalty. This penalty shall be sent to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Post Office Box 3334, Minneapolis, Minnesota 55403, within 60 days after service of this

order.

This decision and order shall be final and effective 35 days after service upon Respondent, unless an appeal is filed to the Judicial Officer with 30 days after service, pursuant to 1.1, Rule 1.145 of the Rules of Practice.

[C]opies of this decision and hearing order, this decision and order, which, in this context, is actually the pages of the transcript that this order it reflected in, shall be served on each of the parties.

---

**In re: MARLA GARCIA GONZALEZ.**
**A.Q. Docket No. 05-0004.**
**Decision and Order.**
**Filed April 27, 2005.**

**A.Q. – Failure to file answer – Waiver of right to hearing – Civil penalty.**

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Peter M. Davenport concluding Respondent imported 1.5 kilograms of pork into the United States from Spain in violation of the Animal Health Protection Act and regulations issued under the Animal Health Protection Act (9 C.F.R. § 94.9(b) (2002)) and assessing Respondent a $500 civil penalty. The Judicial Officer rejected Respondent's contention that she had previously paid a $100 civil penalty, stating Respondent failed to file a timely answer to the complainant and failed to file timely objections to Complainant's motion for a default decision; therefore, Respondent is deemed to have admitted the allegations in the complaint, waived her defense to the assessment of a civil penalty, and waived opportunity for hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Krishna Ramaraju for Complainant.
Respondent, Pro se.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

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

filing a Complaint on November 17, 2004. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8320 (Supp. II 2002)); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94 (2002)) [hereinafter the Regulations];[1] and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about August 13, 2002, Marla Garcia Gonzalez [hereinafter Respondent] violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,[2] without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.[3] Respondent failed to respond to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for

---

[1]The Animal Health Protection Act was enacted on May 13, 2002. Effective June 4, 2002, the Animal and Plant Health Inspection Service, United States Department of Agriculture, revised the authority citation applicable to 9 C.F.R. pt. 94 (2002) to add a reference to the Animal Health Protection Act (67 Fed. Reg. 47,243 (July 18, 2002)).

[2]At all times material to this proceeding, section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) regulated the importation of pork and pork products into the United States from regions where hog cholera was known to exist. However, veterinary practitioners in the international community refer to hog cholera as "classical swine fever" and effective April 7, 2003, the term "hog cholera" was removed from section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) and the term "classical swine fever" was added in its place. (68 Fed. Reg. 16,922 (Apr. 7, 2003).)

[3]See United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 3663 establishing that the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.

Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.[4] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.[5]

On February 11, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision and Order] concluding Respondent violated the Animal Health Protection Act and the Regulations as alleged in the Complaint and assessing Respondent a $500 civil penalty (Initial Decision and Order at 2-3).

On March 30, 2005, Respondent appealed to the Judicial Officer. On April 20, 2005, Complainant filed a response to Respondent's appeal petition. On April 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with

---

[4] See United States Postal Service Track and Confirm for Article Number 7004 1160 0001 9221 2529 establishing that the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.

[5] Letter dated February 4, 2005, from Joyce A. Dawson, Hearing Clerk, to Marla Garcia Gonzalez.

minor modifications, the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 109—ANIMAL HEALTH PROTECTION

. . . .

**§ 8303. Restrictions on importation or entry**

**(a) In general**

With notice to the Secretary of the Treasury and public notice as soon as practicable, the Secretary may prohibit or restrict—

(1) the importation or entry of any animal, article, or means of conveyance, or use of any means of conveyance or facility, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock[.]

. . . .

**(b) Regulations**

**(1) Restrictions on import and entry**

The Secretary may issue such orders and promulgate such regulations as are necessary to carry out subsection (a) of this section.

. . . .

**§ 8313. Penalties**

. . . .

**(b) Civil penalties**

**(1) In general**

Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A)(i) $50,000 in the case of any individual, except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain;

(ii) $250,000 in the case of any other person for each violation; and

(iii) $500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under this chapter that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

**(2) Factors in determining civil penalty**

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the

Secretary may consider, with respect to the violator—

(A) the ability to pay;

(B) the effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) such other factors the Secretary considers to be appropriate.

. . . .

**(4) Finality of orders**

**(A) Final order**

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28.

**(B) Review**

The validity of the order of the Secretary may not be reviewed in an action to collect the civil penalty.

**(C) Interest**

Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. §§ 8303(a)(1), (b)(1), 8313(b)(1)-(2), (4) (Supp. II 2002).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,**

## DEPARTMENT OF AGRICULTURE

. . . .

## SUBCHAPTER D—EXPORTATION AND IMPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

## PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

. . . .

### § 94.9 Pork and pork products from regions where hog cholera exists.

(a) Hog cholera is known to exist in all regions of the world except Australia; Canada; Denmark; England, except for East Anglia (Essex, Norfolk, and Suffolk counties); Fiji; Finland; Iceland; Isle of Man; New Zealand; Northern Ireland; Norway; Republic of Ireland; Scotland; Sweden; Trust Territory of the Pacific Islands; and Wales.

(b) No pork or pork product may be imported into the United States from any region where hog cholera is known to exist unless it complies with the following requirements:

(1) Such pork or pork product has been treated in accordance with one of the following procedures:

(i) Such pork or pork product has been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking, so that such cooking and sealing produced a fully sterilized product which is shelf-stable

without refrigeration;

(ii) Such pork or pork product is in compliance with the following requirements:

(A) All bones were completely removed prior to cooking; and

(B) Such pork or pork product was heated by other than a flash-heating method to an internal temperature of 69 °C. (156 °F.) throughout; or

(iii) Such pork or pork product is in compliance with the following requirements:

(A) All bones have been completely removed in the region of origin, and

(B) The meat has been held in an unfrozen, fresh condition for at least 3 days immediately following the slaughter of the animals from which it was derived, and

(C) The meat has been thoroughly cured and fully dried for a period of not less than 90 days so that the product is shelf stable without refrigeration: *Provided*, That the period of curing and drying shall be 45 days if the pork or pork product is accompanied to the processing establishment by a certificate of an official of the national government of a hog cholera free region which specifies that:

(*1*) The pork involved originated in that region and the pork or pork product was consigned to a processing establishment in _____ (a region not listed in paragraph (a) of this section as free of hog cholera), in a closed container sealed by the national veterinary authorities of the hog cholera free region by seals of a serially numbered type; and

(*2*) The numbers of the seals used were entered on the meat inspection certificate of the hog cholera free region which accompanied the shipment from such free region: *And provided further*, That the certificate required by paragraph (b)(3) of this section also states that: The container seals specified in paragraph (b)(1)(iii)(C)(*1*) of this section were found intact and free of any evidence of tampering on arrival at the processing establishment by a national veterinary inspector; and the processing establishment from which the pork or pork product is shipped to the United States does not receive or process any live

swine, and uses only pork or pork product which originates in regions listed in paragraph (a) of this section as free of hog cholera and processes all such pork or pork products in accordance with paragraph (b)(1)(i), (ii), or (iii) of this section.

(2) Articles under paragraph (b)(1)(ii) or (iii) of this section were prepared in an inspected establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act and § 327.2 of this title; and,

(3) In addition to the foreign meat inspection certificate required by § 327.4 of this title, pork and pork products prepared under paragraph (b)(1)(ii) or (iii) of this section shall be accompanied by a certificate that states that the provisions of paragraph (b)(1)(ii) or (iii) of this section have been met. This certificate shall be issued by an official of the national government of the region of origin who is authorized to issue the foreign meat inspection certificate required by § 327.4 of this title. Upon arrival of the pork or pork products in the United States, the certificate must be presented to an authorized inspector at the port of arrival.

(4) Small amounts of pork or pork product, subject to the restrictions in this section, may in specific cases be imported for purposes of examination, testing, or analysis if the importer applies for and receives written approval for such importation from the Administrator. Approval will be granted only when the Administrator determines that the articles have been processed by heat in a manner so that such importation will not endanger the livestock of the United States.

(c) Thoroughly cured and fully dried pork and pork products from regions where both hog cholera and swine vesicular disease are known to exist need not comply with paragraph (b)(1)(iii) of this section if they are in compliance with the provisions of § 94.12(b)(1)(iii) of this part.

9 C.F.R. § 94.9 (2002) (footnotes omitted).

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER

**(AS RESTATED)**

**Statement of the Case**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent is an individual with a mailing address of 8600 SW 101st Avenue, Miami, Florida 33173.

2. On or about August 13, 2002, Respondent violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,[6] without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture.

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the Findings of Fact, Respondent has violated the Animal Health Protection Act and the Regulations.

---

[6] See note 2.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises one issue in her appeal petition. Respondent admits she imported into the United States pork sausages from Spain on August 13, 2002, but states she previously paid a civil penalty for her violation of the Regulations. Specifically, Respondent asserts she "was . . . given a written citation with instructions to pay a fine of $100 which [she] did within a month." (Letter dated March 17, 2005, from Respondent to Joyce A. Dawson, Hearing Clerk.) Complainant asserts he has searched his files in a vain attempt to find a record of Respondent's alleged payment (Complainant's Response to Respondent's Letter dated March 17, 2005, at 5).

Respondent's assertion that she previously paid a $100 civil penalty for her August 13, 2002, violation of section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived her defense to the assessment of a civil penalty because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 23, 2004.[7] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes

---

[7] *See* note 3.

of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondent. The

> respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of the allegations in this complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the November 17, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice, that the answer must set forth any defense Respondent wishes to assert, and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> November 17, 2004
>
> Ms. Marla Garcia Gonzales
> 8600 SW 101st Avenue
> Miami, Florida 33173
>
> Dear Ms. Gonzalez:
>
> Subject: In re: Marla Garcia Gonzalez, Respondent -
> A.Q. Docket No. 05-0004
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the [sic] Section 2 of the Act of February 2, 1903, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a

substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,

/s/
Joyce A. Dawson
Hearing Clerk

Respondent's answer was due no later than December 13, 2004. Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 3 months 17 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint and waived her defense that she previously paid a civil penalty.

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.[8] Section 1.139 of the Rules of Practice states the time within which objections to a proposed decision and a motion for adoption of the proposed decision must be filed and the consequences of failing to file timely meritorious objections, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the

[8] See note 4.

> respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

Moreover, the Hearing Clerk informed Respondent in the December 22, 2004, service letter that Respondent's objections must be filed within 20 days after service of Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order, as follows:

> December 22, 2004
>
> Ms. Marla Garcia Gonzales
> 8600 SW 101st Avenue
> Miami, Florida 33173
>
> Dear Ms. Gonzalez:
>
> Subject: In re: Marla Garcia Gonzalez, Respondent -
> A.Q. Docket No. 05-0004
>
> Enclosed is a copy of Complainant's Motion for Adoption of Proposed Default Decision and Order together with Default Decision and Order, which have been filed with this office in the above-captioned proceeding.
>
> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision.
>
> Sincerely,
> /s/

Joyce A. Dawson
Hearing Clerk

Respondent's objections were due no later than January 18, 2005.[9] On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision. Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 2 months 12 days after Respondent's objections were due.

On February 11, 2005, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default and assessed a $500 civil penalty against Respondent.

---

[9]Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that objections to a proposed decision and motion for adoption of the proposed decision must be filed within 20 days after service of the proposed decision and motion for adoption of the proposed decision. Twenty days after December 27, 2004, was January 16, 2005. However, January 16, 2005, was a Sunday, and January 17, 2005, was a legal public holiday (5 U.S.C. § 6103(a)). Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Sunday or legal public holiday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, January 16, 2005, and Monday, January 17, 2005, was Tuesday, January 18, 2005. Therefore, Respondent was required to file her objections to Complainant's Motion for Adoption of Default Decision and Order and Complainant's Proposed Default Decision and Order no later than January 18, 2005.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[10] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[11] The Rules of Practice

---

[10]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[11]*See, e.g., In re Salvador Sanchez-Gomez*, 61 Agric. Dec. 99 (2002) (holding the administrative law judge properly issued a default decision where the respondent filed his answer more than 5 months after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have

(continued...)

provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 3 months 17 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order.

Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[12]

---

[11](...continued)
admitted violating 9 C.F.R. §§ 93.101(a), .104(a), and .105(a), regulations issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel E. Murray*, 58 Agric. Dec. 64 (1999) (holding the administrative law judge properly issued a default decision where the respondent filed his answer 9 months 3 days after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. § 78.8(a)(2)(ii), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In Conrad Payne*, 57 Agric. Dec. 921 (1998) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer to the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and 9 C.F.R. § 94.0 *et seq*., as alleged in the complaint); *In re Eddie Benton*, 50 Agric. Dec. 428 (1991) (adopting the administrative law judge's default decision where the respondent failed to file an answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file an answer, to have admitted violating 9 C.F.R. § 78.9(c)(2)(ii)(B), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel Cano*, 50 Agric. Dec. 383 (1991) (adopting the administrative law judge's default decision where the respondent failed to file a timely answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and the regulations promulgated under the Act of February 2, 1903).

[12]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the
(continued...)

For the foregoing reasons, the following Order should be issued.

## ORDER

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0004.

## RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[13] Respondent must seek

---

[12](...continued)
complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[13]7 U.S.C. § 8313(b)(4)(A).

judicial review within 60 days after entry of the Order.[14] The date of entry of the Order is April 27, 2005.

_____

[14]28 U.S.C. § 2344.

## ANIMAL WELFARE ACT

## DEPARTMENTAL DECISIONS

**In re: ERICA NICOLE deHAAN, formerly known as, ERICA NICOLE MASHBURN, formerly known as, ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; AND RICKY deHAAN, AN INDIVIDUAL.**
**AWA Docket No. 04-0004.**
**Decision and Order as to Erica Nicole deHaan.**
**Filed August 18, 2004.***

**AWA – Animal Welfare Act – Failure to file answer – Waiver of right to hearing – Default – Admission during teleconference – Dealer – Civil penalty – Cease and desist order.**

The Judicial Officer affirmed two decisions issued by Administrative Law Judge Jill S. Clifton finding that Erica Nicole deHaan (Respondent) operated as a dealer, as defined in 7 U.S.C. § 2132(f) and 9 C.F.R. § 1.1, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1). The Judicial Officer held, pursuant to 7 U.S.C. § 2149(b), each dog Respondent sold and each day during which Respondent sold dogs without an Animal Welfare Act license constituted a separate violation, and the Judicial Officer increased the $3,840 civil penalties assessed against Respondent by the ALJ to $18,000. The Judicial Officer stated Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). In addition, the Judicial Officer based the decision on Respondent's admissions, during a teleconference with the ALJ and counsel for Complainant, that she committed violations alleged in the Complaint to have been committed by another respondent.

Bernadette R. Juarez for Complainant.
Respondent Erica Nicole deHaan, Pro se.
Initial decisions issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order as to Erica Nicole deHaan issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service,

---

*This case was inadvertently left out of *63 Agric. Dec. Jul-Dec. (2004)*. Editor

United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on December 5, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges: (1) on April 1, 2003, and April 8, 2003, Respondent Ricky deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)); and (2) on June 3, 2003, June 10, 2003, July 1, 2003, July 8, 2003, July 29, 2003, August 5, 2003, August 6, 2003, August 12, 2003, August 13, 2003, August 19, 2003, August 20, 2003, August 21, 2003, August 26, 2003, October 6, 2003, October 7, 2003, and October 14, 2003, and on or about September 30, 2003, and October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)) (Compl. ¶¶ 4-26).

The Hearing Clerk served Respondent Ricky deHaan and Respondent Erica Nicole deHaan with the Complaint, the Rules of Practice, and a service letter on December 13, 2003.[1] Neither Respondent Ricky deHaan nor Respondent Erica Nicole deHaan filed an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption

---

[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 6569 and Article Number 7001 0360 0000 0304 6552.

of Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On January 21, 2004, the Hearing Clerk served Respondent Erica Nicole deHaan with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[2] On January 26, 2004, Respondent Erica Nicole deHaan filed two motions to dismiss, and on February 4, 2004, Complainant filed "Complainant's Response to Respondent's Motions to Dismiss Complaint."

On March 25, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel" [hereinafter First Initial Decision and Order]: (1) concluding that Respondent Erica Nicole deHaan willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing Respondent Erica Nicole deHaan a $3,480 civil penalty (First Initial Decision and Order at 4-8).

On April 5, 2004, the ALJ issued a "Second Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel" [hereinafter Second Initial Decision and Order]: (1) stating she conducted a teleconference with Respondent Erica Nicole deHaan and counsel for Complainant in which Respondent Erica Nicole deHaan took responsibility for the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (2) concluding Respondent

---

[2]United States Postal Service Track & Confirm for Article Number 7001 0360 0000 0310 4030.

Erica Nicole deHaan committed the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (3) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) assessing Respondent Erica Nicole deHaan a $360 civil penalty (Second Initial Decision and Order at 1, 4-6).

On April 19, 2004, Complainant appealed to the Judicial Officer. Respondent Erica Nicole deHaan failed to file a response to Complainant's appeal petition, and on June 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I agree with the ALJ's First Initial Decision and Order and Second Initial Decision and Order, except for the amount of the civil penalty the ALJ assessed against Respondent Erica Nicole deHaan. Therefore, except for the amount of the civil penalty assessed against Respondent Erica Nicole deHaan and minor modifications, I adopt the ALJ's First Initial Decision and Order and Second Initial Decision and Order as the final Decision and Order as to Erica Nicole deHaan. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

**§ 2131. Congressional statement of policy**

The Congress finds that animals and activities which are

regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

**§ 2132. Definitions**

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no

more than $500 gross income from the sale of other animals during any calendar year[.]

**§ 2134. Valid license for dealers and exhibitors required**

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

**§ 2149. Violations by licensees**

. . . .

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and

conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. . . .

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(b)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq.*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

**PART 1—DEFINITION OF TERMS**

**§ 1.1 Definitions.**

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who

derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

## PART 2—REGULATIONS

## SUBPART A—LICENSING

### § 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

9 C.F.R. §§ 1.1; 2.1(a)(1).

## ADMINISTRATIVE LAW JUDGE'S FIRST INITIAL DECISION AND ORDER AND SECOND INITIAL DECISION AND ORDER (AS RESTATED)

### Statement of Case

Respondent Erica Nicole deHaan failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the prescribed

time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation in the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file and answer constitutes a waiver of hearing. This Decision and Order as to Erica Nicole deHaan is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and is issued based on Respondent Erica Nicole deHaan's admissions during the April 5, 2004, teleconference with the ALJ and counsel for Complainant.[3]

## Findings of Fact

1. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, an unincorporated association, is an individual whose mailing address is Rt. #3, Box 209-A, Ava, Missouri 65608.

2. Respondent Erica Nicole deHaan, at all times material to this proceeding, operated as a dealer as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1).

3. On April 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Labradors, four Pugs, and three Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.

4. On April 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug and one Golden Retriever to Puppy Love of Virginia, Inc., for resale, for use as pets.

5. On June 3, 2003, Respondent Erica Nicole deHaan operated as

---

[3]*In re H. Schnell & Co.*, 57 Agric. Dec. 1722, 1730-31 (1998) (Remand Order) (stating that oral statements made by a respondent during a conference that clearly constitute admissions of allegations in a complaint may constitute a basis for findings of fact and for issuance of a default decision).

a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Boston Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.

6. On June 10, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug, one Eskimo, four Chihuahuas, and two Bichon Frises to Puppy Love of Virginia, Inc., for resale, for use as pets.

7. On July 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Golden Retrievers and two Maltese to Puppy Love of Virginia, Inc., for resale, for use as pets.

8. On July 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.

9. On July 29, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, one Bichon Frise, and two Boston Terriers to the National Breeders Association, Inc., for resale, for use as pets.

10. On August 5, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Chihuahua, three Pekingese, and one Cocker Spaniel to Puppy Love of Virginia, Inc., for resale, for use as pets.

11. On August 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Doberman Pinscher, one Wheaten Terrier, one Old English Sheepdog, one Shiba Inu, one Schnauzer, one Chihuahua, two Bichon Frises, four Labradors, one Cocker Spaniel, and one Wheaten Terrier to National Breeders Association, Inc., for resale,

for use as pets.

12. On August 12, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Shih Tzus, two Golden Retrievers, one Pomeranian, one Poodle, one Dachshund, and two West Highland White Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.

13. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Golden Retriever, one Pug, two Cocker Spaniels, two Boxers, one Sheltie, one Pomeranian, two Shih Tzus, two Labradors, and one Poodle to National Breeders Association, Inc., for resale, for use as pets.

14. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound to Bahuaka, Inc., for resale, for use as a pet.

15. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, five Shih Tzus to Stillwell Pets & Quality Pups, for resale, for use as pets.

16. On August 19, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Poodles and two Dachshunds to Puppy Love of Virginia, Inc., for resale, for use as pets.

17. On August 20, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, three Labradors, two Bichon Frises, one Poodle, two Chihuahuas, two Shih Tzus, two Golden Retrievers, and one Cocker Spaniel to National Breeders Association, Inc., for resale, for use as pets.

18. On August 21, 2003, Respondent Erica Nicole deHaan operated

as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Shih Tzu to Stillwell Pets & Quality Pups, for resale, for use as a pet.

19. On August 26, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Yorkshire Terriers, one Sheltie, and two Chi to National Breeders Association, Inc., for resale, for use as pets.

20. On or about September 30, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to Pets and the City, Inc., for resale, for use as a pet.

21. On or about October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six dogs, including one Sky Terrier, to Pets and the City, Inc., for resale, for use as pets.

22. On October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier and one American Eskimo to United Pet Supply, Inc., for resale, for use as pets.

23. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Dachshunds and one Jack Russell Terrier to Precious Pet Cottage, Inc., for resale, for use as pets.

24. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to PetLand, Inc., Orlando East, for resale, for use as a pet.

25. On October 14, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in

commerce, two Dachshunds to Precious Pet Cottage, Inc., for resale, for use as pets.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.

2. As shown by the Findings of Fact, Respondent Erica Nicole deHaan operated as a dealer, as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1), without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)).

3. As shown by the Findings of Fact, Respondent Erica Nicole deHaan sold 128 dogs, in commerce, for resale, for use as pets, without an Animal Welfare Act license.

4. Each of the 128 dogs sold by Respondent Erica Nicole deHaan during the period April 1, 2003, through October 14, 2003, constitutes a separate violation of the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

5. Each of 19 days during the period April 1, 2003, through October 14, 2003, when Respondent Erica Nicole deHaan operated as a dealer without an Animal Welfare Act license constitutes a separate violation of the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

6. The assessment of an $18,000 civil penalty against Respondent Erica Nicole deHaan is reasonable and appropriate for her 147 violations the Animal Welfare Act and the Regulations and Standards.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in "Complainant's Petition for Appeal of Decision and Order and Second Decision and Order By Reason of Admission of Facts as to Erica Nicole deHaan" [hereinafter Complainant's Appeal Petition]. Complainant appeals the $3,480 and $360 civil penalties the ALJ assessed against Respondent Erica Nicole deHaan and requests the assessment of an $18,000 civil penalty against

Respondent Erica Nicole deHaan.

Respondent Erica Nicole deHaan, by her failure to file an answer within 20 days after the Hearing Clerk served her with the Complaint, is deemed to have admitted the allegations in the Complaint.[4] In addition, during a teleconference with the ALJ and counsel for Complainant, Respondent Erica Nicole deHaan admitted that she committed the violations alleged in the Complaint to have been committed by Respondent Ricky deHaan. Thus, Respondent Erica Nicole deHaan is deemed to have admitted that she committed 147 willful violations of the Animal Welfare Act and the Regulations and Standards during the period April 1, 2003, through October 14, 2003.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration 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.[5]

Respondent Erica Nicole deHaan sold 128 dogs to 8 different buyers on 19 days during the period April 1, 2003, through October 14, 2003. Based on the number of dogs sold, the number of buyers, and the time during which these sales took place, I infer Respondent Erica Nicole deHaan operates a large business.

Respondent Erica Nicole deHaan's violations are serious. The failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers as defined by section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1). Respondent Erica Nicole deHaan's failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

Respondent Erica Nicole deHaan's willful violations on 19 days during the period April 1, 2003, through October 14, 2003, reveals a

---

[4] See 7 C.F.R. § 1.136(c).

[5] See 7 U.S.C. § 2149(b).

consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks the assessment of an $18,000 civil penalty against Respondent Erica Nicole deHaan and a cease and desist order (Complainant's Appeal Pet. at 5).

Respondent Erica Nicole deHaan could be assessed a maximum civil penalty of $404,250 for her 147 violations of the Animal Welfare Act and the Regulations and Standards.[6] After examining all the relevant

---

[6]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under (continued...)

circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order and assessment of an $18,000 civil penalty are appropriate and necessary to ensure Respondent Erica Nicole deHaan's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and in particular, shall cease and desist from engaging in any activity for which an Animal Welfare Act license is required without an Animal Welfare Act license.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent Erica Nicole deHaan.

2. Respondent Erica Nicole deHaan is assessed an $18,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel

---

[6](...continued)
section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondent Erica Nicole deHaan. Respondent Erica Nicole deHaan shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0004.

## RIGHT TO JUDICIAL REVIEW

Respondent Erica Nicole deHaan has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Erica Nicole deHaan must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is August 18, 2004.

---

**In re: DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.**
**AWA Docket No. 04-0012.**
**Decision and Order.**
**Filed October 8, 2004.***

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision –**

---

*This case was inadvertently left out of *63 Agric. Dec. Jul.-Dec. (2004*). - Editor

**Bases for denial of motion for default – Sanction – Cease and desist order – Civil penalty – License revocation.**

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents violated the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer concluded Respondents filed a late answer to the Amended Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Amended Complaint and waived the opportunity for a hearing. The Judicial Officer rejected Respondents' contention that they had filed meritorious objections to Complainant's motion for a default decision. The Judicial Officer issued a cease and desist order against Respondents, assessed Respondents a $20,000 civil penalty, and revoked Respondent Dennis Hill's Animal Welfare Act license.

Bernadette R. Juarez, for Complainant.
M. Michael Stephenson, Shelbyville, IN, for Respondents.
*Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 4, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards.[1]

The Hearing Clerk served Respondents with the Complaint, the

[1]Complaint.

Rules of Practice, and a service letter on March 15, 2004.[2] Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to answer the Complaint within 20 days after service. On March 26, 2004, Respondents requested an additional 30 days within which to file an answer.[3] On March 30, 2004, Chief Administrative Law Judge Marc R. Hillson extended the time for filing Respondents' answer to May 5, 2004.[4]

On April 23, 2004, Complainant filed an "Amended Complaint." On April 27, 2004, Respondents filed an "Answer" in which Respondents deny the material allegations of the Complaint. The Hearing Clerk sent Respondents a letter dated April 27, 2004, stating "Respondents' Amended Answer to Amended Complaint, has been received and filed in the above-captioned proceeding." On April 30, 2004, the Hearing Clerk served Respondents with the Amended Complaint.[5] Respondents failed to file a response to the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On June 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Dennis Hill and Willow Hill Center for Rare & Endangered Species, LLC, By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On June 7, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default

---

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 0500 0000 1056 0083 and Article Number 7003 0500 0000 1056 0090.

[3]Request for Extension of Time to Respond to Complaint.

[4]Extension of Time.

[5]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0458.

Decision.[6] On June 15, 2004, and June 23, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[7]

On July 13, 2004, during a teleconference with counsel for Respondents and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision and provided Respondents until August 2, 2004, to file a response to the Amended Complaint.[8] On August 3, 2004, Respondents filed "Answer to Amended Complaint."

On August 27, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[9] On September 15, 2004, Respondents filed "Response in Opposition to Complainant's Appeal Petition." On September 22, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based on Respondents' failure to file a timely answer to the Amended Complaint.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

---

[6]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0656.

[7]Objection to Motion for Adoption of Proposed Decision and Order, filed June 15, 2004, and Supplemental Objection to Motion for Adoption of Proposed Decision and Order, filed June 23, 2004.

[8]Notice of Hearing and Exchange Deadlines at 1, filed by the ALJ on July 14, 2004.

[9]Complainant's Appeal Petition.

## TITLE 7—AGRICULTURE

. . . .

## CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

### § 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

### § 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce,

for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

**§ 2149. Violations by licensees**

. . . .

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the

Secretary's order with the appropriate United States Court of Appeals. 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. . . .

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2149(b)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

## TITLE 9—ANIMALS AND ANIMAL PRODUCTS

## CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

## SUBCHAPTER A—ANIMAL WELFARE

## PART 1—DEFINITION OF TERMS

### § 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who

derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

## PART 2—REGULATIONS

. . . .

### SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

**§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).**

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

. . . .

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct

and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

## SUBPART G—RECORDS

### § 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

## SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

### § 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

### SUBPART I—MISCELLANEOUS

. . . .

**§ 2.126 Access and inspection of records and property.**

(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.

## PART 3—STANDARDS

. . . .

### SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

**§ 3.75 Housing facilities, general.**

(a) *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.

. . . .

**§ 3.76 Indoor housing facilities.**

(a) *Heating, cooling, and temperature*. Indoor housing facilities must be sufficiently heated and cooled when necessary to protect nonhuman primates from temperature extremes and to provide for their health and well-being. The ambient temperature in the facility must not fall below 45 °F (7.2 °C) for more than 4 consecutive hours when nonhuman primates are present, and must not rise above 85 °F (29.5 °C) for more than 4 consecutive hours when nonhuman primates are present. The ambient temperature must be maintained at a level that ensures the health and well-being of the species housed, as directed by the attending veterinarian, in accordance with generally accepted professional and husbandry practices.

. . . .

**§ 3.80 Primary enclosures.**

Primary enclosures for nonhuman primates must meet the following minimum requirements:

(a) *General requirements*. . . .

(2) Primary enclosures must be constructed and maintained so that they:

. . . .

(v) Enable the nonhuman primates to remain dry and clean;

. . . .

(viii) Provide the nonhuman primates with easy and convenient access to clean food and water;

. . . .

(b) *Minimum space requirements*. Primary enclosures must meet the minimum space requirements provided in this subpart. These minimum space requirements must be met even if perches, ledges, swings, or other suspended fixtures are placed in the enclosure. Low perches and ledges that do not allow the space underneath them to be comfortably occupied by the animal will be counted as part of the floor space.

(1) Prior to February 15, 1994:

(i) Primary enclosures must be constructed and maintained so as to provide sufficient space to allow each nonhuman primate to make normal postural adjustments with adequate freedom of movement; and

(ii) Each nonhuman primate housed in a primary enclosure must be provided with a minimum floor space equal to an area at least three times the area occupied by the primate when standing on four feet.

(2) On and after February 15, 1994:

(i) The minimum space that must be provided to *each* nonhuman primate, whether housed individually or with other nonhuman primates, will be determined by the typical weight of animals of its species, except for brachiating species and great apes and will be calculated by using the following table [table omitted]:

(ii) Dealers[,] exhibitors, and research facilities, including Federal research facilities, must provide great apes weighing over 110 lbs. (50 kg) an additional volume of space in excess of that required for Group 6 animals as set forth in paragraph (b)(2)(i) of this section, to allow for normal postural adjustments.

(iii) In the case of research facilities, any exemption from these standards must be required by a research proposal or in the judgment of the attending veterinarian and must be approved by the Committee. In the case of dealers and exhibitors, any exemption from these standards must be required in the judgment of the attending veterinarian and approved by the Administrator.

(iv) When more than one nonhuman primate is housed in a primary enclosure, the minimum space requirement for the

enclosure is the sum of the minimum floor area space required for each individual nonhuman primate in the table in paragraph (b)(2)(i) of this section, and the minimum height requirement for the largest nonhuman primate housed in the enclosure. Provided however, that mothers with infants less than 6 months of age may be maintained together in primary enclosures that meet the floor area space and height requirements of the mother.

. . . .

**§ 3.81 Environment enhancement to promote psychological well-being.**

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address each of the following:

(a) *Social grouping*. The environment enhancement plan must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards, as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. The plan may provide for the following exceptions:

(1) If a nonhuman primate exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis), it should be housed separately;

(2) Nonhuman primates that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony as directed by the attending veterinarian. When an entire group or room of nonhuman primates is known to have or

believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

(3) Nonhuman primates may not be housed with other species of primates or animals unless they are compatible, do not prevent access to food, water, or shelter by individual animals[,] and are not known to be hazardous to the health and well-being of each other. Compatibility of nonhuman primates must be determined in accordance with generally accepted professional practices and actual observations, as directed by the attending veterinarian, to ensure that the nonhuman primates are in fact compatible. Individually housed nonhuman primates must be able to see and hear nonhuman primates of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being.

(b) *Environmental enrichment*. The physical environment in the primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities. Species differences should be considered when determining the type or methods of enrichment. Examples of environmental enrichments include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

(c) *Special considerations*. Certain nonhuman primates must be provided special attention regarding enhancement of their environment, based on the needs of the individual species and in accordance with the instructions of the attending veterinarian. Nonhuman primates requiring special attention are the following:

(1) Infants and young juveniles;

(2) Those that show signs of being in psychological distress through behavior or appearance;

(3) Those used in research for which the Committee-approved protocol requires restricted activity;

(4) Individually housed nonhuman primates that are unable to see and hear nonhuman primates of their own or compatible

species; and

(5) Great apes weighing over 110 lbs. (50 kg). Dealers, exhibitors, and research facilities must include in the environment enhancement plan special provisions for great apes weighing over 110 lbs. (50 kg), including additional opportunities to express species-typical behavior.

(d) *Restraint devices*. Nonhuman primates must not be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the Committee at research facilities. Maintenance under such restraint must be for the shortest period possible. In instances where long-term (more than 12 hours) restraint is required, the nonhuman primate must be provided the opportunity daily for unrestrained activity for at least one continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the Committee at research facilities.

(e) *Exemptions*. (1) The attending veterinarian may exempt an individual nonhuman primate from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted nonhuman primate. Unless the basis for the exemption is a permanent condition, the exemption must be reviewed at least every 30 days by the attending veterinarian.

(2) For a research facility, the Committee may exempt an individual nonhuman primate from participation in some or all of the otherwise required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption shall be documented in the approved proposal and must be reviewed at appropriate intervals as determined by the Committee, but not less than annually.

(3) Records of any exemptions must be maintained by the dealer, exhibitor, or research facility and must be made available to USDA officials or officials of any pertinent funding Federal agency upon request.

**§ 3.82 Feeding.**

(a) The diet for nonhuman primates must be appropriate for the species, size, age, and condition of the animal, and for the conditions in which the nonhuman primate is maintained, according to generally accepted professional and husbandry practices and nutritional standards. The food must be clean, wholesome, and palatable to the animals. It must be of sufficient quantity and have sufficient nutritive value to maintain a healthful condition and weight range of the animal and to meet its normal daily nutritional requirements.

(b) Nonhuman primates must be fed at least once each day except as otherwise might be required to provide adequate veterinary care. Infant and juvenile nonhuman primates must be fed as often as necessary in accordance with generally accepted professional and husbandry practices and nutritional standards, based upon the animals' age and condition.

. . . .

(d) Food and food receptacles, if used, must be located so as to minimize any risk of contamination by excreta and pests. Food receptacles must be kept clean and must be sanitized in accordance with the procedures listed in § 3.84(b)(3) of this subpart at least once every 2 weeks. Used food receptacles must be sanitized before they can be used to provide food to a different nonhuman primate or social grouping of nonhuman primates. Measures must be taken to ensure there is no molding, deterioration, contamination, or caking or wetting of food placed in self-feeders.

**§ 3.83 Watering.**

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and

well-being, but no less than twice daily for at least 1 hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

**§ 3.84 Cleaning, sanitization, housekeeping, and pest control.**

(a) *Cleaning of primary enclosures*. Excreta and food waste must be removed from inside each indoor primary enclosure daily and from underneath them as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the nonhuman primates from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Dirt floors, floors with absorbent bedding, and planted areas in primary enclosures must be spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta, or as often as necessary to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, nonhuman primates must be removed, unless the enclosure is large enough to ensure the animals will not be harmed, wetted, or distressed in the process. Perches, bars, and shelves must be kept clean and replaced when worn. If the species of the nonhuman primates housed in the primary enclosure engages in scent marking, hard surfaces in the primary enclosure must be spot-cleaned daily.

. . . .

(c) *Housekeeping for premises*. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair in order to protect the nonhuman primates from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate

breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste, and discarded matter. Weeds, grass, and bushes must be controlled so as to facilitate cleaning of the premises and pest control.

**§ 3.85 Employees.**

Every person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining nonhuman primates must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practices and care, or handle nonhuman primates, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates to supervise others. The employer must be certain that the supervisor can perform to these standards.

**SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS**

FACILITIES AND OPERATING STANDARDS

**§ 3.125 Facilities, general.**

(a) *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.

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin.

Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

**§ 3.127 Facilities, outdoor.**

(a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(b) *Shelter from inclement weather*. 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

(c) *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.

(d) *Perimeter fence*. On or after May 17, 2000, all outdoor housing facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (*e.g.*, lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in

the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

**§ 3.128 Space requirements.**

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

**§ 3.129 Feeding.**

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of food.

**§ 3.130 Watering.**

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

**§ 3.131 Sanitation.**

(a) *Cleaning of enclosures*. 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. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

(c) *Housekeeping*. Premises (buildings and grounds) shall be

kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

**§ 3.132 Employees.**

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40(a), (b)(2)-(3), .75(b)(1), .100(a), .126(a); 3.75(a), .76(a), .80(a)(2)(v), (viii), (b), .81, .82(a)-(b), (d), .83, .84(a), (c), .85, .125(a), (c)-(d), .127, .128, .129, .130, .131(a), (c)-(d), .132 (footnotes omitted).

## DECISION

### Statement of the Case

Respondents failed to file an answer to the Amended Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Amended Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules

of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent Dennis Hill is an individual, d/b/a White Tiger Foundation, whose mailing address is 3050 West Willow Road, Flat Rock, Indiana 47234. At all times material to this proceeding, Respondent Dennis Hill was licensed and operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 32-A-0160, issued to "Dennis Hill, DBA Willow Hill Center for Rare And Endangered Species."

2. Between April 8, 1998, and March 12, 2002, Respondent Willow Hill Center for Rare & Endangered Species, LLC, was an Indiana domestic limited liability company, d/b/a Hill's Exotics, whose agent for service of process was M. Michael Stephenson, 30 East Washington Street, Suite 400, Shelbyville, Indiana 46176. At all times material to this proceeding, Respondent Willow Hill Center for Rare & Endangered Species, LLC, operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations. On March 12, 2002, the Indiana Secretary of State administratively dissolved Respondent Willow Hill Center for Rare & Endangered Species, LLC.

3. Animal and Plant Health Inspection Service personnel conducted inspections of Respondents' facilities, records, and animals for the purpose of determining Respondents' compliance with the Animal Welfare Act and the Regulations and Standards on August 30, 2002 (42 animals), August 31, 2002 (approximately 42 animals), September 5, 2002 (41 animals), October 8, 2002 (39 animals), October 22, 2002, November 4, 2002, November 8, 2002, March 12, 2003, March 14, 2003, July 1, 2003, September 22, 2003, September 23, 2003, and January 22, 2004.

4. On August 30, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

5. On August 30, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals

that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, and a black leopard ("Dangerous") with hair loss on a majority of its tail. (9 C.F.R. § 2.40(a), (b)(2).)

6. On August 30, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, three wolves ("Two Way," "Predator," and "Tundra") had fly invested ear edges with open lesions. (9 C.F.R. § 2.40(b)(2).)

7. On August 30, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to an injured lemur, three wolves ("Two Way," "Predator," and "Tundra") that had fly invested ear edges with open lesions, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, and a black leopard ("Dangerous") with hair loss on a majority of its tail. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

8. On August 31, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

9. On August 31, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, a black leopard ("Dangerous") with hair loss on a majority of its tail, and a tiger ("Vixie") with hair loss on its

face, chest, front legs, and the inside of its back legs. (9 C.F.R. § 2.40(a), (b)(2).)

10. On August 31, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, three wolves ("Two Way," "Predator," and "Tundra") had fly invested ear edges with open lesions. (9 C.F.R. § 2.40(b)(2).)

11. On August 31, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, a black leopard ("Dangerous") with hair loss on a majority of its tail, and a tiger ("Vixie") with hair loss on its face, chest, front legs, and the inside of its back legs. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

12. On September 4, 2002, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

13. On October 8, 2002, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

14. On November 4, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for a black leopard ("Dangerous") with hair loss on a majority of its tail and a tiger ("Megan") with generalized hair loss and skin lesions. (9 C.F.R. § 2.40(a), (b)(2).)

15. On November 4, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to a black leopard ("Dangerous") with hair loss on a majority of its tail and a tiger ("Megan") with generalized hair loss and skin lesions. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

16. On September 23, 2003, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

17. On September 23, 2003, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

18. On January 22, 2004, Respondents failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide annual vaccinations and fecal exams to felids and tetanus vaccinations to four ring-tailed lemurs, in accordance with Respondents' program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

19. On August 30, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession. (9 C.F.R. § 2.75(b)(1).)

20. On August 31, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession.

(9 C.F.R. § 2.75(b)(1).)

21. On September 4, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession. (9 C.F.R. § 2.75(b)(1).)

22. On September 22, 2003, Respondents failed to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities (9 C.F.R. § 2.126(a)).

23. On August 30, 2002, Respondents failed to provide food of sufficient quantity and nutritive value to maintain a healthful condition and weight range and to meet normal daily nutritional requirements for nonhuman primates. Specifically, Respondents failed to provide food to eight lemurs. (9 C.F.R. § 3.82(a), (b).)

24. On August 30, 2002, Respondents failed to keep food receptacles clean and sanitary. Specifically, the food receptacle used by the injured lemur was caked with old food, attracted numerous flies, and was in need of sanitation. (9 C.F.R. § 3.82(d).)

25. On August 30, 2002, Respondents failed to keep premises, where housing facilities are located, clean and in good repair. Specifically, the floor and area around the injured lemur's enclosure was covered with feces and debris. (9 C.F.R. § 3.84(c).)

26. On August 30, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices and care for nonhuman primates. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry practices and care to, eight lemurs. (9 C.F.R. § 3.85.)

27. On October 8, 2002, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide environment enhancement to seven lemurs. (9 C.F.R. § 3.81.)

28. On November 4, 2002, Respondents failed to provide food of sufficient quantity and nutritive value to maintain a healthful condition and weight range and to meet normal daily nutritional requirements for nonhuman primates. Specifically, Respondents failed to provide a sufficient amount of food to seven lemurs that appeared thin with poor haircoats. (9 C.F.R. § 3.82(a), (b).)

29. On November 4, 2002, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to seven lemurs. (9 C.F.R. § 3.83.)

30. On November 4, 2002, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide environment enhancement to seven lemurs. (9 C.F.R. § 3.81.)

31. On November 4, 2002, Respondents failed to remove excreta and food waste from inside each indoor primary enclosure daily and from underneath each primary enclosure as often as necessary to prevent excessive accumulation of feces and food waste, to prevent the nonhuman primate from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Specifically, Respondents housed seven lemurs in soiled primary enclosures. (9 C.F.R. § 3.84(a).)

32. On November 4, 2002, Respondents failed to construct and maintain the primary enclosures for seven lemurs so as to enable the nonhuman primates to remain dry and clean and failed to provide the nonhuman primates with easy and convenient access to clean food and water (9 C.F.R. § 3.80(a)(2)(v), (viii)).

33. On November 4, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices and care for nonhuman primates. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, seven lemurs. (9 C.F.R. § 3.85.)

34. On March 12, 2003, Respondents failed to construct and maintain

the primary enclosures for nonhuman primates so as to meet the minimum space requirements. Specifically, Respondents housed six lemurs in enclosures that provided each lemur approximately 2 square feet of space and 14 inches of height. (9 C.F.R. § 3.80(b).)

35. On March 12, 2003, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide or follow a plan of environment enhancement for six lemurs. (9 C.F.R. § 3.81.)

36. On March 12, 2003, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to six lemurs. (9 C.F.R. § 3.83.)

37. On March 12, 2003, Respondents failed to remove excreta and food waste from inside each indoor primary enclosure daily and from underneath each primary indoor enclosure as often as necessary to prevent excessive accumulation of feces and food waste, to prevent the nonhuman primate from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Specifically, Respondents housed six lemurs in primary enclosures with excessive accumulations of feces and food waste. (9 C.F.R. § 3.84(a).)

38. On March 12, 2003, Respondents failed to construct and maintain the primary enclosures for nonhuman primates so as to enable the nonhuman primates to remain dry and clean. Specifically, Respondents housed six lemurs in enclosures so contaminated with excessive feces and food waste that some of the lemurs had feces on their haircoats and could not avoid the overwhelming contamination of wet filth. (9 C.F.R. § 3.80(a)(2)(v).)

39. On January 22, 2004, Respondents failed to design and construct primate facilities so they were structurally sound and failed to keep the primate facilities in good repair to protect the animals from injury, contain the animals securely, and restrict other animals from entering. Specifically, the enclosure housing four ring-tailed lemurs had a leaking roof, exposed electrical wires, and door that was off its hinge. (9 C.F.R.

§ 3.75(a).)

40. On January 22, 2004, Respondents failed to construct the surfaces of housing facilities in a manner, and made of material, that allow the surfaces to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Specifically, Respondents constructed the walls and flooring in the lemurs' enclosure of unsealed wood. (9 C.F.R. § 3.75(a).)

41. On January 22, 2004, Respondents failed to sufficiently heat indoor housing facilities when necessary to protect nonhuman primates from temperature extremes and to provide for their health and well-being. Specifically, the heating device in the enclosure housing four ring-tailed lemurs provided insufficient heat to prevent the ambient temperature from dropping below 45 degrees Fahrenheit for more than 4 hours. (9 C.F.R. § 3.76(a).)

42. On January 22, 2004, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to four ring-tailed lemurs. (9 C.F.R. § 3.83.)

43. On January 22, 2004, Respondents failed to clean and sanitize water receptacles as often as necessary to keep them clean and free from contamination. Specifically, the water receptacle used by four ring-tailed lemurs contained green algae, fecal material, and floating monkey biscuits. (9 C.F.R. § 3.83.)

44. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in an enclosure housing two wolves ("Two Way" and "Tundra"). (9 C.F.R. § 3.125(a).)

45. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the sagging fencing material in the top, southeast corner of the black bears' enclosure. (9 C.F.R. § 3.125(a).)

46. On August 30, 2002, Respondents failed to construct indoor and

outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the chainlink fence that was detached from the horizontal foundational bar in the spotted leopard's ("Maya") enclosure. (9 C.F.R. § 3.125(a).)

47. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the damaged chainlink fence on the front of the Timber wolf's enclosure and used torn and bent chainlink fencing with sharp edges to patch the damaged east-side area of the cougar's ("Maurice") enclosure. (9 C.F.R. § 3.125(a).)

48. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, two tigers ("Thor" and "Dixie") escaped from their primary enclosure through an unsound gate. (9 C.F.R. § 3.125(a).)

49. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents constructed an 8-foot-high, open-top outdoor enclosure for two tigers ("Sophie" and "Bubba"). (9 C.F.R. § 3.125(a).)

50. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

51. On August 30, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional and meat, which was thawing in a wheel barrow, exhibited putrefaction and fly infestation. (9 C.F.R. §

3.125(c).)

52. On August 30, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, decomposing food was found in several enclosures, empty feed boxes were scattered throughout the facility, and boxes containing rotting, maggot infested meat, and debris associated with the boxes, were found behind the wolves' enclosures. (9 C.F.R. § 3.125(d).)

53. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in a wolf's ("Two Way") enclosure. (9 C.F.R. § 3.125(a).)

54. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the chainlink fence that was detached from the horizontal foundational bar in the spotted leopard's ("Maya") enclosure. (9 C.F.R. § 3.125(a).)

55. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the damaged chainlink fence on the front of the Timber wolf's enclosure and used torn and bent chainlink fencing with sharp edges to patch the damaged east-side area of the cougar's ("Maurice") enclosure. (9 C.F.R. § 3.125(a).)

56. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

57. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from

injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for nine young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

58. On August 31, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional and meat, which was thawing in a wheel barrow, exhibited putrefaction and fly infestation. (9 C.F.R. § 3.125(c).)

59. On August 31, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, decomposing food was found in several enclosures for wolves, tigers, and leopards. (9 C.F.R. § 3.125(d).)

60. On September 4, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

61. On September 4, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for nine young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

62. On September 4, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

63. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in the black bears' ("Boo Boo" and "Apache") primary enclosure. (9 C.F.R. § 3.125(a).)

64. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to

maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for five young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

65. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in a wolf's ("Tundra") enclosure. (9 C.F.R. § 3.125(a).)

66. On October 8, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

67. On November 4, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

68. On November 4, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, Respondents allowed piles of manure packs to accumulate outside the tigers' enclosures. (9 C.F.R. § 3.125(d).)

69. On March 12, 2003, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the roof of a tiger's ("Sierra") enclosure (two sections of the fencing that comprised the roof were disconnected). (9 C.F.R. § 3.125(a).)

70. On March 12, 2003, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

71. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to

secure the perimeter fence with a locking device to prevent unauthorized access. (9 C.F.R. § 3.125(a).)

72. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the top of the shelter box used by two tigers ("Thor" and "Vixie") that had become detached. (9 C.F.R. § 3.125(a).)

73. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the detached panel on the top east side of the enclosure housing two bears. (9 C.F.R. § 3.125(a).)

74. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to adequately secure chainlink fencing panels in enclosures housing three tigers ("Rachel," Sophie," and "Bubba"). (9 C.F.R. § 3.125(a).)

75. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair or remove the fallen resting platform in a leopard's enclosure ("Pepper"). (9 C.F.R. § 3.125(a).)

76. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the sharp, exposed wire ends in a tiger cub's enclosure ("Bolbar"). (9 C.F.R. § 3.125(a).)

77. On January 22, 2004, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondents stored turkey legs (being fed to animals) on the ground outside. (9 C.F.R. § 3.125(c).)

78. On August 30, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a tiger ("Ozzie"), was pulled away from its enclosure and failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

79. On August 30, 2002, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, a wolf ("Predator") was without any shelter. (9 C.F.R. § 3.127(b).)

80. On August 30, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, excess water in a tiger's ("Tony") enclosure resulted in the animal being unable to remain clean and dry. (9 C.F.R. § 3.127(c).)

81. On August 30, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

82. On August 30, 2002, Respondents failed to construct a perimeter fence so that it protected the animals in the facility by restricting animals and unauthorized persons from going through or under it and having contact with animals in the facility. Specifically, the west-side gate of Respondents' perimeter fence was damaged and there was a large hole under the perimeter fence in the northeast corner of the facility. (9 C.F.R. § 3.127(d).)

83. On August 30, 2002, Respondents failed to construct a perimeter fence so that it protected the animals in the facility by restricting animals and unauthorized persons from going through or under it and having contact with animals in the facility. Specifically, the security of the perimeter fence was compromised; the key used to secure the padlock was lost and, therefore, the padlock was non-functional. (9 C.F.R. § 3.127(d).)

84. On August 31, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a tiger ("Ozzie"), was pulled away from its enclosure and failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

85. On August 31, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a wolf ("Predator"), failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

86. On August 31, 2002, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, a wolf's ("Two Way") igloo-style enclosure was damaged above the entrance and did not protect against inclement weather. (9 C.F.R. § 3.127(b).)

87. On August 31, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondents failed to eliminate excess water in a tiger's ("Tony") enclosure. (9 C.F.R. § 3.127(c).)

88. On August 31, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

89. On September 4, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

90. On October 8, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondents failed to eliminate excess water in three tiger enclosures ("Munchkin," "Ozzie," and "Sierra"). (9 C.F.R. § 3.127(c).)

91. On October 8, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including seven tigers and three leopards housed in the barn (9 C.F.R. § 3.127(d)).

92. On March 12, 2003, Respondents failed to provide adequate natural or artificial shelter for animals kept outdoors. Specifically, the wet bedding used by the tigers and bears provided inadequate shelter from inclement weather. (9 C.F.R. § 3.127(b).)

93. On March 12, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud covered 100% of the enclosure for two tigers ("Sophie" and "Bubba") and 60% of the enclosure for two other tigers ("Zinny" and

"Montrose"). (9 C.F.R. § 3.127(c).)

94. July 1, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud covered 100% of the enclosure for two tigers (southeast enclosures) and 60% of the enclosure for two other tigers (southeast enclosures). (9 C.F.R. § 3.127(c).)

95. On September 23, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud was found in two tiger enclosures housing three tigers. (9 C.F.R. § 3.127(c).)

96. On January 22, 2004, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, Respondents provided a shelter box for two tigers ("Ozzie" and "Sierra") that was too small to contain both animals. (9 C.F.R. § 3.127(b).)

97. On August 30, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

98. On August 31, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

99. On September 4, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

100. On September 4, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, Respondents housed a spotted leopard in an enclosure that measured 3 feet by 12 feet. (9 C.F.R. § 3.128.)

101. On October 8, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make

normal postural and social adjustments with adequate freedom of movement. Specifically, two enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

102. On January 22, 2004, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, Respondents housed a 9-month old tiger ("Darley"), that weighed between 150 pounds and 175 pounds, in an enclosure that measured 4 feet by 8 feet. (9 C.F.R. § 3.128.)

103. On August 30, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, wholesome, palatable food was not available for 16 tigers, 7 leopards, 1 cougar, 1 jaguar, 3 bears, and 6 wolves. (9 C.F.R. § 3.129.)

104. On October 8, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for 14 tigers, 7 leopards, 1 cougar, 1 jaguar, 3 bears, and 6 wolves. (9 C.F.R. § 3.129.)

105. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately 14 tigers, 10 of which ("Dixie," "Thor," "Sophie," "Bubba," "Zinni," "Montrose," "Megan," "Luna," "Shantra," and "Ozzie") appeared thin and gaunt with thin brittle haircoats. (9 C.F.R. § 3.129.)

106. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately three bears, one of which (the singly housed bear) appeared thin with a poor quality haircoat. (9 C.F.R. § 3.129.)

107. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately one

cougar, one jaguar, and seven leopards, six of which (excepting "Pepper") appeared thin with poor quality haircoats. (9 C.F.R. § 3.129.)

108. On March 12, 2003, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for the large felids. (9 C.F.R. § 3.129.)

109. On August 30, 2002, Respondents failed to ensure that water receptacles were clean and sanitary. Specifically, all of the water receptacles used by the animals were in need of cleaning and sanitation. (9 C.F.R. § 3.130.)

110. On October 8, 2002, Respondents failed to provide access to potable water and ensure that water receptacles were clean and sanitary. Specifically, a tiger's ("Munchkin") water and water receptacle were contaminated with maggots. (9 C.F.R. § 3.130.)

111. On October 22, 2002, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals. Specifically, water receptacles used by the tigers contained insufficient water. (9 C.F.R. § 3.130.)

112. On November 4, 2002, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals and failed to ensure that water receptacles were clean and sanitary. Specifically, water receptacles used by the animals at Respondents' facility contained insufficient water contaminated with debris and were in need of sanitation. (9 C.F.R. § 3.130.)

113. On March 12, 2003, Respondents failed to provide access to potable water and failed to ensure that water receptacles were clean and sanitary. Specifically, the water and water receptacle used by two tigers ("Ozzy" and "Luna") was filled with feces. (9 C.F.R. § 3.130.)

114. On January 22, 2004, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals. Specifically, all the outdoor water receptacles were frozen, several of which were completely iced to the top; four cubs housed in the building had no water; and the water and water receptacle used by

one tiger ("Rachel") contained bird droppings. (9 C.F.R. § 3.130.)

115. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing nine tigers in the barn. (9 C.F.R. § 3.131(a).)

116. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears in an enclosure with excessive feces. (9 C.F.R. § 3.131(a).)

117. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves and seven tigers in enclosures with accumulated piles of manure. (9 C.F.R. § 3.131(a).)

118. On August 30, 2002, Respondents failed to keep premises clean and in good repair. Specifically, diffused piles of debris and trash were within and outside of Respondents' facility and the trash cans and dumpsters were at full capacity and needed to be emptied. (9 C.F.R. § 3.131(c).)

119. On August 30, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control avian and mammalian pests. (9 C.F.R. § 3.131(d).)

120. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing nine tigers in the barn. (9 C.F.R. § 3.131(a).)

121. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears in an enclosure with excessive feces. (9 C.F.R. § 3.131(a).)

122. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves and seven tigers in enclosures with accumulated piles of manure.

(9 C.F.R. § 3.131(a).)

123. On August 31, 2002, Respondents failed to keep premises clean and in good repair. Specifically, trash cans and dumpsters were at full capacity and needed to be emptied. (9 C.F.R. § 3.131(c).)

124. On August 31, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control avian and mammalian pests. (9 C.F.R. § 3.131(d).)

125. On September 4, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears, wolves, and tigers in enclosures with excessive feces. (9 C.F.R. § 3.131(a).)

126. On October 8, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves, four tigers, and two bears in enclosures with accumulated piles of manure and/or excessive feces. (9 C.F.R. § 3.131(a).)

127. On October 8, 2002, Respondents failed to keep premises clean and in good repair. Specifically, Respondents left pieces of chainlink fencing, unused water tubs, portions of a partially dismantled enclosure, and other debris throughout the facility. (9 C.F.R. § 3.131(c).)

128. On October 8, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control mammalian pests. (9 C.F.R. § 3.131(d).)

129. On November 4, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing the large felids. (9 C.F.R. § 3.131(a).)

130. On March 12, 2003, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed three bears in enclosures with excessive accumulation of feces. (9 C.F.R. § 3.131(a).)

131. On January 22, 2004, Respondents failed to remove excreta

from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed five tigers ("Montrose," "Zinni," "Ozzie," "Seirra," and "Zeus") in enclosures with excessive accumulations of feces on top of, and behind, the shelter boxes. (9 C.F.R. § 3.131(a).)

132. On August 30, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, 34 animals. (9 C.F.R. § 3.132.)

133. On August 31, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, 34 animals. (9 C.F.R. § 3.132.)

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.

2. By reason of the Findings of Fact set forth in this Decision and Order, *supra*, I conclude Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraphs 3 through 34 of these Conclusions of Law.

3. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, September 23, 2003, and January 22, 2004, Respondents willfully violated section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)).

4. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

5. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(b)(2) of the Regulations and Standards (9 C.F.R. § 2.40(b)(2)).

6. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)).

7. On August 30, 2002, August 31, 2002, and September 4,

2002, Respondents willfully violated section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)).

8. On September 22, 2003, Respondents willfully violated section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

9. On August 30, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.82(a) and (b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.82(a)-(b)).

10. On August 30, 2002, Respondents willfully violated sections 2.100(a) and 3.82(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.82(d)).

11. On August 30, 2002, Respondents willfully violated sections 2.100(a) and 3.84(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.84(c)).

12. On August 30, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.85 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.85).

13. On October 8, 2002, November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.81 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.81).

14. On November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.83 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.83).

15. On November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.84(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.84(a)).

16. On November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.80(a)(2)(v) and (viii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(2)(v), (viii)).

17. On March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.80(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(b)).

18. On March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.80(a)(2)(v) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(2)(v)).

19. On January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.75(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a)).

20. On January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.76(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.76(a)).

21. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.125(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(a)).

22. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.125(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(c)).

23. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.125(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(d)).

24. On August 30, 2002, and August 31, 2002, Respondents willfully violated sections 2.100(a) and 3.127(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(a)).

25. On August 30, 2002, August 31, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.127(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(b)).

26. On August 30, 2002, August 31, 2002, October 8, 2002, March 12, 2003, July 1, 2003, and September 23, 2003, Respondents willfully violated sections 2.100(a) and 3.127(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(c)).

27. On August 30, 2002, August 31, 2002, September 4, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.127(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(d)).

28. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.128).

29. On August 30, 2002, October 8, 2002, November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.129 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.129).

30. On August 30, 2002, October 8, 2002, October 22, 2002,

November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.130 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.130).

31. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.131(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(a)).

32. On August 30, 2002, August 31, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.131(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(c)).

33. On August 30, 2002, August 31, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.131(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(d)).

34. On August 30, 2002, and August 31, 2002, Respondents willfully violated sections 2.100(a) and 3.132 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.132).

## COMPLAINANT'S APPEAL PETITION

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I issue an order reversing the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision or that I issue an order vacating the ALJ's denial of Complainant's Motion for Default Decision and remanding the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 3-9.)

During a July 13, 2004, teleconference with counsel for Respondents and counsel for Complainant, the ALJ denied Complainant's Motion for Default Decision and provided Respondents until August 2, 2004, to file a response to the Amended Complaint. In a July 14, 2004, filing, the ALJ made reference to his July 13, 2004, denial of Complainant's Motion for Default Decision, as follows:

> Motion for Adoption of Proposed Decision and Order, filed June 3, 2004, was denied during the teleconference. Respondent [sic] is allowed to file his [sic] Answer to the Amended Complaint no later than **Monday, August 2, 2004.**

Notice of Hearing and Exchange Deadlines at 1 (emphasis in original).

The ALJ did not explicitly conclude that Respondents filed meritorious objections to Complainant's Motion for Default Decision. However, section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) requires that an administrative law judge deny, with supporting reasons, a complainant's motion for a default decision if the administrative law judge finds the respondent has filed meritorious objections to the motion, and requires that an administrative law judge issue a decision, without further procedure or hearing, if the administrative law judge finds the respondent has failed to file meritorious objections to the motion. Therefore, I infer, based on the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision, the ALJ found meritorious some or all of Respondents' June 15, 2004, and June 23, 2004, objections to Complainant's Motion for Default Decision. I disagree with the ALJ's finding that Respondents filed meritorious objections to Complainant's Motion for Default Decision. Instead, I find Respondents' objections, filed June 15, 2004, and June 23, 2004, are without merit, and I conclude a decision, without further procedure or hearing, must be issued.

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because they failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served them with the Amended Complaint. The Hearing Clerk served Respondents with the Amended Complaint and the Hearing Clerk's April 23, 2004, service letter on April 30, 2004.[10] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

**§ 1.136 Answer.**

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an

[10] See note 5.

answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Amended Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this amended complaint.

Amended Compl. at 29.

Similarly, the Hearing Clerk informed Respondents in the April 23, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Amended Complaint would constitute an admission of that allegation, as follows:

> April 23, 2004
>
> Mr. Michael Stephenson, Esq.
> McNeely, Stephenson, Thopy & Harrold
> 30 East Washington Street, Suite 400
> Shelbyville, Indiana 46176
>
> Dear Mr. Stephenson:
>
> **Subject: In re: Dennis Hill, an individual d/b/a White Tiger Foundation and Willow Hill Center for Rare & Endangered Species, LLC, an Indiana domestic limited liability company d/b/a Hill's Exotics**
> **AWA Docket No. 04-0012**
>
> Enclosed is a copy of Complainant's Amended Complaint, which has been filed with this office in the above-captioned proceeding.
>
> Inasmuch as Complainant has filed the Amended Complaint prior

to the filing of a motion for hearing, the amendment is effective upon filing.

You will have 20 days from service of this letter in which to file an answer to the amended complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motion or requests that you may wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and 3 copies are required for each document submitted.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On April 27, 2004, 3 days before the Hearing Clerk served Respondents with the Amended Complaint, Respondents filed an Answer in response to the Complaint. The Hearing Clerk sent Respondents a letter dated April 27, 2004, informing Respondents that their response to the Amended Complaint had been received, as follows:

April 27, 2004

Mr. Michael Stephenson, Esquire
McNeely, Stephenson, Thopy & Harrold
30 East Washington Street
Suite 400
Shelbyville, Indiana 46176

Dear Mr. Stephenson:

Subject: In re: Dennis Hill, an individual d/b/a White Tiger Foundation and Willow Hill Center for Rare &

Endangered Species, LLC, an Indiana domestic limited liability company d/b/a Hill's Exotics., Respondents
AWA Docket No. 04-0012

Respondents' Amended Answer To Amended Complaint, has been received and filed in the above-captioned proceeding.

You will be informed of any future action taken in this matter[.]

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Notwithstanding the Hearing Clerk's April 27, 2004, letter, the record establishes that Respondents' April 27, 2004, filing was neither an amended answer nor a response to the Amended Complaint. As an initial matter, the Hearing Clerk did not serve Respondents with the Amended Complaint until April 30, 2004,[11] 3 days after Respondents filed their Answer. Moreover, Respondents entitle their April 27, 2004, filing "Answer." Further still, Respondents state in the April 27, 2004, filing that the filing is a response to the "Complaint" and pray that the ALJ deny the "Complaint." In addition, Respondents' letter transmitting the April 27, 2004, filing is dated April 22, 2004, the April 27, 2004, filing contains a certificate of service stating counsel for Respondents placed the filing "in the United States Mail, first class, postage prepaid, this 22nd day of April, 2004[,]"[12] and the envelope containing the April 27, 2004, filing is postmarked April 22, 2004, 1 day prior to the date Complainant filed the Amended Complaint and 8 days prior to the date the Hearing Clerk served Respondents with the Amended Complaint. Based on the record before me, I find Respondents' April 27, 2004, filing is an answer filed in response to the Complaint and

[11] See note 5.

[12] Answer at second unnumbered page.

Complainant's operative pleading is the Amended Complaint.

Respondents rely on the Hearing Clerk's April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing as the basis for their Objection to Motion for Adoption of Proposed Decision and Order. The Rules of Practice, the Amended Complaint, and the Hearing Clerk's April 23, 2004, service letter clearly inform Respondents of the requirement for a timely response to the Amended Complaint and the consequences of a failure to file a timely response to the Amended Complaint. Therefore, I find Respondents' reliance on the Hearing Clerk' s April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing, misplaced.

Moreover, I find Respondents' 13 objections to Complainant's Motion for Default Decision in Respondents' Supplemental Objection to Motion for Adoption of Proposed Decision and Order, without merit. The length of time Respondents maintained an Animal Welfare Act license; the request that Respondent Dennis Hill testify on the United State Department of Agriculture's behalf as an expert on large cats; the failure of any animal to escape from Respondents' property; the failure of any animal to injure Respondents; Respondents' disposal, or intention to dispose, of animals after the Animal Welfare Act violations occurred;[13] and Respondents' short-term economic downturn (Supplemental Objection to Motion for Adoption of Proposed Decision and Order ¶¶ 1-5, 8, 10-11, 13) are neither meritorious bases for denying Complainant's Motion for Default Decision nor relevant to this proceeding. Further, while Respondents' corrections of their Animal Welfare Act violations (Supplemental Objection to Motion for Adoption of Proposed Decision and Order ¶¶ 6-7, 9, 12) are commendable and can be taken into account when determining the sanction to be imposed, they neither eliminate the fact that violations of the Animal Welfare Act and

---

[13]*In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997) (stating the respondent's disposal of animals under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act is not a defense to a violation of the Animal Welfare Act or the Regulations and Standards); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's intention to dispose of animals under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act is not a defense to a violation of the Animal Welfare Act or the Regulations and Standards).

the Regulations and Standards occurred[14] nor constitute meritorious bases for denying Complainant's Motion for Default Decision.

The Rules of Practice provide that an answer must be filed within 20 days after service of the amended complaint (7 C.F.R. § 1.136(a)), and Respondents' answer to the Amended Complaint was required to be filed no later than May 20, 2004. Respondents filed an Answer to Amended Complaint on August 3, 2004, 3 months 4 days after the Hearing Clerk served Respondents with the Amended Complaint. Respondents' failure to file a timely answer to the Amended Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Amended Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[15]

---

[14]*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); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[15]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of

(continued...)

## SANCTION

Respondents, by their failure to file an answer within 20 days after the Hearing Clerk served them with the Amended Complaint, are deemed to have admitted the allegations in the Amended Complaint.[16]

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration 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.[17]

During 3 of the 11 days on which Respondents violated the Animal Welfare Act and the Regulations and Standards, Respondents maintained between 39 and 42 animals at Respondents' facility.[18] The limited record before me does not provide me with any other indication of the size of Respondents' business; therefore, for the purposes of determining the amount of the civil penalty, I give Respondents the benefit of the lack of a record and assume for purposes of this Decision and Order that Respondents' business is a small business.

Many of Respondents' violations are serious violations which directly jeopardized the health and well-being of Respondents' animals.

Respondents' willful violations on 11 days during the period August 30, 2002, through January 22, 2004, reveals a consistent

---

[15](...continued)
the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[16] See 7 C.F.R. § 1.136(c).

[17] See 7 U.S.C. § 2149(b).

[18]Amended Compl. ¶ 6.

disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[19]

---

[19]*In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec.763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *appeal docketed*, No. 04-9540 (10th Cir. Apr. 24, 2004); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec.

(continued...)

Complainant seeks revocation of Respondent Dennis Hill's Animal Welfare Act license, assessment of a $27,775 civil penalty against Respondents, and a cease and desist order (Complainant's Motion for Default Decision at 1).

Respondents committed more than 500 violations of the Animal Welfare Act and the Regulations and Standards. Respondents could be assessed a maximum civil penalty of $2,750 for each of their violations of the Animal Welfare Act and the Regulations and Standards.[20] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the

---

[19](...continued)
165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *aff'd*, No. 02-15602, 2003 WL 21259771 (9th Cir. May 29, 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packin*g *Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[20]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $20,000 civil penalty,[21] and revocation of Respondent Dennis Hill's Animal Welfare Act license are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a $20,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW

---

[21]I did not adopt Complainant's recommendation that I assess Respondents a $27,775 civil penalty only because Complainant's recommendation is based, in part, on his contention that "Respondents have a moderate size business" (Complainant's Motion for Default Decision at 2). The limited record before me does not allow me to conclude that Respondents have a moderate size business. Therefore, I give Respondents the benefit of the lack of a record and assume for purposes of this Decision and Order that Respondents' business is a small business.

Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0012.

3. Respondent Dennis Hill's Animal Welfare Act license (Animal Welfare Act license number 32-A-0160) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent Dennis Hill.

## RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is October 8, 2004.

---

**In re: NELLIE L. BABB, a/k/a NELLIE L. STANBAUGH or STAMBAUGH.**
**AWA DOCKET No. 03-0026.**
**Decision and Order.**
**Filed February 18, 2005.**

**AWA – Intrastate activity covered by AWA – Retail sales – Expired APHIS license.**

Robert Ertman, for Complainant.
Respondent Pro se.
*Decision and Order issued by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

This action was brought by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") against the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, for violations of the Animal Welfare Act, as amended, (7 U.S.C. 2131, *et seq*.), hereinafter referred to as the "Act" and the Regulations issued pursuant to the Act. The Respondent has generally denied the allegations of the Complaint and an Oral Hearing was held in Tulsa, Oklahoma on Wednesday, February 16, 2005.

The Respondent failed to appear and although a Decision by Reason of Default could have been entered, the Complainant introduced the testimony of witnesses and produced documentary evidence fully supporting the allegations contained in the Complaint. A brief summary of the evidence follows.

The Complainant first called Leon Robertson, the former owner of Pine Spring Pets who testified concerning his dealings with the Respondent, identifying specific purchases from the Respondent on January 2, 2001 (Exhibits CX 1 and 2), January 9, 2001 (Exhibit CX 5), January 11, 2001 (Exhibit CX 6), August 21,2001 (Exhibit CX 12, 13 and 14), November 13, 2001 (Exhibit CX 17), February 19, 2002 (Exhibit CX 18), May 21, 2002 (Exhibit CX 3) and June 4, 2002 (Exhibit CX 3) as well as confirming the contents of his affidavit given to Investigator Bob Stiles on July 1, 2002 (Exhibit CX 3).

Kenneth Josserand, a licensed dealer under the Act, was next called to identify an invoice dated July 16, 2001 for the purchase of six puppies from the Respondent (Exhibit CX 7) and to confirm the specifics contained on an affidavit given to Senior Investigator Daniel Hutchings on April 16, 2002 (Exhibit CX 8).

Daniel Hutchings, a APHIS Senior Investigator, testified that, during the course of the investigation, he had interviewed Mr. Josserand (Exhibit CX 8) and Joyce Walters, the owner of Select Pets, another dealer who had purchased Pomeranian puppies from the Respondent on two separate occasions, June 26, 2001 and August 6, 2001 and identified the affidavit he took from Ms. Walters on March 28, 2002. (Exhibits CX 9, 10 and 11) Senior Investigator Hutchings then testified that he had obtained documentary evidence of the Respondent's dealings

with Southwest Kennel Auctions and the sale of six dogs through that facility on September 21, 2001. He concluded his testimony by identifying the Respondent's application for her dealer license (Exhibit CX 23), a copy of the license (Exhibit CX 25) and a copy of the letter notifying the Respondent that her license had expired (Exhibit CX 21).

The last witness, Bob Stiles, an APHIS Investigator, testified that as part of his duties in this investigation, he had interviewed both Leon Robertson and the Respondent and secured affidavits from Mr. Robertson on July 1, 2002 (Exhibit CX 3) and the Respondent on June 24, 2002 (Exhibit CX 4) and a summary of his investigation was contained in a Memorandum sent to Senior Investigator Hutchings which was dated June 26, 2002 (Exhibit CX 26).

Section 2131 of Title 7, United States Code provides:

> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order –
>
> > (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> > (2) to assure the humane treatment of animals during transportation in commerce; and
> > (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
> >
> > The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

The implementing regulations found at 9 C.F.R. 1.1, *et seq*. define a Dealer as:

> ...any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes.....
>
> and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

Section 2.1 sets forth the requirements for licensing, describes the application process and contains the exemptions from licensing requirements:
(a)(1) Any person operating or desiring to operate as a dealer…except persons who are exempted from the licensing requirements…must have a valid license. …
(3) The following persons are exempt from the licensing requirements…
(i) Retail pet stores which sell…at retail only: *Provided, That* Anyone wholesaling any animals, selling any animals for research or exhibition…must have a license.
(ii) Any person who sells or negotiates the sale or purchase of any animal…and who derives no more than $500 gross income from the sale of such animals …during any calendar year and is not otherwise required to obtain a license. …
(iv) Any person who sells fewer than 25 dogs and/or cats per year which were raised on his or her premises…

Section 2.2 contains the requirement of acknowledgement of the regulations and standards before a license will be issued and again before it may be renewed. The signature on the application form constitutes an agreement to comply with the regulations and standards.

The transactions detailed in the testimony and documentary evidence

above expressly come within the above provisions of the Act and the Regulations. By failing to renew her license but continuing to operate as a dealer, it is clear that the Respondent repeatedly and willfully violated the Regulations. The Respondent seeks to excuse her conduct by claiming an exemption by an "explicit reservation of rights" under the Uniform Commercial Code provisions; however federal preemption precludes such a claim. She also publicly denies the Fourteenth Amendment and indicates that she cannot be compelled to perform under edicts and accordingly is not subject to regulation. Her assertions while imaginative and possibly novel are without merit.

Having heard the testimony of the witnesses and considered the exhibits and the entire record, the violations alleged in the Complaint have been established and the following Findings of Fact are made.

## FINDINGS OF FACT

1. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh, is an individual formerly residing at Route 1, Box 70, San Antonio, Texas.
2. That at all times material herein, the Respondent was operating as a dealer as defined in the Act and the Regulations.
3. That on May 15, 1999 Respondent applied for and received a license as a “Class A Dealer”, which license expired on May 26, 2000.
4. That by letter dated August 9, 2000, the Respondent was advised in writing that her license had expired.
5. That the Respondent, in willful violation of the Act and the Regulations, continued to operate as a dealer without renewing her license, selling at least forty (40) dogs to licensed dealers on at least ten occasions, to wit:

| DATE | NUMBER OF ANIMALS | PURCHASER |
|---|---|---|
| January 2, 2001 | 7 | Pine Springs Pets |
| January 9, 2001 | 5 | Pine Springs Pets |
| January 11, 2001 | 1 | Pine Springs Pets |
| July 16, 2001 | 6 | Kenneth Josserand |
| August 6, 2001 | 2 | Select Pets |
| August 21, 2001 | 6 | Pine Springs Pets |

| | | |
|---|---|---|
| November 13, 2001 | 1 | Pine Springs Pets |
| February 19, 2002 | 6 | Pine Springs Pets |
| May 21, 2002 | 3 | Pine Springs Pets |
| June 4, 2004 | 3 | Pine Springs Pets |

**ORDER**

Being sufficiently advised, it is **ORDERED** as follows:

1. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, shall cease and desist from any and all further violations of the Act and the Regulations.
2. That by reason of her willful violations of the Act and the Regulations, the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, is **PERMANENTLY** disqualified from becoming licensed under the Act and Regulations.
3. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh, is assessed a civil penalty in the amount of THIRTY THOUSAND DOLLARS ($30,000.00); however, of this amount, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) of the civil penalty shall be suspended on the condition that the Respondent commit no further violations of the Act and Regulations.
This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded with thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
Office of General Counsel
Attention: Robert Ertman
Room 2343, South Building
Washington, D.C. 20250

Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 03-0026.
Copies of this Order shall be served upon the Parties by the Hearing Clerk's Office.

---

**In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.**
**AWA Docket No. 04-0017.**
**Decision and Order as to Ricky M. Watson and Cheri Watson.**
**Filed February 23, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Bases for denial of motion for default – Sanction – Cease and desist order – Civil penalty.**

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents Ricky M. Watson and Cheri Watson violated the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer concluded Respondents Ricky M. Watson and Cheri Watson filed a late answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. The Judicial Officer rejected Respondents Ricky M. Watson's and Cheri Watson's contention that they had filed meritorious objections to Complainant's motion for a default decision. The Judicial Officer issued a cease and desist order against Respondents Ricky M. Watson and Cheri Watson and assessed each of them a $17,050 civil penalty.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson & Cheri Watson, Pro se.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards

issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Ricky M. Watson, Cheri Watson, Tiger's Eyes, Inc., and Richard J. Burns [hereinafter Respondents] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 6-12).

The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and a service letter on May 26, 2004.[1] Respondents Ricky M. Watson and Cheri Watson were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents Ricky M. Watson and Cheri Watson filed an answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served them with the Complaint.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Ricky M. Watson and Cheri Watson By Reason of Admission of Facts" [hereinafter Proposed Default Decision as to Ricky M. Watson and Cheri Watson]. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[2] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections

---

[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 8488 and Article Number 7001 0360 0000 0304 8471.

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4318 and Article Number 7003 2260 0005 5721 4325.

to Complainant's Motion for Default Decision.

On November 17, 2004, during a teleconference with Respondents Ricky M. Watson and Cheri Watson, representatives of Tiger's Eyes, Inc., counsel for Respondent Richard J. Burns, and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision.[3]

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[4] On January 5, 2005, Respondent Ricky M. Watson filed a response in opposition to Complainant's Appeal Petition. On January 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order as to Ricky M. Watson and Cheri Watson based on Respondent Ricky M. Watson's and Respondent Cheri Watson's failure to file a timely answer to the Complaint.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

---

[3]Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1, filed by the ALJ on November 22, 2004.

[4]Complainant's Appeal Petition.

## CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

### § 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

### § 2132. Definitions

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or

the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

**§ 2149. Violations by licensees**

. . . .

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the

Secretary's order with the appropriate United States Court of Appeals. 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. . . .

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2149(b)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil

monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each

civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

**PART 1—DEFINITION OF TERMS**

**§ 1.1 Definitions.**

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also

signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

## PART 2—REGULATIONS

. . . .

### SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

#### § 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal

arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

. . . .

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

. . . .

## SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

### § 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

## SUBPART I—MISCELLANEOUS

. . . .

**§ 2.126 Access and inspection of records and property.**

(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.

. . . .

## PART 3—STANDARDS

. . . .

### SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

. . . .

**§ 3.77 Sheltered housing facilities.**

. . . .

(c) *Lighting*. The sheltered part of sheltered housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman

primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

. . . .

## SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

### FACILITIES AND OPERATING STANDARDS

. . . .

**§ 3.126 Facilities, indoor.**

. . . .

(c) *Lighting*. Indoor housing facilities shall have ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Such lighting shall be uniformly distributed and of sufficient intensity to permit routine inspection and cleaning. Lighting of primary enclosures shall be designed to protect the animals from excessive illumination.

. . . .

**§ 3.127 Facilities, outdoor.**

. . . .

(b) *Shelter from inclement weather*. 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

. . . .

**§ 3.128 Space requirements.**

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

**§ 3.129 Feeding.**

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

. . . .

**§ 3.130 Watering.**

If potable water is not accessible to the animals at all times, it

must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

**§ 3.131 Sanitation.**

(a) *Cleaning of enclosures*. 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. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

(c) *Housekeeping*. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

. . . .

**§ 3.133 Separation.**

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.40(a), (b)(3), .100(a), .126(a); 3.77(c), .126(c), .127(b), .128, .129(a), .130, .131(a), (c), .133.

## DECISION

## Statement of the Case

Respondents Ricky M. Watson and Cheri Watson failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order as to Ricky M. Watson and Cheri Watson is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

## Findings of Fact

1. Respondent Ricky M. Watson is an individual whose mailing address is 1832 Chalk Road, Harwood, Texas 78632. At all times material to this proceeding, Respondent Ricky M. Watson operated as an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations and Standards. Respondent Ricky M. Watson is an executive director of Respondent Tiger's Eyes, Inc., and directed, managed, and controlled its business activities. The acts, omissions, and failures to act by Respondent Ricky M. Watson alleged in the Complaint were within the scope of Respondent Ricky M. Watson's office and are deemed the acts, omissions, and failures of Respondent Tiger's Eyes, Inc., as well as Respondent Ricky M. Watson, for the purpose of construing or enforcing the Animal Welfare Act and the Regulations and Standards.

2. Respondent Cheri Watson is an individual whose mailing address is 1832 Chalk Road, Harwood, Texas 78632. At all times material to

this proceeding, Respondent Cheri Watson operated as an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations and Standards. Respondent Cheri Watson is an executive director of Respondent Tiger's Eyes, Inc., and directed, managed, and controlled its business activities. The acts, omissions, and failures to act by Respondent Cheri Watson alleged in the Complaint were within the scope of Respondent Cheri Watson's office and are deemed the acts, omissions, and failures of Respondent Tiger's Eyes, Inc., as well as Respondent Cheri Watson, for the purpose of construing or enforcing the Animal Welfare Act and the Regulations and Standards.

3. Animal and Plant Health Inspection Service personnel conducted inspections of Respondents' facilities, records, and animals for the purpose of determining Respondents' compliance with the Animal Welfare Act and the Regulations and Standards on March 13, 2001 (213 animals), September 7, 2001, December 18, 2001, February 4, 2002 (280 animals), February 6, 2002, February 21, 2002, March 27, 2002 (217 animals), July 31, 2002, and December 18, 2002 (unable to inspect).

4. On June 24, 2001, Respondents Ricky M. Watson and Cheri Watson, d/b/a Noah's Land Wildlife, entered into a settlement agreement for alleged violations of the Animal Welfare Act and the Regulations and Standards, documented in Animal Welfare investigation No. TX01015-AC.

*Noncompliance with Regulations Governing*
*Attending Veterinarian and Adequate Veterinary Care*

5. Respondents Ricky M. Watson and Cheri Watson willfully failed to have an attending veterinarian provide adequate veterinary care to their animals, as follows:

a. On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to obtain treatment for a camel with a draining area on the right side of its neck.

b. On September 7, 2001, Respondents Ricky M. Watson and

Cheri Watson failed to obtain treatment for a thin black bear (enclosure with wood floor), two tigers with hair loss, and an emaciated pig (drive-thru).

c. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson failed to obtain treatment for a caracal with hair loss on both sides of his body.

6. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication. Specifically, Respondents Ricky M. Watson and Cheri Watson willfully failed to observe and assess the daily health of a caracal with hair loss on both sides of his body and were, therefore, unable to covey accurate information regarding the caracal's health and well-being to the attending veterinarian.

*Noncompliance with Regulations Governing*
*Miscellaneous Licensee Requirements*

7. On December 18, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities.

*Noncompliance with Regulations Governing*
*Humane Handling, Care, and Treatment of Nonhuman Primates*

8. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to meet the minimum facilities and operating standards for nonhuman primates by failing to provide nonhuman primates with a regular diurnal lighting cycle of either natural or artificial means. Specifically, Respondents Ricky M. Watson and Cheri Watson willfully failed to adequately light the primates' enclosure.

*Noncompliance with Standards Governing Humane Handling, Care, and Treatment of Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals*

9. Respondents Ricky M. Watson and Cheri Watson willfully failed to meet the minimum facilities and operating standards for other animals, as follows:

a. Respondents willfully failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain housing facilities in good repair to protect the animals from injury and contain them in the housing facilities, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to repair the jagged, clawed east-side board of a leopard's shelter box and failed to fill the holes in the bears' enclosure (drive-thru).

(ii) On February 21, 2002, the fencing was detached from the bottom support pole in an enclosure housing two tigers ("Ishon" and "Kisha").

(iii) On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson failed to repair or replace the loose fencing in the new guinea hogs' enclosure, the rusted chain securing the lock in the tigers' enclosure (by the pavilion), and the chain-link fencing that was detached from the cattle panel in the tigers' enclosure (drive-thru).

(iv) On July 31, 2002, Respondents Ricky M. Watson and Cheri Watson failed to repair or replace the rusted pole supporting the shared wall between the leopard's ("Cybil") enclosure and the tiger's enclosure and failed to repair the deteriorated wood floor in a bear's enclosure ("Sugar").

b. Respondents Ricky M. Watson and Cheri Watson willfully failed to store supplies of food in facilities that adequately protected the supplies of food from deterioration, molding, or contamination by vermin, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson stored sacks of cattle feed on the floor and used a food storage bin with a non-fitting lid.

(ii) On September 7, 2001, Respondents Ricky M. Watson and Cheri Watson failed to clean and sanitize the freezer (food storage room) that was littered with old meat wrappers and meat juices and stored thawing meat on the floor.

c. Respondents Ricky M. Watson and Cheri Watson willfully failed to remove and dispose of animal and food wastes, bedding, dead animals, trash, and debris, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove decaying animal carcasses, rotting produce and meat, and trash from the food storage room.

(ii) On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove approximately 19 boxes of unused soy milk from the food storage room; the milk was present for, at least, 2 weeks.

d. On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Specifically, Respondents Ricky M. Watson and Cheri Watson housed two tigers ("Caesar" and "Kisha") in an enclosure covered with tarpaulins.

e. On or about February 4, 2002, through February 6, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide adequate natural or artificial shelter to animals kept outdoors. Specifically, Respondents Ricky M. Watson and Cheri Watson provided two tigers ("Ishon" and "Kisha") with an open-front, metal shelter box that failed to restrict air flow, rain, and snow and failed to help maintain body heat and that was too small to house both animals.

f. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments with adequate freedom of movement. Specifically, Respondents Ricky M.

Watson and Cheri Watson housed four adult tigers (drive-thru) in the "lockout" portion of the enclosure measuring approximately 9 feet by 9 feet.

g. On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide animals with food that was of sufficient quantity and nutritive value to maintain good animal health and that was prepared with consideration for the age, species, condition, size, and type of animal. Specifically, the oryx (drive-thru) appeared to be malnourished and chased vehicles for food.

h. Respondents Ricky M. Watson and Cheri Watson willfully failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and failed to keep water receptacles clean and sanitary, as follows:

(i) On September 7, 2001, the water and water troughs provided to two tigers (pavilion) were contaminated with feces, black water, and debris.

(ii) On February 21, 2002, the water and water troughs provided to a leopard contained floating algae.

i. Respondents Ricky M. Watson and Cheri Watson willfully failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odors, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bone from the tiger enclosure in the drive-thru and the enclosure "on the hill" housing two tigers.

(ii) On December 18, 2001, Respondents Ricky M. Watson and Cheri Watson housed two muntjacs in an enclosure littered with fecal pellets and a urine-soaked rug.

(iii) On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from the enclosure "on the hill" housing two tigers ("Jean Paul" and "Henrietta") and housed ferrets in an enclosure with excessive feces.

(iv) On February 6, 2002, Respondents Ricky M. Watson

and Cheri Watson failed to remove excessive feces and old bones from the enclosure "on the hill" housing two tigers ("Jean Paul" and "Henrietta") and from the enclosure housing two tigers in the drive-thru.

(v) On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from two enclosures housing tigers in the drive-thru.

(vi) On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from two tiger enclosures (the end enclosure and "Puppy's" lockout).

j. Respondents Ricky M. Watson and Cheri Watson willfully failed to keep premises clean and in good repair, as follows:

(i) On September 7, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove the decaying meat, old meat wrappers, and thawed but unfed meat from the food storage room.

(ii) On December 18, 2001, spilled feed littered the floor in the food storage room.

k. On January 12, 2002, Respondents Ricky M. Watson and Cheri Watson willfully housed incompatible animals together. Specifically, a white female tiger ("Jewel") was attacked and severely injured by her cage mate.

## Conclusions of Law

### *Violations of Regulations Governing Attending Veterinarians and Adequate Veterinary Care*

1. On March 13, 2001, September 7, 2001, and February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to have their attending veterinarian provide adequate care to their animals.

2. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)) by failing to establish and maintain a

program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication with the attending veterinarian.

*Violations of Regulations Governing*
*Miscellaneous Licensee Requirements*

3. On December 18, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated sections 2.100(a) and 2.126(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)) by failing to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities.

*Violations of Regulations Governing*
*Humane Handling, Care, and Treatment of Nonhuman Primates*

4. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated sections 2.100(a) and 3.77(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.77(c)) by failing to provide nonhuman primates with a regular diurnal lighting cycle of either natural or artificial means.

*Violations of Standards Governing*
*Humane Handling, Care, and Treatment of Animals*
*Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs,*
*Nonhuman Primates, and Marine Mammals*

5. Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for other animals, as follows:

a. *Structural strength*

On March 13, 2001, February 21, 2002, March 27, 2002, and July 31, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(a)).

b. *Storage*

On March 13, 2001, and September 7, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(c)).

c. *Waste disposal*

On March 13, 2001, and February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(d)).

d. *Lighting*

On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.126(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.126(c)).

e. *Shelter from inclement weather*

On or about February 4, 2002, through February 6, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.127(b)).

f. *Space*

On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.128).

g. *Feeding*

On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. § 2.100(a), 3.129(a)).

h. *Watering*

On September 7, 2001, and February 21, 2002, Respondents

Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.130).

i. *Cleaning of enclosures*

On March 13, 2001, December 18, 2001, February 4, 2002, February 6, 2002, February 21, 2002, and March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.131(a)).

j. *Housekeeping*

On September 7, 2001, and December 18, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.131(c)).

k. *Separation*

On January 12, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.133 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.133).

## COMPLAINANT'S APPEAL PETITION

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I issue an order reversing the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision and issue a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 3-9.)

During a November 17, 2004, teleconference with, *inter alia*, Complainant's counsel, Respondent Ricky M. Watson, and Respondent Cheri Watson, the ALJ denied Complainant's Motion for Default Decision. In a November 22, 2004, filing, the ALJ made reference to his November 17, 2004, denial of Complainant's Motion for Default Decision, as follows:

> Complainant's Motion for Adoption of Proposed Decision and Order, filed September 3, 2004, is **DENIED**.

Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1 (emphasis in original).

The ALJ did not explicitly conclude that Respondents Ricky M. Watson and Cheri Watson filed meritorious objections to Complainant's Motion for Default Decision. However, section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) requires that an administrative law judge deny, with supporting reasons, a complainant's motion for a default decision if the administrative law judge finds the respondent has filed meritorious objections to the motion, and requires that an administrative law judge issue a decision, without further procedure or hearing, if the administrative law judge finds the respondent has failed to file meritorious objections to the motion. Therefore, I infer, based on the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision, the ALJ found meritorious some or all of Respondents Ricky M. Watson's and Respondent Cheri Watson's October 12, 2004, objections to Complainant's Motion for Default Decision. I disagree with the ALJ's finding that Respondent Ricky M. Watson and Respondent Cheri Watson filed meritorious objections to Complainant's Motion for Default Decision. Instead, I find Respondent Ricky M. Watson's and Respondent Cheri Watson's objections, filed October 12, 2004, are without merit, and I conclude a decision, without further procedure or hearing, must be issued.

Respondents Ricky M. Watson and Cheri Watson are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint. The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and the Hearing Clerk's

service letter on May 26, 2004.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If

---

[5]See note 1.

> the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents Ricky M. Watson and Cheri Watson of the consequences of failing to file a timely answer, as follows:

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 10.

Similarly, the Hearing Clerk informed Respondents Ricky M. Watson and Cheri Watson in the May 19, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

May 19, 2004

Mr. Ricky M. Watson
1832 Chalk Road
Harwood, Texas 78632

Ms. Cheri Watson
1832 Chalk Road
Harwood, Texas 78632

Tiger's Eyes, Inc.
d/b/a Noah's Land Wildlife Park
c/o Ricky M. Watson
1033 Highway 304
Harwood, Texas 78632

Mr. Richard J. Burns
719 Laurel Grove Lane
Pearland, Texas 77584

Dear Sir/Madame:

Subject: In re: Ricky M. Watson, an individual; Cheri Watson, an individual; Tiger's Eyes, Inc., a Texas domestic nonprofit corporation, doing business as Noah's Land Wildlife Park; and Richard J. Burns, an individual - AWA Docket No. 04-0017

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed

answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On June 22, 2004, 27 days after the Hearing Clerk served

Respondents Ricky M. Watson and Cheri Watson with the Complaint, Respondents Ricky M. Watson and Cheri Watson filed an answer dated June 21, 2004.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision as to Ricky M. Watson and Cheri Watson. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[6] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant's Motion for Default Decision.

Respondents Ricky M. Watson and Cheri Watson raise five objections to Complainant's Motion for Default Decision. First, Respondent Cheri Watson contends Respondent Richard J. Burns was never associated with the business of Respondent Ricky M. Watson's and Respondent Cheri Watson's "sanctuary" (Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

Respondent Ricky M. Watson's and Respondent Cheri Watson's business relationship with Respondent Richard J. Burns is not relevant to Complainant's Motion for Default Decision. Therefore, even if I were to find Respondent Richard J. Burns was never associated with Respondent Ricky M. Watson's and Respondent Cheri Watson's sanctuary, I would not find Respondent Cheri Watson's objection to Complainant's Motion for Default Decision meritorious.

Second, Respondents Ricky M. Watson and Cheri Watson contend, due to Respondent Cheri Watson's being out of town when the Hearing Clerk served them with the Complaint, they were not able to file a timely response to the Complaint (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

Section 1.147(f) of the Rules of Practice specifically provides that the

---

[6]See note 2.

time for filing any document authorized under the Rules of Practice may be extended, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (f) *Extensions of time*. The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in §1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f).

Respondents Ricky M. Watson and Cheri Watson could have, but did not, file a motion to extend the time for filing a response to the Complaint. Moreover, Respondents Ricky M. Watson and Cheri Watson admit Respondent Cheri Watson returned home 10 days prior to the date their response to the Complaint was required to be filed with the Hearing Clerk (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1). Under these circumstances, I do not find Respondent Ricky M. Watson's and Cheri Watson's excuse for failing to file a timely response to the Complaint a meritorious basis for denying Complainant's Motion for Default Decision.

Third, Respondent Cheri Watson contends she tried to contact the Hearing Clerk's Office, but the telephone number listed was not valid and she could not find the correct telephone number through directory assistance (Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

The Hearing Clerk's service letter, which the Hearing Clerk served

on Respondents Ricky M. Watson and Cheri Watson on May 26, 2004, along with the Complaint and the Rules of Practice, provides the correct telephone number, fax number, and address for the Office of the Hearing Clerk. Moreover, the Rules of Practice describes how a party may obtain an extension of time. Therefore, I reject Respondent Cheri Watson's contention that she was not able to contact the Office of the Hearing Clerk. Moreover, I conclude Respondent Cheri Watson's purported inability to contact the Office of the Hearing Clerk by telephone is not a meritorious basis for denying Complainant's Motion for Default Decision.

Fourth, Respondents Ricky M. Watson and Cheri Watson contend their violations of the Animal Welfare Act and the Regulations and Standards resulted from a lack of adequate financial resources (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's lack of financial resources to comply with the Animal Welfare Act and the Regulations and Standards is neither a meritorious basis for denying Complainant's Motion for Default Decision nor relevant to this proceeding.[7]

Fifth, Respondents Ricky M. Watson and Cheri Watson contend they disposed of their animals, ceased all activities governed by the United States Department of Agriculture, and have not requested renewal of their Animal Welfare Act license (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's disposal of animals after the violations of the Animal Welfare Act and the Regulations and Standards occurred, ceasing all activities governed by the United States Department of Agriculture, and failure to renew their

---

[7]*See In re Dennis Hill*, 64 Agric. Dec. 91, 147 (2004) (stating the respondent's short-term economic downturn is neither a meritorious basis for denying the complainant's motion for a default decision nor relevant to the proceeding).

Animal Welfare Act license are not meritorious bases for denying Complainant's Motion for Default Decision.[8]

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)), and Respondent Ricky M. Watson's and Cheri Watson's answer to the Complaint was required to be filed no later than June 15, 2004. Respondents Ricky M. Watson and Cheri Watson filed an Answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint. Respondents Ricky M. Watson's and Cheri Watson's failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents Ricky M. Watson and Cheri Watson of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[9]

---

[8]*See In re Dennis Hill*, 64 Agric. Dec. 91, 147 (2004) (the respondent's disposal, or intention to dispose, of animals after the Animal Welfare Act violations occurred is neither a meritorious basis for denying the complainant's motion for a default decision nor relevant to the proceeding).

[9]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely

(continued...)

## SANCTION

Respondents Ricky M. Watson and Cheri Watson, by their failure to file an answer within 20 days after the Hearing Clerk served them with the Complaint, are deemed to have admitted the allegations in the Complaint.[10]

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration 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.[11]

During 3 of the 9 days on which Respondents Ricky M. Watson and Cheri Watson violated the Animal Welfare Act and the Regulations and Standards, they maintained between 213 and 280 animals at Respondents' facility.[12] Therefore, I find Respondents Ricky M. Watson and Cheri Watson had a large business.

Many of Respondents Ricky M. Watson's and Cheri Watson's violations are serious violations which directly jeopardized the health and well-being of Respondents Ricky M. Watson's and Cheri Watson's animals.

Respondents Ricky M. Watson's and Cheri Watson's willful violations on 9 days during the period March 13, 2001, through December 18, 2002, reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the

---

[9](...continued)
answer).

[10]See 7 C.F.R. § 1.136(c).

[11]See 7 U.S.C. § 2149(b).

[12]Compl. ¶ 5.

Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks assessment of a $28,600 civil penalty against Respondent Ricky M. Watson, assessment of a $28,600 civil penalty against Respondent Cheri Watson, and a cease and desist order. Complainant also proposes that Respondents Ricky M. Watson and Cheri Watson be assessed a civil penalty that represents 20 percent of the maximum possible civil penalty. (Complainant's Motion for Default Decision at 3.)

I find that Respondent Ricky M. Watson and Respondent Cheri Watson each committed 31 violations of the Animal Welfare Act and the Regulations and Standards. Respondents Ricky M. Watson and Cheri Watson could be assessed a maximum civil penalty of $2,750 for each of their violations of the Animal Welfare Act and the Regulations

and Standards.[13] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $17,050 civil penalty against Respondent Ricky M. Watson,[14] and assessment of a $17,050 civil penalty against Respondent Cheri Watson[15] are appropriate and necessary to ensure Respondents Ricky M. Watson's and Cheri Watson's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order should be issued.

---

[13]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, Respondents Ricky M. Watson and Cheri Watson could each be assessed a maximum civil penalty of $85,250.

[14]The $17,050 civil penalty which I assess against Respondent Ricky M. Watson represents 20 percent of the maximum civil penalty which I conclude could be assessed against Respondent Ricky M. Watson for his 31 violations of the Animal Welfare Act and the Regulations and Standards.

[15]The $17,050 civil penalty which I assess against Respondent Cheri Watson represents 20 percent of the maximum civil penalty which I conclude could be assessed against Respondent Cheri Watson for her 31 violations of the Animal Welfare Act and the Regulations and Standards.

## ORDER

1. Respondents Ricky M. Watson and Cheri Watson, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents Ricky M. Watson and Cheri Watson.

2. Respondents Ricky M. Watson and Cheri Watson are each assessed a $17,050 civil penalty. The civil penalties shall be paid by certified checks or money orders made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents Ricky M. Watson and Cheri Watson. Respondents Ricky M. Watson and Cheri Watson shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 04-0017.

## RIGHT TO JUDICIAL REVIEW

Respondents Ricky M. Watson and Cheri Watson have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in

whole or in part), or to determine the validity of this Order. Respondents Ricky M. Watson and Cheri Watson must seek judicial review within 60 days after entry of this Order.[16] The date of entry of this Order is February 23, 2005.

---

**In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; JERRY L. KORN AND SUSAN F. KORN, INDIVIDUALLY AND d/b/a FOR THE BIRDS; AND BEN KORN.**
**AWA DOCKET NO. 04-0033.**
**Decision and Order.**
**Filed February 25, 2005.**

**AWA – Veterinary care, failure to provide adequate – License, operating without – Injury and death of exotic animals - Veterinary plan, lack of – Housing, inadequate animal.**

Colleen Carroll, for Complainant.
Karen L. Silva, for Respondent.
*Decision and Order issued by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

This proceeding was commenced by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture on September 8, 2004 by the filing of a Complaint alleging violations of the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq.*) (the "Act").

On September 9, 2004, the Hearing Clerk sent copies of the Complaint and the Rules of Practice governing the proceedings under the Act (7 C.F.R. § 1.130 *et seq.*) to the addresses contained in the

---

[16]See 7 U.S.C. § 2149(c).

Complaint via certified mail. The record contains the postal Domestic Service Receipts (PS Forms 3811) reflecting delivery of the mailings to the Respondents For the Birds, Inc. and Jerry L. Korn, d/b/a For the Birds on September 14, 2004 at 1506 Happy Valley Road, Nampa, Idaho 83687.[1] Delivery of the certified mail was made to the Respondent Susan F. Korn on September 29, 2004. Delivery of the certified mail to the Respondent Ben Korn was never made and it is unclear whether actual notice of the proceedings has ever been given to him.[2]

Each of the Respondents were informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that a timely failure to answer any allegation of the Complaint would constitute an admission of that allegation. An untimely Answer generally denying the allegations of the Complaint was filed on behalf of the Respondents Jerry L. Korn, Ben Korn and For the Birds on October 12, 2004.[3] No Answer has been filed on behalf of the corporate Respondents, For the Birds, Inc.[4] or Susan F. Korn. On January 29, 2005, the Complainant filed separate Motions seeking adoption of three separate tendered Decisions and Orders against the Respondents For the Birds, Inc., Jerry L. Korn and Susan F. Korn.

An Objection to the Motion for Adoption of Decision and Order and

---

[1] Attached to the Decision and Order is a copy of the registered address for the corporation at 1506 Happy Valley Rd, Nampa, ID 83687 as reflected by the Idaho Secretary of State's Office. The PS Forms 8311 reflect that the certified mail was delivered as addressed.

[2] The Answer filed by Jerry L. Korn indicates that the Answer included Jerry L. Korn individually and d/b/a For the Birds as well as Ben Korn.

[3] The Answer alleges that Ben Korn is a dependent child and appears to suggest that some unspecified mail was misdelivered or accepted by unauthorized individuals; however, the PS 3811s reflect delivery of the Complaint and a copy of the Rules of Practice as indicated. The Answer was received thirteen days late.

[4] The Objection to the Motion for Adoption of Decision and Order purports to respond for the corporate respondent however the Answer as originally filed failed to include it.

Request for Telephonic Hearing was filed by counsel for Jerry L. Korn, For the Birds, Inc. and Ben Korn on February 22, 2005 which incorrectly asserts that a timely answer was filed. Although the Answer is in fact dated October 1, 2004, the file contains the envelope in which it was mailed bearing a post mark of October 7, 2004 which was received by the Hearing Clerk's Office on October 12, 2004.

As the Respondents have failed to file an Answer within the time prescribed by the Rules of Practice, the material facts alleged in the Complaint are deemed admitted and are adopted and set forth herein in the Findings of Fact and this Decision and Order are issued pursuant to Section 1.139 of the Rule of Practice.

## FINDINGS OF FACT

1. The Respondent, For the Birds, Inc. is an Idaho corporation with a registered address of 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations contained in the Complaint, the corporate Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations.

2. The Respondent Jerry L. Korn is an individual doing business as For the Birds and whose address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations contained in the Complaint, the said Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations. Between 2001 and May 23, 2003, the said Respondent jointly held Animal Welfare Act License Number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which license was cancelled on May 23, 2003 and has not been reinstated.

3. The Respondent Susan F. Korn is an individual doing business as For the Birds and whose address is Post Office Box 72, Nampa, Idaho 83653. At all times material to the allegations contained in the Complaint, the said Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations. Between 2001 and May 23, 2003, the said Respondent jointly held Animal Welfare Act

License Number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS" which license was cancelled on May 23, 2003 and has not been reinstated.

4. The Respondents have a moderate-sized business, with approximately fifty animals, including farm, wild and exotic animals: goats, llamas, giraffe, a camel, a bear, tigers, a mountain lion, lemurs, eland, elk, prairie dogs, rabbits, cats, dogs and a kangaroo. The gravity of the violations alleged in this complaint is great. They include repeated instances in which Respondents knowingly exhibited animals without having a valid license, and continuing instances of a failure by the Respondents to provide minimally-adequate veterinary care, food, water or housing to animals and to handle animals carefully and in compliance with the Regulations (which failures have resulted in serious injuries and death to animals in Respondents' custody). The Respondents have continually failed to comply with the Regulations, after having been repeatedly advised of deficiencies.

5. The Respondents do not have a history of previous violations.

6. Between March 15, 2001 until May 23, 2003, the Respondents Jerry L. Korn and Susan F. Korn d/b/a For the Birds were licensed under the Animal Welfare Act, having been issued License Number 82-C-0035 until the license was cancelled. From and after May 23, 2003 until at least August 24, 2003, the Respondents continued to exhibit animals without having been licensed by the Secretary to do so, and specifically, said Respondents continuously kept the animals kept at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to the public.

7. Between May 23, 2003 and at least August 16, 2003, the Respondent Jerry L. Korn operated as a "dealer" as that term is defined in the Act and the Regulations without being licensed by the Secretary to do so, specifically delivering for transportation or transported, sold or negotiated the sale of a zebra, multiple elk and llamas.

8. On or about the following dates, the Respondents violated the Act and Regulations by failing to have an attending veterinarian provide adequate veterinary care to its animals:

a. October 2002 through August 12, 2003. Respondents failed to obtain any veterinary care for a giraffe whose hooves were overgrown.

b. Approximately May 2003 through August 2003. Respondents failed to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss.

c. Approximately August 1, 2003 through August 16, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen.

d. Approximately May 2003 through August 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a camel having a golf-ball sized abscess on its lower left jaw. The Respondent Jerry F. Korn lanced the abscess, causing it to become a seeping, open wound that attracted a large number of flies.

e. On or about July 7, 2003 through July 9, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, on July 7, 2003, Respondents failed to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and whose condition was reported directly to Respondent Jerry F. Korn, who took no action, which inaction resulted in or contributed to the animal's death on or about July 9, 2003.

f. Spring 2002.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a pregnant llama, resulting in or contributing to the death of the animal and her baby.

g. On or about August 12, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for an eland whose hooves were overgrown.

9. On or about the following dates, Respondents failed to employ a full-

time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1):

a. March 7, 2001
b. April 3, 2002
c. May 22, 2002
d. July 2, 2002
e. August 27, 2002
f. February 12, 2003

10. Between March 7, 2001, and August 24, 2003, Respondents failed to ensure that their attending veterinarian or attending veterinarians had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

11. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences.

12. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry, and specifically, on or about August 2002, failed to have sufficient personnel to remove mud and excreta in the elk enclosure, and allowed an aged elk to become trapped therein for several days, subjecting the elk to injury by a bull elk.

13. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

14. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services, and specifically, failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an

eland, a pregnant llama and her baby.

15. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically, failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby.

16. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian or attending veterinarians, so that timely and accurate information on problems of animal health, behavior, and well-being would be conveyed to the attending veterinarian or attending veterinarians, and specifically, failed to communicate to its attending veterinarian animal heath information regarding, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby.

17. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, to assess their health and well-being.

18. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization, and specifically, failed to train personnel (including Respondent Jerry F. Korn) in the care and handling of animals.

19. On or about the following dates, Respondents failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondents' possession or under Respondents' control, or disposed of by Respondents.

a. March 7, 2001

b. August 27, 2002.

c. February 11, 2003
d. February 12, 2003

20. On April 3, 2002, Respondents failed to allow APHIS officials, during business hours, to examine records required to be kept by the Act and the Regulations.

21. On or about the following dates, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

a. May 1, 2001 (tigers)
b. May 10, 2001 (tiger- Raja)
c. April 3, 2002 (giraffe)
d. June 4, 2002 (tiger)
e. June 2002 (tiger - Raja)
f. June 25, 2002 (bear)
g. February 19, 2003 (tigers)
h. May 6, 2003 (tigers, hoofstock, kangaroo)
i. May 8, 2003 (tigers)
j. May 13, 2003 (tigers)
k. July 23, 2003 (tiger)
l. August 2002 (elk)

22. On May 6, 2003, Respondents used physical abuse to handle a tiger during an exhibition to the public.

23. On several occasions, including May 1, 2001, May 10, 2001, February 19, 2003 and May 13, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically exhibited adult tigers to the public without sufficient barrier or distance.

24. On June 4, 2002 and July 23, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically exhibited adult tigers to children without any barrier or distance.

25. On May 6, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public).

26. On May 6, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public, without sufficient distance or barriers to protect the animals from the public.

27. On May 8, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.

28. On August 12, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited an adult giraffe and an adult eland to the public, without any distance or barriers between the animals and the public.

29. Between approximately May 2003 and August 16, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents regularly allowed customers to enter the primary enclosure containing two tigers, without any distance or barriers between the animals and the public.

30. On May 6, 2003, Respondents exhibited animals under conditions

that were inconsistent with the animals' well-being, and specifically, said Respondents exhibited tigers to the public outside of any enclosures, and allowed personnel and the public to touch, tease and harass animals, including adult goat and her kids, an adult eland, a giraffe and a juvenile kangaroo.

31. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. On August 24, 2003, Respondents failed to provide food or potable water to non-human primates, two lemurs.

b. On August 27, 2002, Respondents failed to keep the premises clean and in good repair, specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs.

c. On February 12, 2003, Respondents failed to keep the premises clean and in good repair, specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs.

d. Between August 27, 2002, and August 24, 2003, Respondents failed to have enough employees to carry out the level of husbandry practices and care for non-human primates required by the Regulations and Standards.

32. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding structural strength, as follows:

a. On April 3, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair torn metal in the eland enclosure.

b. On July 2, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to construct the bear enclosure so that it contained the bear securely.

c. On July 2, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to construct the tiger enclosure so that it contained the tigers securely.

d. On August 12, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair exposed nails in camel enclosure.

e. On August 27, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, specifically failing to repair jagged wire mesh or the gap between the frame and the wire in the tiger cub enclosure.

f. On May 6, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair broken wire in the enclosure housing a juvenile kangaroo.

g. On February 11, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

h. On February 12, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

33. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding storage, as follows:

a. On August 27, 2002, Respondents failed to store supplies of food in facilities that adequately protected them from

contamination.

b. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from contamination, and specifically failed to protect food supplies from vermin, including the three to four rats found in the food preparation area.

c. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from contamination, and specifically failed to dispose of rancid food in the food preparation area, leaving it out for days at a time.

e. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically failed to protect animal bedding supplies, which contained countless live maggots.

34. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding waste disposal, as follows:

a. On April 3, 2002 and August 27, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris, food waste and old bones from the tiger enclosure.

b. On April 3, 2002, August 27, 2002, February 12, 2003 and in June of 2003, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta from the giraffe enclosure

c. On July 2, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the prairie dog enclosure.

d. On August 12, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead

animals, trash and debris, and specifically, failed to remove waste and debris from the moat adjacent to the bear enclosure.

e. On August 27, 2002 and February 12, 2002, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta and debris from the eland enclosure.

f. On August 27, 2002, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta and debris from the elk enclosure.

g. On August 27, 2002 and February 12, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove mouse droppings from the food preparation area.

h. On August 27, 2002, February 12, 2003 and August 12, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the camel enclosure.

i. On May 6, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the goat enclosure.

j. On August 12, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove waste and debris from the moat adjacent to the cougar enclosure.

35. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, by failing to comply with the general facilities standards, specifically on August 27, 2003, Respondents failed to provide a suitable and sanitary method to eliminate rapidly excess water from

indoor housing facilities for tigers.

36. On or about the following dates, Respondents failed to meet the minimum the general facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Between at least August 27, 2002 and August 12, 2003, Respondents failed to provide a bear housed outdoors with appropriate natural or artificial shelter.

b. On February 11, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water from the elk enclosure.

c. On March 15, 2001, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the tiger and bear enclosures.

d. On April 3, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the mountain lion enclosure.

e. On April 3, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the snow leopard enclosure.

f. That from at least May 22, 2003 through July 2, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the tiger enclosure.

g. That from at least May 22, 2002 through August 27, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the bear enclosure.

37. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding space requirements, as follows:

a. Between October 2002 and May 30, 2003, Respondents failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

b. On August 12, 2003, Respondents failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

38. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding feeding, as follows:

a. Between March 2002 and February 2003, Respondents repeatedly failed to provide tigers with a sufficient quantity of wholesome, palatable food, and routinely failed to feed tigers any food for four days in a row.

b. On or about April 3, 2002, Respondents failed to minimize contamination of food, and specifically, provided spoiled meat to tigers.

c. On or about August 15, 2003, Respondents failed to minimize contamination of food, and specifically, food for tigers was putrified and contained maggots.

d. On or about August 24, 2003, Respondents failed to provide animals with food that was wholesome, palatable and free from contamination and of sufficient quantity, and specifically, failed to feed sufficient food to a giraffe, an eland, rabbits, a kangaroo, elk, tigers, and domestic cats, which animals were thin and hungry.

39. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding watering, as follows:

a. On at least three occasions, including May 22, 2002, April 3, 2003 and July 2, 2002, Respondents failed to maintain water receptacles for the eland clean and sanitary, and specifically allowed large clumps of algae to grow in the eland's water trough.[5]

b. On or about July 2, 2002, Respondents failed to minimize maintain water receptacles for the snow leopards clean and sanitary.

c. On or about August 24, 2003, Respondents failed to provide animals with potable water as often as necessary, and specifically failing to provide adequate water to the rabbits.

40. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding sanitation, and specifically, the cleaning of enclosures, as follows:

a. On numerous occasions, including April 3, 2002, February 12, 2003 and August 24, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the giraffe enclosure had contained excessive fecal material.

b. On February 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the eland enclosure contained excessive fecal material.

c. On February 11 and 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize

[5] On July 2, 2002, in addition to the algae a dead bird was not removed from the water trough.

disease hazards and reduce odors, specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

d. On August 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the enclosure housing the camel contained excessive excreta.

41. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding employees during 2002 and 2003, and specifically on July 2, 2002, Respondents failed to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

42. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding the separation of animals, specifically during Spring and Summer 2002, Respondents housed incompatible animals in the same enclosure, and specifically housed a cow elk (which became trapped in mud and excreta) in the same enclosure as a bull elk which harassed and attacked the trapped elk.

## CONCLUSIONS OF LAW

1. Between March 15, 2001 and May 23, 2003, the Respondents Jerry L. Korn and Susan F. Korn d/b/a For the Birds were "exhibitors" as that term is defined in the Act and the implementing Regulations and held Animal Welfare Act License Number 82-C-0035. That license was cancelled on May 23, 2003 and has not been reissued or otherwise reinstated. The corporate Respondent, For the Birds, Inc. was not licensed.

2. After May 23, 2003, the Respondents exhibited animals without having been licensed by the Secretary to do so, specifically, said Respondents continuously kept the animals kept at 1506 Happy Valley

Road, Nampa, Idaho 83687, on display to the public, in willful violation of sections 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

3. Between May 23, 2003 and at least August 16, 2003, the Respondent Jerry L. Korn operated as a "dealer" as that term is defined in the Act and the Regulations without having been licensed by the Secretary to do so by delivering for transport or transported, sold or negotiated the sale of a zebra, multiple elk and llamas.

4. That between Spring of 2002 and as late as August 16, 2003, as previously detailed, Respondents failed to have an attending veterinarian provide adequate veterinary care to its animals, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)).

5. That between March 7, 2001 and February 12, 2003, Respondents failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1).

6. Between March 7, 2001, and August 24, 2003, Respondents failed to ensure that their attending veterinarian or attending veterinarians had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of section 2.40(a)(2) of the Regulations. 9 C.F.R. § 2.40(a)(2).

7. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

8. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry, and specifically, on or about August 2002, failed to have sufficient personnel to remove mud and excreta in the elk enclosure, and allowed an aged elk to become trapped therein for several days, subjecting the elk to injury by a bull elk, in willful violation of section

2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

9. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

10. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services, and specifically, failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

11. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically, failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(2) of the Regulations. 9 C.F.R. § 2.40(b)(2).

12. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian or attending veterinarians, so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian or attending veterinarians, and specifically, failed to communicate to their attending veterinarian animal heath information regarding, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

13. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant

llama and her baby, to assess their health and well-being, in willful violation of section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

14. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization, and specifically, failed to train personnel (including Respondent Jerry F. Korn) in the care and handling of animals, in willful violation of section 2.40(b)(4) of the Regulations. 9 C.F.R. § 2.40(b)(4).

15. Between March 7, 2001 and February 12, 2003, Respondents failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondents' possession or under Respondents' control, or disposed of by Respondents, in willful violation of section 2.75(b)(1) of the Regulations. 9 C.F.R. § 2.75(b)(1).

16. On April 3, 2002, Respondents failed to allow APHIS officials, during business hours, to examine records required to be kept by the Act and the Regulations, in willful violation of section 2.136(a)(2) of the Regulations. 9 C.F.R. § 2.126(a)(2).

17. Between May 1, 2001 and July 23, 2003 as previously detailed, the Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(1).

18. On May 6, 2003, Respondents used physical abuse to handle a tiger during an exhibition to the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(2)(i).

19. Between May 1, 2001 and July 23, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the handling regulations, and specifically exhibiting adult tigers to the public, including children, without sufficient barrier or distance. 9 C.F.R. § 2.131(b)(1).

20. On May 6, 2003, Respondents failed to handle animals during public

exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public), in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

21. On May 6, 2003 and August 12, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, specifically, said Respondents exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public, without sufficient distance or barriers to protect the animals from the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

22. Between approximately May 2003 and August 16, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents regularly allowed customers to enter the primary enclosure containing two tigers, without any distance or barriers between the animals and the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

23. On May 6, 2003, Respondents exhibited animals under conditions that were inconsistent with the animals' well-being, and specifically, said Respondents exhibited tigers to the public outside of any enclosures, and allowed personnel and the public to touch, tease and harass animals, including adult goat and her kids, an adult eland, a giraffe and a juvenile kangaroo, in willful violation of the handling regulations. 9 C.F.R. § 2.131(c)(1).

24. Between February 12, 2003 and August 27, 2003, as previously detailed, Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-3.92).

25. Between April 3, 2002 and August 27, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding structural strength (9 C.F.R. § 3.125(a)).

26. Between August 27, 2002 and sometime in June of 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding storage (9 C.F.R. § 3.125(c)).

27. Between April 3, 2002 and May 6, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding waste disposal (9 C.F.R. § 3.125(d)).

28. On or about the following dates, Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), by failing to comply with the general facilities standards (9 C.F.R. § 3.126) on August 27, 2003 by failing to provide a suitable and sanitary method to eliminate rapidly excess water from indoor housing facilities for tigers. 9 C.F.R. § 3.126(d).

29. Between March 15, 2001 and August 12, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R.§§ 3.127).

30. Between October of 2002 and August 12, 2003, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding space requirements (9 C.F.R. § 3.128), by

failing to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

31. Between March of 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding feeding (9 C.F.R. § 3.129).

32. Between May 22, 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding watering (9 C.F.R. § 3.130).

33. Between April 3, 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding sanitation, and specifically, the cleaning of enclosures (9 C.F.R. § 3.131(a)).

34. Between 2002 and 2003 and specifically on July 2, 2002, the Respondents willfully violated section 2.100(a) of the Regulations regarding the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding employees (9 C.F.R. § 3.132), by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

35. During the Spring and Summer of 2002, the Respondents willfully violated section 2.100(a) of the Regulations regarding the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding the separation of animals (9 C.F.R. § 3.133), by

housing incompatible animals in the same enclosure, and specifically housed a cow elk (which became trapped in mud and excreta) in the same enclosure as a bull elk which harassed and attacked the trapped elk.

## ORDER

1. The Respondents, their 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 and Standards.

2. The Respondents, For the Birds, Inc., Jerry L. Korn and Susan F. Korn, jointly and severally, are assessed a civil penalty of TWENTY-EIGHT THOUSAND FIFTY DOLLARS ($28,050.00), to be paid by certified check or money order made payable to the Treasurer of the United States. The said civil penalty shall be delivered to Counsel for the Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, D.C. 20250.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties by the Hearing Clerk's Office.

---

**In re: DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.**
**AWA Docket No. 05-0003.**
**Decision and Order.**
**Filed March 29, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Failure to file timely motion for extension of time – Default decision – Bases for denial of motion for default – Argument raised for first time on appeal – Inappropriate argument – Cease and desist order – Civil penalty.**

The Judicial Officer reversed Chief Administrative Law Judge Marc R. Hillson's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents violated the Animal Welfare Act and the regulations issued under the Animal Welfare Act. The Judicial Officer concluded Respondents filed a late answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Complaint and waived opportunity for hearing. The Judicial Officer issued a cease and desist order against Respondents, assessed Respondent Diana R. McCourt an $18,070 civil penalty, and assessed Respondent Siberian Tiger Conservation Association a $16,420 civil penalty.

Colleen A. Carroll, for Complainant.
Richard D. Rogovin, Columbus, Ohio, for Respondents.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 14, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R.

§§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Diana R. McCourt and Siberian Tiger Conservation Association [hereinafter Respondents] knowingly failed to obey the Secretary of Agriculture's cease and desist order issued in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) and willfully violated the Animal Welfare Act and the Regulations (Compl. ¶¶ 4-11).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 21, 2004.[1] Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents filed a motion to extend the time to answer the Complaint[2] and an answer to the Complaint[3] on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. On January 13, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] granted Respondents' request to extend the time to file an answer and deemed Respondents' answer timely filed.[4]

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Proposed Default Decision]. On January 28, 2005, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed

---

[1]United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0003 5453 1013 and Article Number 7000 1670 0003 5453 1020.

[2]Motion for Extension of Time to Answer the Complaint by Respondents Diana R. McCourt ("McCourt") and the Siberian Tiger Conservation Association ("Association") [hereinafter Motion for Extension of Time to File Answer].

[3]Answer of Respondents Diana R. McCourt ("McCourt) and Siberian Tiger Conservation Association ("Association") [hereinafter Answer].

[4]Order Granting Request for Extension of Time to File Answer.

Default Decision.[5] On February 9, 2005, the Chief ALJ denied Complainant's Motion for Default Decision.[6]

On February 22, 2005, Complainant appealed the Chief ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[7] On March 9, 2005, Respondents filed a response in opposition to Complainant's Appeal Petition.[8] On March 16, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the Chief ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the Chief ALJ's February 9, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Complaint.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

**§ 2131. Congressional statement of policy**

---

[5]Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

[6]Ruling Denying Motion for Adoption of Decision and Order.

[7]Complainant's Appeal Petition.

[8]Respondents' Memo Contra Complainant's Appeal Petition.

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

**§ 2132. Definitions**

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock

shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

**§ 2149. Violations by licensees**

. . . .

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to

institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2149(b)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

## PART VI—PARTICULAR PROCEEDINGS

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil

monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency,

except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the

calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub.

L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

**PART 1—DEFINITION OF TERMS**

**§ 1.1 Definitions.**

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended

distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

## PART 2—REGULATIONS

### SUBPART A—LICENSING

**§ 2.1 Requirements and application.**

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a licence. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

. . . .

### SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

**§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).**

. . . .

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care; [and]

. . . .

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia[.]

. . . .

**SUBPART I—MISCELLANEOUS**

. . . .

**§ 2.131 Handling of animals.**

(a)(1) 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.

. . . .

(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. §§ 1.1; 2.1(a)(1), .40(b)(1)-(2), (4), .131(a)(1), (b)(1) (2004).

## DECISION

### Statement of the Case

Respondents failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. Respondent Diana R. McCourt is an individual formerly known as Diana R. Cziraky, and whose address is 22143 Deal Road, Gambier, Ohio 43022. At all times material to this proceeding, Respondent Diana R. McCourt was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

2. Respondent Siberian Tiger Conservation Association is a Delaware corporation whose agent for service of process is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. At all times material to this proceeding, Respondent Siberian Tiger Conservation Association was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

3. Respondents exhibit exotic felines (lions and tigers) to the public. Respondents' exhibition business is significant. According to

their website, Respondents charge each customer $200 to be a "day-trainer," which program involves no meaningful "training" of either the animal or human participants and is simply an exhibition of Respondents' animals to the public in the guise of "training." Respondents purport to have thousands of customers each year and also solicit and accept donations from the public.

The gravity of Respondents' violations is great, and Respondents' violations involve willful, deliberate violations of the licensing and handling regulations. The violations demonstrate a lack of good faith on the part of Respondents.

Respondent Diana R. McCourt has been the subject of two previous administrative enforcement cases under the Animal Welfare Act, and Respondent Siberian Tiger Conservation Association has been the subject of one previous administrative enforcement case. *In re The International Siberian Tiger Foundation* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53 (2002) (where the Secretary of Agriculture found that the respondents repeatedly violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), found that Respondent Diana R. McCourt exhibited animals while her Animal Welfare Act license was suspended, in violation of section 2.10 of the Regulations (9 C.F.R. § 2.10), and revoked Respondent Diana R. McCourt's Animal Welfare Act license - number 31-C-0123); *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) (where the respondents admitted all of the violations and agreed to a liquidated civil penalty of $10,000).

4. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that "Respondents, their 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 and Standards, and shall not engage in activities for which a license under the Act is required." Pursuant to section 19(b) of the Animal Welfare Act

(7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

5. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

6. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

7. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling tigers safely.

8. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure.

9. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so.

10. On November 2, 2003, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and

in turn, be injured or killed.

11. On November 2, 2003, Respondents, during public exhibition, failed to handle animals so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, under the guise of "day-training," Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people.

## Conclusions of Law

1. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that "Respondents, their 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 and Standards, and shall not engage in activities for which a license under the Act is required." Pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

2. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association

operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

4. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling tigers safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1)).

5. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

6. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so, in willful violation of section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4)).

7. On November 2, 2003, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and in turn, be injured or killed, in willful violation of the handling regulations (9 C.F.R. § 2.131(a)(1) (2004)).

8. On November 2, 2003, Respondents, during public exhibition, failed to handle animals so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the

safety of animals and the public, and specifically, under the guise of "day-training," Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people, in willful violation of the handling regulations (9 C.F.R. § 2.131(b)(1) (2004)).

## COMPLAINANT'S APPEAL PETITION

Complainant contends the Chief ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I reverse the Chief ALJ's ruling denying Complainant's Motion for Default Decision or vacate the Chief ALJ's ruling denying Complainant's Motion for Default Decision and remand the proceeding to the Chief ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 5-15.)

The Chief ALJ denied Complainant's Motion for Default Decision on the ground that he had granted Respondents' Motion for Extension of Time to File Answer and had deemed Respondents' Answer timely filed (Ruling Denying Motion for Adoption of Decision and Order). I find the Chief ALJ's Order Granting Request for Extension of Time to File Answer, in which the Chief ALJ deemed Respondents' Answer timely filed, and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order, error.

Respondents filed a Motion for Extension of Time to File Answer on November 24, 2004, 14 days after Respondents' Answer was required to be filed. Motions for extensions of time filed after the deadline for filing the document for which the extension is sought have been consistently rejected in proceedings conducted under the Rules of Practice.[9]

[9] *In re Lion Raisins, Inc.*, 63 Agric. Dec. 271, 280 ( 2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order) (concluding the respondents' request to file an answer to the complaint and respondents' answer to the complaint, filed 50 days after the time expired for filing respondents' answer, do not (continued...)

Therefore, I find the Chief ALJ's Order Granting Request for Extension of Time to File Answer, error. Moreover, a late-filed answer cannot cure a default[10] or be deemed to be timely filed.[11] Therefore, I find the Chief ALJ erred when he deemed Respondents' late-filed Answer timely filed. Instead, I find Respondents' Answer, which was filed 14 days after the due date, untimely.

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint. The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on October 21, 2004.[12] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

**§ 1.136 Answer.**

---

[9](...continued)
cure the respondents' default); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 536 (2002) (holding, where the respondents were required to file their answer no later than November 4, 2001, the respondents' request for an extension of time within which to file their answer, filed September 16, 2002, comes far too late to be considered); *In re Everflora, Inc.*, 57 Agric. Dec. 1314, 1318 n.3 (1998) (Ruling Denying Respondents' Motion for Extension of Time) (denying a motion to extend the time for filing an appeal petition where the motion was filed 1 day after the time expired for filing the appeal petition); *In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (denying the complainant's motion for an extension of time to file a response to the respondent's appeal petition filed 13 minutes late), *aff'd*, 189 F.3d 473, 1999 WL 512009 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 58 Agric. Dec. 742 (1999).

[10]*In re Lion Raisins, Inc.*, 63 Agric. Dec. 271, 280 ( 2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order).

[11]*In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons.) (stating the Judicial Officer is bound by the Rules of Practice and cannot deem the respondents' late-filed reply to a motion to lift stay to have been timely filed).

[12]See note 1.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the

> answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon the respondents, who shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 5.

Similarly, the Hearing Clerk informed Respondents in the October 14, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> October 14, 2004
>
> | | |
> |---|---|
> | Diana R. McCourt | The Corporation Trust Company |
> | f/k/a Diana R. Cziraky | Corporation Trust Center |
> | 22143 Deal Raod [sic] | 1209 Orange Street |
> | Gambier, Ohio 43022 | Wilmington, Delaware 19801 |
>
> Dear Sir or Madam:
>
> Subject: In re: DIANA R. McCOURT, an individual formerly known as Diana R. Cziraky; and SIBERIAN TIGER CONSERVATION ASSOCIATION, a Delaware corporation; Respondents - AWA Docket No. 05-0003

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act.

Also enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the Rules in that the comments which follow are not a substitute for their exact requirements.

The Rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed Answer to the Complaint.**

It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the Complaint. Your Answer may include a request for an oral hearing. Failure to file an Answer or filing an Answer which does not deny the material allegations of the Complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in

quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the Complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint, Respondents filed a Motion for Extension of Time to File Answer and an Answer.

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision. On January 28, 2005, Respondents filed an objection to Complainant's Motion for Default Decision stating the Chief ALJ had granted Respondents' motion for an extension of time to answer the Complaint and had deemed Respondents' Answer timely filed.[13]

As discussed in this Decision and Order, *supra*, the Chief ALJ's ruling granting Respondents' late-filed motion for extension of time to file an answer and the Chief ALJ's ruling that Respondents' late-filed answer was timely filed, are error. Therefore, Respondents' objection to Complainant's Motion for Default Decision is without merit and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order is error.

The Rules of Practice provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)), and Respondents' Answer to the Complaint was required to be filed no later than November 10, 2004. Respondents filed an Answer to the

[13]Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

Complaint on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[14]

## RESPONDENTS' RESPONSE TO COMPLAINANT'S APPEAL PETITION

Respondents state four bases for their opposition to Complainant's Appeal Petition. First, Respondents contend Complainant did not oppose Respondents' Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 1-2).

Complainant's failure to file a response to Respondents' Motion for Extension of Time to File Answer is not a basis for granting a motion for an extension of time filed after the expiration of the time for filing the document which is the subject of the motion for extension of time. As stated in this Decision and Order, *supra*, motions for extensions of time filed after the deadline for filing the document for which the extension is

---

[14]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

sought have been consistently rejected in proceedings conducted under the Rules of Practice.[15] Moreover, the record indicates that Complainant conveyed his opposition to Respondents' Motion for Extension of Time to File Answer to the Chief ALJ's secretary, who subsequently informed the Chief ALJ of Complainant's opposition (Order Granting Request for Extension of Time to File Answer at 1).

Second, Respondents contend the Rules of Practice should be construed liberally to permit the parties to plead their respective positions and not so strictly as to prevent a respondent from going to trial and making its defense on the merits. Respondents contend liberal construction is particularly appropriate where no prejudice to Complainant can be demonstrated. (Respondents' Memo Contra Complainant's Appeal Pet. at 2.)

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint. Under these circumstances, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Therefore, even if I found that Complainant would not be prejudiced by my remanding the proceeding to the Chief ALJ for a hearing, that finding would not constitute a basis for remanding the proceeding to the Chief ALJ for a hearing.[16]

Third, Respondents contend Complainant should not be permitted to raise issues that could have been raised in an opposition to Respondents'

---

[15]See note 9.

[16]*See In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 538-39 (2002) (stating, even if the complainant would not be prejudiced by remanding the proceeding to the chief administrative law judge for a hearing, that finding would not constitute a basis for setting aside the chief administrative law judge's decision and remanding the proceeding to the chief administrative law judge for a hearing); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice does not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 2-3).

It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[17] However, Complainant appeals the Chief ALJ's February 9, 2005, Ruling Denying Motion for Adoption of Decision and Order, not the Chief ALJ's January 13, 2005, Order Granting Request for Extension of Time to File Answer, as Respondents

---

[17]*In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); In *re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

contend. Complainant raised the issue of Respondents' failure to file a timely answer in Complainant's Motion for Default Decision. Therefore, I reject Respondents' contention that Complainant raises new issues in Complainant's Appeal Petition.

Fourth, Respondents contend Complainant's argument concerning the timing of the death of Respondents' counsel's father, Mr. Herman Rogovin, is inappropriate, and, while in most circumstances Complainant's zeal would be admirable, Complainant's argument seems only vengeful in this instance (Respondents' Memo Contra Complainant's Appeal Pet. at 3-5).

Complainant argues Mr. Herman Rogovin's death on November 10, 2004, the last day Respondents' Answer could be filed, could not have caused Respondents' failure to file an answer during the previous 19 days. Complainant failed to consider Mr. Herman Rogovin's final illness, which occurred over several months just prior to his death (Respondents' Memo Contra Complainant's Appeal Pet. at 3).

Even if I were to find Complainant's argument inappropriate and vengeful, I would not affirm the Chief ALJ's denial of Complainant's Motion for Default Decision. The death of a parent is generally a very sad event, and I know from first-hand experience that the final illness of a parent can cause one to neglect duties other than those owed to the parent. Nonetheless, Respondents failed to file a timely motion for extension of time and failed to file a timely answer. Thus, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint and waived opportunity for hearing. The final illness and subsequent death of Respondents' counsel's father, tragic though it is, does not constitute a meritorious basis for the Chief ALJ's denial of Complainant's Motion for Default Decision.[18]

For the foregoing reasons, the following Order should be issued.

---

[18]Complainant states he sympathizes with Respondents' counsel and derives no pleasure from his appeal of the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order (Complainant's Appeal Pet. at 8). I trust Complainant is aware that, while section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that a denial of a motion for a default decision may be appealed to the Judicial Officer, parties are not obliged by the Rules of Practice to appeal every denial of a motion for a default decision.

## ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondent Diana R. McCourt is assessed an $18,070 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Diana R. McCourt. Respondent Diana R. McCourt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

3. Respondent Siberian Tiger Conservation Association is assessed a $16,420 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Siberian Tiger Conservation Association. Respondent Siberian Tiger Conservation Association shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

## RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order.[19] The date of entry of this Order is March 29, 2005.

---

[19] 7 U.S.C. § 2149(c).

**In re: BODIE S. KNAPP, AN INDIVIDUAL, d/b/a WAYNE'S WORLD SAFARI.**
**AWA Docket No. 04-0029.**
**Decision and Order.**
**Filed May 31, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Pro se – Estoppel – Effective date of filing – Mailbox rule – Due process – Cease and desist order – License revocation.**

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) concluding Respondent committed 84 violations of the regulations and standards issued under the Animal Welfare Act during the period March 13, 2002, through March 13, 2004. The Judicial Officer stated Respondent is deemed, by his failure to file a timely answer, to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer held Respondent's appearance pro se, Respondent's belief that filing was effective on the date of mailing, Respondent's unsuccessful attempts to contact Complainant's counsel and a United States Department of Agriculture inspector, and Respondent's purported receipt of erroneous information did not constitute good cause to set aside the Chief ALJ's Default Decision. The Judicial Officer issued a cease and desist order and revoked Respondent's Animal Welfare Act license.

Colleen A. Carroll, for Complainant.
Phillip Westergren, Corpus Christi, Texas, for Respondent.
Initial Decision by Chief Administrative Law Judge Marc R. Hillson.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 31, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary

Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on March 13, 2002, September 5, 2002, January 9, 2003, April 11, 2003, September 5, 2003, December 18, 2003, March 11, 2004, March 13, 2004, and March 11, 2005, Bodie S. Knapp, d/b/a Wayne's World Safari [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 3-9).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on September 4, 2004.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on October 6, 2004, the Hearing Clerk sent Respondent a letter informing him that he had not filed an answer to the Complaint in accordance with section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 25, 2004.[2] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service. On November 8, 2004, Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] extended the time for Respondent's filing objections to

[1]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4592.

[2]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7342.

Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to November 19, 2004.[3] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued a Decision and Order By Reason of Admission of Facts [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

On March 11, 2005, Respondent filed a motion for leave to file an affidavit and appealed to, and requested oral argument before, the Judicial Officer. On March 30, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit. On May 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I agree with the Chief ALJ's January 4, 2005, Initial Decision. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions and rulings by the Judicial Officer follow the Chief ALJ's conclusions of law, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

[3]Order Extending Time to File Objections to Proposed Decision and Order.

## CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

### § 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

### § 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or

dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

**§ 2149. Violations by licensees**

**(a) Temporary license suspension; notice and hearing; revocation**

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate

offense.

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), (h), 2149(a)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

. . . .

## FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

### SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

### FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

### DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of

a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

## TITLE 9—ANIMALS AND ANIMAL PRODUCTS

## CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

## SUBCHAPTER A—ANIMAL WELFARE

## PART 1—DEFINITION OF TERMS

### § 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the

purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

. . . .

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

## PART 2—REGULATIONS

### SUBPART D–ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

### § 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending

veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter[.]

. . . .

## SUBPART H–COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

### § 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

## SUBPART I–MISCELLANEOUS

. . . .

### § 2.131 Handling of animals.

. . . .

(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.

. . . .

(c) . . . .

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.

. . . .

## PART 3—STANDARDS

. . . .

### SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

**§ 3.75 Housing facilities, general.**

. . . .

(c) *Surfaces*–(1) *General requirements*. The surfaces of housing facilities–including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or objects within the facility–must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

**§ 3.83 Watering.**

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and well-being, but no less than twice daily for at least 1 hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

**§ 3.84 Cleaning, sanitization, housekeeping, and pest control.**

(a) *Cleaning of primary enclosures*. Excreta and food waste must be removed from inside each indoor primary enclosure daily and from underneath them as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the nonhuman primates from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Dirt floors, floors with absorbent bedding, and planted areas in primary enclosures must be spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta, or as often as necessary to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, nonhuman primates must be removed, unless the enclosure is large enough to ensure the animals will not

be harmed, wetted, or distressed in the process. Perches, bars, and shelves must be kept clean and replaced when worn. If the species of the nonhuman primates housed in the primary enclosure engages in scent marking, hard surfaces in the primary enclosure must be spot-cleaned daily.

. . . .

## SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

### FACILITIES AND OPERATING STANDARDS

**§ 3.125 Facilities, general.**

(a) *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.

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

. . . .

**§ 3.127 Facilities, outdoor.**

(a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(b) *Shelter from inclement weather*. 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

(c) *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.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

**§ 3.129 Feeding.**

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

. . . .

**§ 3.131 Sanitation.**

(a) *Cleaning of enclosures*. 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. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

9 C.F.R. §§ 1.1; 2.40(a), (b)(1), .100(a), .131(b)(1), (c)(2); 3.75(c)(1)(i),

.83, .84(a), .125(a), (c), .127(a)-(c), .129(a), .131(a) (2004).

## THE CHIEF ALJ'S INITIAL DECISION (AS RESTATED)

### Statement of the Case

Respondent failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. Respondent is an individual doing business as "Wayne's World Safari" and whose address is 11212 Highway 359, Mathis, Texas 78368. At all times material to this proceeding, Respondent operated as a dealer and as an exhibitor, as those terms are defined in the Regulations and Standards, and held Animal Welfare Act license number 74-C-0533.

2. Respondent exhibits approximately 200 wild and exotic animals to the public. Respondent's exhibition business is significant. Respondent has many customers each year and also solicits and accepts donations from the public. The gravity of Respondent's violations is great and the violations involve willful, deliberate violations of the handling and veterinary care regulations and repeated failures to comply with the facilities standards. The violations themselves demonstrate a lack of good faith on the part of Respondent. Respondent has also

exhibited bad faith by lying to Animal and Plant Health Inspection Service officials about the circumstances surrounding the death of two adult tigers in December 2003. Specifically, Respondent informed Animal and Plant Health Inspection Service officials that the animals died in a fight, when in fact both animals had died at the hand of Respondent. Respondent is a respondent in another enforcement proceeding under the Animal Welfare Act: *In re Corpus Christi Zoological Association*, AWA Docket No. 04-0015.

3. On or about the following dates, Respondent willfully violated the veterinary care regulations (9 C.F.R. § 2.40), as follows:

a. On March 13, 2002, Respondent failed to have an attending veterinarian provide adequate veterinary care to animals as required. Specifically, Respondent failed to have an attending veterinarian provide care to a porcupine (Scarface) that needed veterinary medical attention for her left eye. (9 C.F.R. § 2.40(a).)

b. On September 5, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the provisions of the Regulations and Standards. Specifically, Respondent lacked facilities to prevent the escape of the brown bears. (9 C.F.R. § 2.40(b)(1).)

4. On or about the following dates, Respondent willfully violated section 2.131 of the Regulations and Standards (9 C.F.R. § 2.131), as follows:

a. On March 13, 2002, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public. Specifically, there was no barrier between the rhinoceros and the public. (9 C.F.R. § 2.131(b)(1).)

b. On March 13, 2002, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with

animals. (9 C.F.R. § 2.131(c)(2).)

c. On January 9, 2003, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public. Specifically, the barrier at the gate at the front of Respondent's rhinoceros exhibit was only 18 inches high and was constructed of cattle paneling. (9 C.F.R. § 2.131(b)(1).)

d. On April 11, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animal and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

e. On April 11, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

f. On September 5, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

g. On September 5, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

h. On March 11, 2004, Respondent failed to have a responsible,

knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

i. On March 11, 2004, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

5. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. On March 13, 2002, Respondent failed to provide sufficient water to nonhuman primates continually or as often as necessary for the health and comfort of the animals. Specifically, Respondent provided no drinking water to the spider monkeys. (9 C.F.R. § 3.83.)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

c. On January 9, 2003, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

d. On April 11, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

e. On April 11, 2003, Respondent failed to ensure that surfaces

of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

f. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

g. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

h. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

i. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

j. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates

are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

k. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

6. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125 of the Regulations and Standards (9 C.F.R. § 3.125), as follows:

a. On March 13, 2002, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored meat in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.125(c).)

b. On September 5, 2002, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury. Specifically, Respondent's coatimundi enclosure had wires protruding from the concrete base, which wires posed a danger to the animals housed inside. (9 C.F.R. § 3.125(a).)

c. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's bear enclosure were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

d. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were

rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

e. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for tigers were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

f. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

g. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the giraffe barn had been kicked loose and its metal portions structurally compromised. (9 C.F.R. § 3.125(a).)

h. On April 11, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the caracal enclosure was badly rusted, had holes, and was structurally compromised. (9 C.F.R. § 3.125(a).)

i. On April 11, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

j. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and was structurally compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

k. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

l. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

m. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

n. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

o. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

p. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

q. On September 5, 2003, Respondent failed to ensure that his

housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

r. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

s. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a filthy freezer that had blood and food residue on the walls and floor. (9 C.F.R. § 3.125(c).)

t. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a chest freezer with a door that was broken and allowed warm air to enter. (9 C.F.R. § 3.125(c).)

u. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

v. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

w. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure

were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

x. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

y. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

z. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

aa. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

bb. On March 11, 2004, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

cc. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the back wall of the caracal enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

dd. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and its structural strength compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

ee. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ff. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

gg. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

hh. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ii. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

jj. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

kk. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

7. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Regulations and Standards (9 C.F.R. § 3.127), as follows:

a. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed Patagonian cavies in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

b. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed reindeer in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

c. On September 5, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed bears in an enclosure that did not allow the

animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

d. On April 11, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed an adult male caracal in an enclosure with a single shelter that could not accommodate him and had no floor. (9 C.F.R. § 3.127(b).)

e. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed five African crested porcupines in an enclosure with two doghouse shelters that could not accommodate all of the animals. (9 C.F.R. § 3.127(b).)

f. On September 5, 2003, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

g. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed a sable, an eland, a fallow deer, and a bongo in an enclosure with a single shelter that did not protect all of the animals from mud. (9 C.F.R. § 3.127(b).)

h. On September 5, 2003, Respondent failed to provide a suitable method to rapidly eliminate excess water for animals housed outdoors. Specifically, Respondent housed a sable, an eland, a fallow deer, and a bongo in an enclosure where the animals were required to stand in mud up to their knees. (9 C.F.R. § 3.127(c).)

i. On March 11, 2004, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

8. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129), as follows:

a. On March 13, 2002, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals meat that had been stored in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.129(a).)

b. On April 11, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

c. On September 5, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, fruit intended to be offered to animals had been thawed and re-frozen into a large block. (9 C.F.R. § 3.129(a).)

d. On March 11, 2004, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

9. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131 of the Regulations and Standards (9 C.F.R. § 3.131), as follows:

a. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize

disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

c. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

d. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the capybara enclosure. (9 C.F.R. § 3.131(a).)

e. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

f. On April 11, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

g. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

h. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

i. On December 18, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize

disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

j. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

k. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

l. On March 13, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

**Conclusions of Law**

1. By reason of the Findings of Fact, Respondent has willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraphs 2 through 15 of these Conclusions of Law.

2. On March 13, 2002, Respondent willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

3. On September 5, 2003, Respondent willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

4. On March 13, 2002, January 9, 2003, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [now 9 C.F.R. § 2.131(c)(1) (2005)]).

5. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(c)(2) of the Regulations and Standards. (9 C.F.R. § 2.131(c)(2) (2004) [now 9 C.F.R. § 2.131(d)(2) (2005)]).

6. On March 13, 2002, Respondent willfully violated section

2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.83 of the Regulations and Standards (9 C.F.R. § 3.83).

7. On September 5, 2002, and January 9, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.84(a) of the Regulations and Standards (9 C.F.R. § 3.84(a)).

8. On April 11, 2003 (two instances), September 5, 2003 (two instances), December 18, 2003 (two instances), and March 11, 2004 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.75(c)(1)(i) of the Regulations and Standards (9 C.F.R. § 3.75(c)(1)(i)).

9. On September 5, 2002, January 9, 2003 (five instances), April 11, 2003, September 5, 2003 (nine instances), December 18, 2003, (seven instances), March 11, 2004 (five instances), and March 13, 2004 (four instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

10. On March 13, 2002, April 11, 2003, September 5, 2003 (two instances), and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(c) of the Regulations and Standards (9 C.F.R. § 3.125(c)).

11. On March 13, 2002 (two instances), September 5, 2002, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(a) of the Regulations and Standards (9 C.F.R. § 3.127(a)).

12. On April 11, 2003, and September 5, 2003 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

13. On September 5, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

14. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129(a) of the Regulations and Standards (9 C.F.R. § 3.129(a)).

15. On September 5, 2002 (three instances), January 9, 2003 (two instances), April 11, 2003, September 5, 2003 (two instances), December 18, 2003, March 11, 2004 (two instances), and March 13, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)).

## ADDITIONAL CONCLUSIONS AND RULINGS BY THE JUDICIAL OFFICER

### Ruling on Respondent's Request for Oral Argument

Respondent requests oral argument before the Judicial Officer (Appeal to the Judicial Officer at 1). Complainant opposes Respondent's request for oral argument on the ground that oral argument is not necessary because the parties have thoroughly addressed the issues and the issues are not complex (Complainant's Response to Respondent's Appeal Pet. at 13).

I agree with Complainant. Respondent's request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

### Ruling on Respondent's Motion for Leave to File Affidavit

Respondent attaches Jennifer Knapp's March 9, 2005, affidavit, to Respondent's Appeal to the Judicial Officer and requests leave to file the affidavit (Appeal to the Judicial Officer at 8). Complainant contends Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit should be denied because the time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision has passed and the affidavit raises new arguments on appeal (Complainant's Response to Respondent's Appeal Pet. at 13-14).

Jennifer Knapp's March 9, 2005, affidavit is filed in support of Respondent's Appeal to the Judicial Officer, not in support of Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, as Complainant suggests. Moreover, while it is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer,[4] Jennifer

---

[4]*In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740

(continued...)

Knapp's March 9, 2005, affidavit appears to be merely a declaration of facts rather than argument. Therefore, I reject Complainant's arguments for denying Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit, and I grant Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit.

**Respondent's Appeal Petition**

Respondent raises three issues in the Appeal to the Judicial Officer. First, Respondent contends he made no admissions of fact (Appeal to the Judicial Officer at 1-7).

Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because he failed to file an answer to the Complaint within 20 days after the Hearing Clerk served him with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on September 4, 2004.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

**§ 1.136 Answer.**

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an

---

[4](...continued)
(1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[5]See note 1.

answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon the respondent. The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 20-21.

Similarly, the Hearing Clerk informed Respondent in the August 31, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 31, 2004

Mr. Bodie S. Knapp d/b/a
Wayne's World Safari
11212 Highway 359
Mathis, Texas 78368

Dear Mr. Knapp:

Subject: In re: Bodie S. Knapp d/b/a Wayne's World Safari
Respondent
AWA Docket No. 04-0029

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint.

Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in

quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent's answer was due no later than September 24, 2004. Respondent's first filing in this proceeding is dated and was filed November 8, 2004, 1 month 15 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on October 25, 2004.[6] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant' Proposed Default Decision within 20 days after service. On November 8, 2004, Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, the Chief ALJ extended the time for Respondent's filing objections to Complainant's Motion for Default Decision and Complainant's

[6]See note 2.

Proposed Default Decision to November 19, 2004.[7] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued an Initial Decision: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[8] generally there is no

---

[7]See note 3.

[8]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence

(continued...)

basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[9]

---

[8](...continued)
because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[9]*See generally In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the (continued...)

[9](...continued)
default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was
(continued...)

Respondent contends the Chief ALJ's Initial Decision should be set aside for good cause. In support of this contention, Respondent states: (1) at the time the answer was due, he appeared pro se; (2) Sonny Kelm, a United States Department of Agriculture investigator, influenced

---

[9](...continued)
70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Respondent not to file a timely answer by stating that Respondent would only be assessed a civil monetary penalty; (3) Respondent tried to contact Complainant's counsel, Colleen Carroll, and a United States Department of Agriculture inspector, Charlie Currer; and (4) Respondent believed filing was effective on the date of mailing.

I do not find Respondent's appearance pro se constitutes good cause for setting aside the Chief ALJ's Initial Decision. The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel.[10] The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the complaint and provides that failure to file a timely answer shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[11] Respondent's decision to proceed pro se does not operate as an excuse for his failure to file a timely answer to the Complaint.[12]

I do not find the United States Department of Agriculture investigator's purported statement regarding the sanction constitutes good cause for setting aside the Chief ALJ's Initial Decision. I infer Respondent contends I am estopped from adopting the Chief ALJ's Initial Decision because, allegedly, Sonny Kelm, a United States Department of Agriculture investigator, stated that Respondent would only be assessed a civil monetary penalty. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means

---

[10]*In re Chad Way*, 64 Agric. Dec. 401, 419 ( 2005) (stating the Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel); *In re Mary Meyers*, 58 Agric. Dec. 861, 865 (1999) (Order Denying Pet. for Recons.) (stating the respondent is not exempt from the Rules of Practice merely because the respondent was pro se at the time her answer was due).

[11]7 C.F.R. §§ 1.136(a), (c), .139.

[12]*In re Chad Way*, 64 Agric. Dec. 401, 419 (2005) (stating the respondents' decision to proceed pro se does not operate as an excuse for their failure to file a timely answer to the amended complaint); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[13] Even if Respondent acted to his detriment based on Sonny Kelm's statement, it is well settled that the government may not be estopped on the same terms as any other litigant.[14] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[15] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[16] as it is doing in this case,[17] and estoppel is only

---

[13]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[14]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[15]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

[16]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[17]*See In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 646 (2000) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re Mary Meyers*, 58 Agric. Dec. 861, 868 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 601 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding the government acts in its

(continued...)

available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[18] Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, even if I were to find that Sonny Kelm erroneously stated that Respondent would only be assessed a civil monetary penalty, I would reject Respondent's contention that the erroneous statement constitutes good cause for setting aside the Chief ALJ's Initial Decision.

I do not find Respondent's attempts to contact Colleen Carroll and Charlie Currer constitute good cause for setting aside the Chief ALJ's Initial Decision. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that a respondent shall file an answer with the Hearing Clerk within 20 days after service of the complaint. As an initial matter, based on Jennifer Knapp's March 9, 2005, affidavit, Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer appear to have been initiated long after Respondent's answer was due. Moreover, even if I were to find Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer occurred within 20 days after service of the Complaint, I would not

---

[17](...continued)
sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[18]*Lehman v. United* States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971)
.

conclude Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer constituted filing an answer with the Hearing Clerk.[19]

I do not find Respondent's belief that filing is effective on the date of mailing constitutes good cause for setting aside the Chief ALJ's Initial Decision. As an initial matter, Respondent's first filing is dated November 8, 2004, and the filing establishes that Respondent faxed it to the Hearing Clerk on November 8, 2004, 1 month 15 days after Respondent's answer was due. Therefore, even if I were to find the mailbox rule applies to this proceeding (which I do not so find)[20] and Respondent's November 8, 2004, filing is an answer (which it is not), I would not find good cause for setting aside the Chief ALJ's Initial Decision. Moreover, Respondent's belief that the mailbox rule applies in this proceeding is not reasonable. Section 1.147(g) of the Rules of Practice clearly provides the effective date of filing a document is the time when the document reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Respondent's first filing in this proceeding was filed with the

---

[19]*See In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk).

[20]*See In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondents' contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted in accordance with the Rules of Practice), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

Hearing Clerk 1 month 15 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision.

Second, Respondent contends the Chief ALJ's revocation of Respondent's Animal Welfare Act license is far too harsh a sanction under the circumstances (Appeal to the Judicial Officer at 7).

I conclude Respondent committed 84 willful violations of the Regulations and Standards over a 2-year period. Many of these violations are serious violations which jeopardized the health and well-being of Respondent's animals. In light of the number and gravity of the violations and the period of time during which the violations occurred, I find revocation of Respondent's Animal Welfare Act license appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent contends the revocation of his Animal Welfare Act license based upon his failure to file a timely answer deprives him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Appeal to the Judicial Officer at 7-8).

As an initial matter, the due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[21] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the due process clause of the Fourteenth Amendment to

[21]See 5 U.S.C. §§ 101, 551(1).

the Constitution of the United States, as Respondent contends.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[22] Therefore, I reject Respondent's contention that revocation of his Animal Welfare Act license, based upon his failure to file an answer to the Complaint, deprives him of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

**Paragraphs 7i and 7k of the Complaint**

Complainant alleges, and Respondent is deemed to have admitted, that on March 11, 2005, he failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, in violation of section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)) (Compl. ¶¶ 7i, 7k). Complainant filed the Complaint on August 31, 2004, well before the alleged March 11, 2005, violations. As it was impossible for Respondent to have committed the March 11, 2005, violations at the time Complainant filed the Complaint, I decline to include these violations in the findings of fact and conclusions of law, even though Respondent is deemed to have

[22]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

admitted the violations.[23]

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0533) is revoked.

The license revocation provisions of this Order shall become effective 60 days after service of this Order on Respondent.

## RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order.[24] The date of entry of this Order is May 31, 2005.

---

[23]*See In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197 (2001) (concluding the respondent, by her failure to file an answer, is deemed to have admitted the violations alleged in the complaint, even though the complainant and the respondent agreed the date of the violations alleged in the complaint was in error).

[24]7 U.S.C. § 2149(c).

**In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.**
**AWA Docket No. 04-0033.**
**Decision and Order as to For The Birds, Inc., and Jerry L. Korn.**
**Filed June 22, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Cease and desist order – License revocation – Civil penalty.**

The Judicial Officer concluded that For The Birds, Inc., committed at least 1,545 violations of the regulations and standards issued under the Animal Welfare Act and Jerry L. Korn committed at least 749 violations of the regulations and standards issued under the Animal Welfare Act during the period March 2001 through August 2003. The Judicial Officer stated For The Birds, Inc., and Jerry L. Korn are deemed, by their failures to file timely answers, to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer issued a cease and desist order, revoked Jerry L. Korn's Animal Welfare Act license, assessed For The Birds, Inc., a $28,050 civil penalty, and assessed Jerry L. Korn a $20,597 civil penalty.

Colleen A. Carroll, for Complainant.
Respondents For The Birds, Inc., and Jerry L. Korn, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 8, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142 (2004)) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that during the period March 2001 through

August 2003, For The Birds, Inc., Jerry L. Korn, Susan F. Korn, and Ben Korn willfully violated the Regulations and Standards (Compl. ¶¶ 8-52).

The Hearing Clerk served For The Birds, Inc., and Jerry L. Korn with the Complaint, the Rules of Practice, and a service letter on September 14, 2004.[1] The Hearing Clerk served Susan F. Korn with the Complaint, the Rules of Practice, and a service letter on September 29, 2004.[2] For The Birds, Inc., Jerry L. Korn, and Susan F. Korn failed to file answers to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed: (1) a Motion for Adoption of Decision and Order as to Respondent Jerry L. Korn [hereinafter Motion for Default Decision as to Jerry L. Korn] and a proposed Decision and Order as to Respondent Jerry L. Korn [hereinafter Proposed Default Decision as to Jerry L. Korn]; (2) a Motion for Adoption of Decision and Order as to Respondent Susan F. Korn [hereinafter Motion for Default Decision as to Susan F. Korn] and a proposed Decision and Order as to Respondent Susan F. Korn [hereinafter Proposed Default Decision as to Susan F. Korn]; and (3) a Motion for Adoption of Decision and Order as to For The Birds, Inc. [hereinafter Motion for Default Decision as to For The Birds, Inc.], and a proposed Decision and Order as to Respondent For The Birds, Inc. [hereinafter Proposed Default Decision as to For The Birds, Inc.]. On January 27, 2005, the Hearing Clerk served: (1) Jerry L. Korn with Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, and a service letter; and (2) For The Birds, Inc., with Complainant's Motion for Default Decision as to For The Birds, Inc., Complainant's Proposed

[1]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4356 and Article Number 7003 2260 0005 5721 4349.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4431.

Default Decision as to For The Birds, Inc., and a service letter.[3] On February 16, 2005, Jerry L. Korn and For The Birds, Inc., filed objections to Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, Complainant's Motion for Default Decision as to For The Birds, Inc., and Complainant's Proposed Default Decision as to For The Birds, Inc.[4] On February 25, 2005, the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn, Complainant's Proposed Default Decision as to Susan F. Korn, and a service letter.[5]

On February 25, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding For The Birds, Inc., Jerry L. Korn, and Susan F. Korn willfully violated the Regulations and Standards; (2) directing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn, jointly and severally, a $28,050 civil penalty (Initial Decision at 21-30).

On March 11, 2005, Complainant filed Complainant's Appeal Petition. For The Birds, Inc., and Jerry L. Korn failed to file responses to Complainant's Appeal Petition. On May 26, 2005, Susan F. Korn filed a late-filed response to Complainant's Appeal Petition. On May 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to For The Birds, Inc., Jerry L. Korn, and Susan F. Korn.

Based upon a careful review of the record, I disagree with the ALJ's

---

[3]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3786 and Article Number 7003 2260 0005 5721 3779.

[4]Objection to Motion for Adoption of Decision and Order as to Respondents Jerry L. Korn, For the Birds, Inc., and Ben Korn; and Request for Telephonic Hearing.

[5]Memorandum to File from Tonya Fisher dated February 25, 2005.

Initial Decision as it relates to Susan F. Korn,[6] the sanction imposed by the ALJ on For the Birds, Inc., and Jerry L. Korn, and a small number of the ALJ's findings of fact and conclusions of law. Therefore, I do not adopt the ALJ's Initial Decision as the final Decision and Order as to For The Birds, Inc., and Jerry L. Korn.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

**§ 2131. Congressional statement of policy**

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

[6]The record establishes the ALJ did not provide Susan F. Korn with 20 days within which to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, simultaneous with my filing this Decision and Order as to For The Birds, Inc., and Jerry L. Korn, I file a Remand Order as to Susan F. Korn remanding this proceeding, as it relates to Susan F. Korn, to the ALJ to provide Susan F. Korn an opportunity to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn.

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

**§ 2132. Definitions**

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or

the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

**§ 2146. Administration and enforcement by Secretary**

**(a) Investigations and inspections**

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, 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.

**§ 2149. Violations by licensees**

**(a) Temporary license suspension; notice and hearing; revocation**

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such

person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and

such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

. . . .

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), (h), 2146, 2149(a)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary

penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986

[26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service. . . .*

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**PART 1—DEFINITION OF TERMS**

**§ 1.1 Definitions.**

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or

breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

. . . .

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

## PART 2—REGULATIONS

### SUBPART A—LICENSING

#### § 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or

intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

. . . .

**§ 2.10 Licensees whose licenses have been suspended or revoked.**

(a) Any person whose license has been suspended for any reason shall not be licensed in his or her own name or in any other manner within the period during which the order of suspension is in effect. No partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, will be licensed during that period. Any person whose license has been suspended for any reason may apply to the AC Regional Director, in writing, for reinstatement of his or her license.

(b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.

(c) Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation.

**SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE**

**§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).**

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

## SUBPART G—RECORDS

**§ 2.75 Records: Dealers and exhibitors.**

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

. . . .

## SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

**§ 2.100 Compliance with standards.**

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the

regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

## SUBPART I—MISCELLANEOUS

. . . .

### § 2.126 Access and inspection of records and property.

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

. . . .

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

. . . .

### § 2.131 Handling of animals.

(a)(1) 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.

(2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.

. . . .

(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.

. . . .

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

(2) A responsible, knowledgeable, and readily identifiable

employee or attendant must be present at all times during periods of public contact.

. . . .

## PART 3—STANDARDS

. . . .

### SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

**§ 3.83 Watering.**

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and well-being, but no less than twice daily for at least 1 hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

**§ 3.84 Cleaning, sanitization, housekeeping, and pest control.**

. . . .

(c) *Housekeeping for premises*. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair in order to protect the nonhuman primates from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste, and discarded matter. Weeds, grass, and bushes must be controlled so as to facilitate cleaning of the premises and pest control.

. . . .

**§ 3.85 Employees.**

Every person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining nonhuman primates must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practices and care, or handle nonhuman primates, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates to supervise others. The employer must be certain that the supervisor can perform to these standards.

. . . .

**SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS**

FACILITIES AND OPERATING STANDARDS

**§ 3.125 Facilities, general.**

(a) *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.

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

**§ 3.126 Facilities, indoor.**

. . . .

(d) *Drainage*. A suitable sanitary method shall be provided to eliminate rapidly, excess water from indoor housing facilities. If drains are used, they shall be properly constructed and kept in good repair to avoid foul odors and installed so as to prevent any backup of sewage. 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.

**§ 3.127 Facilities, outdoor.**

. . . .

(b) *Shelter from inclement weather*. 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. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

(c) *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.

(d) *Perimeter fence*. On or after May 17, 2000, all outdoor housing facilities (i.e., facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility

and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

**§ 3.128 Space requirements.**

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

**§ 3.129 Feeding.**

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent

molding, contamination, and deterioration or caking of food.

**§ 3.130 Watering.**

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

**§ 3.131 Sanitation.**

(a) *Cleaning of enclosures*. 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. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

**§ 3.132 Employees.**

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

**§ 3.133 Separation.**

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.1(a)(1), .10, .40, .75(b)(1), .100(a), .126(a)(2), .131(a)(1)-(2)(i), (b)(1), (c)(1)-(2); 3.83, .84(c), .85, .125(a), (c)-(d),

.126(d), .127(b)-(d), .128-.131(a), .132-.133 (2004).

## DECISION

### Statement of the Case

For The Birds, Inc., and Jerry L. Korn failed to file answers to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order as to For The Birds, Inc., and Jerry L. Korn is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. For the Birds, Inc., is an Idaho corporation whose agent for service of process is Jerry L. Korn, 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations in the Complaint, For The Birds, Inc., was an "exhibitor" as that word is defined in the Animal Welfare Act and the Regulations and Standards.

2. Jerry L. Korn is an individual doing business as For the Birds and whose mailing address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations in the Complaint, Jerry L. Korn was an "exhibitor" as that word is defined in the Animal Welfare Act and the Regulations and Standards. Between 2001 and May 23, 2003, Jerry L. Korn held Animal Welfare Act license number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which Animal Welfare Act license was cancelled on May 23,

2003, and has not been reinstated.

3. For The Birds, Inc., and Jerry L. Korn have a moderate-sized business, with approximately 50 animals, including farm, wild, and exotic animals: goats, llamas, giraffe, a camel, a bear, tigers, a mountain lion, lemurs, eland, elk, prairie dogs, rabbits, cats, dogs, and a kangaroo. The gravity of For The Birds, Inc.'s and Jerry L. Korn's violations is great. The violations include repeated instances in which For The Birds, Inc., and Jerry L. Korn knowingly exhibited animals without having a valid Animal Welfare Act license and continuing instances of failures by For The Birds, Inc., and Jerry L. Korn to provide minimally-adequate veterinary care, food, water, and housing to animals and to handle animals carefully and in compliance with the Regulations and Standards (which failures have resulted in serious injuries and death to animals in For The Birds, Inc.'s and Jerry L. Korn's custody). For The Birds, Inc., and Jerry L. Korn have continually failed to comply with the Regulations and Standards after having been repeatedly advised of deficiencies.

4. For The Birds, Inc., and Jerry L. Korn have not shown good faith. Jerry L. Korn has not provided notice of his current mailing address. Jerry L. Korn falsely represented to Animal and Plant Health Inspection Service officials that he had not received certified or registered mail. Moreover, For The Birds, Inc., and Jerry L. Korn have demonstrated an unwillingness to comply with the prohibition in the Animal Welfare Act and the Regulations and Standards against exhibiting animals without having a valid Animal Welfare Act license.

5. For The Birds, Inc., and Jerry L. Korn do not have a history of previous violations.

6. Between March 15, 2001, and at least August 24, 2003, For The Birds, Inc., exhibited animals without having been licensed by the Secretary of Agriculture to do so. Specifically, For The Birds, Inc., continuously kept the animals at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to the public. (9 C.F.R. §§ 2.1(a), .100(a).)

7. Between May 23, 2003, and at least August 24, 2003, Jerry L. Korn exhibited animals without having been licensed by the Secretary of Agriculture to do so. Specifically, Jerry L. Korn continuously kept the animals at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to

the public. (9 C.F.R. §§ 2.1(a), .100(a).)

8. Between May 23, 2003, and at least August 16, 2003, Jerry L. Korn operated as a "dealer" as that word is defined in the Animal Welfare Act and the Regulations and Standards without having been licensed by the Secretary of Agriculture to do so. Specifically, Jerry L. Korn delivered for transportation or transported, sold or negotiated the sale of a zebra, multiple elk, and llamas. (9 C.F.R. §§ 2.1(a), .100(a).)

9. On or about the following dates, For The Birds, Inc., and Jerry L. Korn failed to have an attending veterinarian provide adequate veterinary care to their animals:

a. From October 2002 through June 2003, and on or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a giraffe whose hooves were overgrown (9 C.F.R. § 2.40(a)).

b. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss (9 C.F.R. § 2.40(a)).

c. From approximately August 1, 2003, through August 16, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen. (9 C.F.R. § 2.40(a).)

d. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a camel with a golf-ball-sized abscess on the camel's lower left jaw (9 C.F.R. § 2.40(a)).

e. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a camel, after Jerry L. Korn lanced a golf-ball-sized abscess on the camel's lower left jaw, causing it to become a seeping, open wound that attracted a large number of flies. (9 C.F.R. § 2.40(a).)

f. On or about July 7, 2003, through July 9, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, on July 7, 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and a giraffe whose condition was reported directly to Jerry L. Korn, who took no action, which inaction resulted in, or contributed to, the animal's death on or about July 9, 2003. (9 C.F.R. § 2.40(a).)

g. In the spring 2002, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a pregnant llama resulting in, or contributing to, the death of the animal and her baby. (9 C.F.R. § 2.40(a).)

h. On or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for an eland whose hooves were overgrown. (9 C.F.R. § 2.40(a).)

10. On or about March 7, 2001, April 3, 2002, May 22, 2002, July 2, 2002, August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care (9 C.F.R. § 2.40(a)(1)).

11. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to ensure that their attending veterinarian had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use (9 C.F.R. § 2.40(a)(2)).

12. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences (9 C.F.R. § 2.40(b)(1)).

13. Between March 7, 2001, and August 24, 2003, For The Birds,

Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry. Specifically, on or about August 2002, For The Birds, Inc., and Jerry L. Korn failed to have sufficient personnel to remove mud and excreta in the elk enclosure and allowed an aged elk to become trapped in the mud and excreta for several days, subjecting the elk to injury by a bull elk. (9 C.F.R. § 2.40(b)(1).)

14. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment (9 C.F.R. § 2.40(b)(1)).

15. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services. Specifically, For The Birds, Inc., and Jerry L. Korn failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(1).)

16. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care. Specifically, For The Birds, Inc., and Jerry L. Korn failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(2).)

17. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian, so that timely and accurate information on problems of animal health, behavior, and well-being was conveyed to the attending veterinarian. Specifically, For The Birds, Inc., and Jerry L. Korn failed to communicate to their attending veterinarian animal heath information regarding, *inter alia*, a

snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(3).)

18. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, For The Birds, Inc., and Jerry L. Korn failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby, to assess their health and well-being. (9 C.F.R. § 2.40(b)(3).)

19. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization. Specifically, For The Birds, Inc., and Jerry L. Korn failed to train personnel (including Jerry L. Korn) in the care and handling of animals. (9 C.F.R. § 2.40(b)(4).)

20. On or about March 7, 2001, August 27, 2002, February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in For The Birds, Inc.'s and Jerry L. Korn's possession or under For The Birds, Inc.'s and Jerry L. Korn's control, or disposed of by For The Birds, Inc., and Jerry L. Korn (9 C.F.R. § 2.75(b)(1)).

21. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to allow Animal and Plant Health Inspection Service officials, during business hours, to examine records required to be kept by the Animal Welfare Act and the Regulations and Standards (9 C.F.R. § 2.126(a)(2)).

22. On or about May 1, 2001 (tigers), May 10, 2001 (tiger - Raja), April 3, 2002 (giraffe), June 2002 (tiger - Raja), June 4, 2002 (tiger), June 25, 2002 (bear), August 2002 (elk), February 19, 2003 (tigers), May 6, 2003 (tigers, hoofstock, kangaroo), May 8, 2003 (tigers), May 13, 2003 (tigers), and July 23, 2003 (tiger), For The Birds, Inc., and Jerry L. Korn failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm (9 C.F.R. § 2.131(a)(1)

(2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

23. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn used physical abuse to handle a tiger during an exhibition to the public (9 C.F.R. § 2.131(a)(2)(i) (2004) [9 C.F.R. § 2.131(b)(2)(i) (2005)]).

24. On May 1, 2001, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to the public without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

25. On May 10, 2001, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to the public without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

26. In June 2002, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to a child without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

27. On June 4, 2002, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to children without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

28. On February 19, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to the public without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

29. On May 13, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to the public without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

30. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public). (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

31. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public without sufficient distance or barriers to protect the animals from the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

32. On May 8, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of

harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]).

33. On July 23, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to approximately 40 children without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

34. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult giraffe and an adult eland to the public without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

35. Between approximately May 2003 and August 16, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn regularly allowed customers to enter the primary enclosure containing two tigers without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

36. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited tigers to the public outside of any enclosures and allowed personnel and the public to touch, tease, and harass animals, including an adult goat and her kids, an adult eland, a giraffe, and a juvenile kangaroo. (9 C.F.R. § 2.131(c)(1) (2004) [9 C.F.R. § 2.131(d)(1) (2005)].)

37. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide any food to two lemurs (9 C.F.R. § 3.83).

b. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide potable water in sufficient quantity to nonhuman primates. Specifically, For The Birds, Inc., and Jerry L. Korn provided no water to two lemurs. (9 C.F.R. § 3.83.)

c. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to keep the premises clean and in good repair. Specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs. (9 C.F.R. § 3.84(c).)

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to keep the premises clean and in good repair. Specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs. (9 C.F.R. § 3.84(c).)

e. Between August 27, 2002, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to have enough employees to carry out the level of husbandry practices and care for nonhuman primates required by the Regulations and Standards (9 C.F.R. § 3.85).

38. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding structural strength (9 C.F.R. § 3.125(a)), as follows:

a. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn

failed to repair torn metal in the eland enclosure.

b. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the bear enclosure so that it contained the bear securely.

c. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the tiger enclosure so that it contained the tigers securely.

d. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair exposed nails in camel enclosure.

e. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair jagged wire mesh in the tiger cub enclosure.

f. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gap between the frame and wire in the tiger cub enclosure.

g. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair broken wire in the enclosure housing a juvenile kangaroo.

h. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn

failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

i. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

39. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding storage (9 C.F.R. § 3.125(c)), as follows:

a. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food in facilities that adequately protected them from contamination.

b. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect food supplies from vermin, including the three to four rats found in the food preparation area.

c. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to dispose of rancid food in the food preparation area, leaving it out for days at a time.

d. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect food supplies in the produce cooler, which contained countless live

maggots.

e. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect animal bedding supplies, which contained countless live maggots.

40. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding waste disposal (9 C.F.R. § 3.125(d)), as follows:

a. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove food waste (bones) from the tiger enclosure.

b. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from the giraffe enclosure.

c. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the prairie dog enclosure.

d. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove waste and debris from the moat adjacent to the bear enclosure.

e. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and

debris from the giraffe enclosure.

f. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and debris from the eland enclosure.

g. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and debris from the elk enclosure.

h. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove mouse droppings from the food preparation area.

i. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and old bones from the tiger enclosure.

j. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the camel enclosure.

k. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the giraffe enclosure.

l. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the eland enclosure.

m. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the food preparation area.

n. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the goat enclosure.

o. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the camel enclosure.

p. Between October 2002 and June 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from the giraffe enclosure.

q. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the camel enclosure.

r. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove waste and debris from the moat adjacent to the cougar enclosure.

41. On August 27, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142). Specifically, For The Birds, Inc., and Jerry L. Korn failed

to provide a suitable and sanitary method to eliminate rapidly excess water from indoor housing facilities for tigers. (9 C.F.R. § 3.126(d).)

42. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with (9 C.F.R. § 3.127), as follows:

a. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

b. On November 8, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

c. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

e. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

f. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a suitable method to eliminate rapidly excess water from the elk enclosure (9 C.F.R. § 3.127(c)).

g. On March 15, 2001, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger and bear enclosures. (9 C.F.R. § 3.127(d).)

h. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the mountain lion enclosure. (9 C.F.R. § 3.127(d).)

i. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the snow leopard enclosure. (9 C.F.R. § 3.127(d).)

j. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger enclosure. (9 C.F.R. § 3.127(d).)

k. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

l. On May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger enclosure. (9 C.F.R. § 3.127(d).)

m. On May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

n. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

o. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a suitable method to eliminate rapidly excess water from the elk enclosure (9 C.F.R. § 3.127(c)).

43. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities

and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding space requirements (9 C.F.R. § 3.128), as follows:

a. Between October 2002 and May 30, 2003, For The Birds, Inc., and Jerry L. Korn failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained in the enclosures to make normal postural and social adjustments. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

b. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained in the enclosures to make normal postural and social adjustments. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

44. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding feeding (9 C.F.R. § 3.129), as follows:

a. Between March 2002 and February 2003, For The Birds, Inc., and Jerry L. Korn repeatedly failed to provide tigers with a sufficient quantity of wholesome, palatable food and routinely failed to feed tigers any food for 4 days in a row.

b. On or about April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to minimize contamination of food. Specifically, For The Birds, Inc., and Jerry L. Korn provided spoiled meat to tigers.

c. On or about August 15, 2003, For The Birds, Inc., and Jerry L. Korn failed to minimize contamination of food. Specifically, food for tigers was putrified and contained maggots.

d. On or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide animals with a sufficient quantity of food that was wholesome, palatable, and free from contamination.

Specifically, For The Birds, Inc., and Jerry L. Korn failed to feed sufficient food to a giraffe, an eland, rabbits, a kangaroo, elk, tigers, and domestic cats, which animals were thin and hungry.

45. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding watering (9 C.F.R. § 3.130), as follows:

a. On or about May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough.

b. On or about July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough and failed to remove a dead bird from the trough.

c. On or about April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough and failed to remove a dead bird from the trough.

d. On or about July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the snow leopards clean and sanitary.

e. On or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide animals with potable water as often as necessary. Specifically, For The Birds, Inc., and Jerry L. Korn failed to provide adequate water to rabbits.

46. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding the cleaning of enclosures (9 C.F.R. § 3.131(a)), as

follows:

a. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material.

b. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material.

c. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the eland enclosure contained excessive fecal material.

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

e. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the giraffe contained excessive excreta.

f. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the camel contained excessive excreta.

g. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the

enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

47. During 2002 and 2003, and specifically on July 2, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards (9 C.F.R. § 3.132).

48. During the spring and summer 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing incompatible animals in the same enclosure. Specifically, For The Birds, Inc., and Jerry L. Korn housed a cow elk, which became trapped in mud and excreta, in the same enclosure as a bull elk which harassed and attacked the trapped elk. (9 C.F.R. § 3.133.)

## Conclusions of Law

1. By reason of the Findings of Fact, For The Birds, Inc., and Jerry L. Korn have willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraph 2 through paragraph 41 of these conclusions of law.

2. Between March 15, 2001, and at least August 24, 2003, For The Birds, Inc., willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by exhibiting animals without an Animal Welfare Act license.

3. Between May 23, 2003, and at least August 24, 2003, Jerry L. Korn willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by exhibiting animals without an Animal Welfare Act license.

4. Between May 23, 2003, and at least August 16, 2003, Jerry L. Korn willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by operating as a dealer without an Animal Welfare Act license.

5. From October 2002 through June 2003, and on or about August

12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a giraffe whose hooves were overgrown.

6. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss.

7. From approximately August 1, 2003, through August 16, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen.

8. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a camel with a golf-ball-sized abscess on the camel's lower left jaw.

9. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a camel, after Jerry L. Korn lanced a golf-ball-sized abscess on the camel's lower left jaw, causing it to become a seeping, open wound that attracted a large number of flies.

10. On or about July 7, 2003, through July 9, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and a giraffe whose condition was reported directly to Jerry L. Korn, who took no action, which inaction resulted in, or contributed to, the animal's death on or about July 9, 2003.

11. In the spring 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a pregnant

llama resulting in, or contributing to, the death of the animal and her baby.

12. On or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for an eland whose hooves were overgrown.

13. On or about March 7, 2001, April 3, 2002, May 22, 2002, July 2, 2002, August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)) by failing to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

14. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a)(2) of the Regulations and Standards (9 C.F.R. § 2.40(a)(2)) by failing to ensure that their attending veterinarian had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

15. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)) by failing to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences.

16. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)) by failing to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, equipment, and services.

17. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(2) of the Regulations and Standards (9 C.F.R. § 2.40(b)(2)) by failing to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care.

18. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)) by failing to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being and a mechanism of direct and frequent communication with the attending veterinarian, so that timely and accurate information on problems of animal health, behavior, and well-being was conveyed to the attending veterinarian.

19. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(4) of the Regulations and Standards (9 C.F.R. § 2.40(b)(4)) by failing to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization.

20. On or about March 7, 2001, August 27, 2002, February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)) by failing to make, keep, and maintain records that fully and correctly disclose information concerning animals in For The Birds, Inc.'s and Jerry L. Korn's possession or under For The Birds, Inc.'s and Jerry L. Korn's control, or disposed of by For The Birds, Inc., and Jerry L. Korn.

21. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.126(a)(2) of the Regulations and Standards (9 C.F.R. § 2.126(a)(2)) by failing to allow Animal and Plant Health Inspection Service officials, during business hours, to examine records required to be kept by the Animal Welfare Act and the Regulations and Standards.

22. On or about May 1, 2001 (tigers), May 10, 2001 (tiger - Raja), April 3, 2002 (giraffe), June 2002 (tiger - Raja), June 4, 2002 (tiger), June 25, 2002 (bear), August 2002 (elk), February 19, 2003 (tigers), May 6, 2003 (tigers, hoofstock, kangaroo), May 8, 2003 (tigers), May 13, 2003 (tigers), and July 23, 2003 (tiger), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]) by failing to handle animals as expeditiously and carefully as

possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

23. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 2.131(a)(2)(i)) (2004) [9 C.F.R. § 2.131(b)(2)(i) (2005)]) by using physical abuse to handle a tiger during an exhibition to the public.

24. On May 1, 2001, on May 10, 2001, in June 2002 (one instance), on June 4, 2002, on February 19, 2003, on May 6, 2003 (two instances), on May 8, 2003, on May 13, 2003, on July 23, 2003, on August 12, 2003, and between May 2003 and August 16, 2003 (regularly), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]) by failing to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.

25. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(c)(1) of the Regulations and Standards (9 C.F.R. § 2.131(c)(1) (2004) [9 C.F.R. § 2.131(d)(1) (2005)]) by exhibiting animals under conditions that were inconsistent with the animals' well-being.

26. On August 24, 2003 (two instances), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.83 of the Regulations and Standards (9 C.F.R. § 3.83).

27. On August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.84(c) of the Regulations and Standards (9 C.F.R. § 3.84(c)).

28. Between August 27, 2002, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have enough employees to carry out the level of husbandry practices and care

for nonhuman primates as required in section 3.85 of the Regulations and Standards (9 C.F.R. § 3.85).

29. On April 3, 2002, July 2, 2002 (two instances), August 12, 2002, August 27, 2002 (two instances), February 11, 2003, February 12, 2003, and May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding structural strength of facilities in section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

30. On August 27, 2002, and in approximately June 2003 (four instances), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding storage in section 3.125(c) of the Regulations and Standards (9 C.F.R. § 3.125(c)).

31. On April 3, 2002 (two instances), July 2, 2002, August 12, 2002 (two instances), August 27, 2002 (six instances), February 12, 2003 (four instances), May 6, 2003, and August 12, 2003, and between October 2002 and June 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding waste disposal in section 3.125(d) of the Regulations and Standards (9 C.F.R. § 3.125(d)).

32. On August 27, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding drainage in section 3.126(d) of the Regulations and Standards (9 C.F.R. § 3.126(d)).

33. On August 27, 2002, November 8, 2002, February 11, 2003, February 12, 2003, and August 12, 2003, For The Birds, Inc., and Jerry

L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding shelter from inclement weather in section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

34. On February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding drainage of outdoor facilities in section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

35. On March 15, 2001, April 3, 2002 (two instances), May 22, 2002 (two instances), July 2, 2002 (two instances), and August 27, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding perimeter fencing in section 3.127(d) of the Regulations and Standards (9 C.F.R. § 3.127(d)).

36. Between October 2002 and May 30, 2003, and on August 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding space requirements in section 3.128 of the Regulations and Standards (9 C.F.R. § 3.128).

37. Between March 2002 and February 2003 (routinely), and on or about April 3, 2002, August 15, 2003, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding feeding in section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129).

38. On or about April 3, 2002, May 22, 2002, July 2, 2002 (two instances), and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding watering in section 3.130 of the Regulations and Standards (9 C.F.R. § 3.130).

39. On April 3, 2002, February 11, 2003, February 12, 2003 (three instances), August 12, 2003, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding cleaning of enclosures in section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)).

40. During 2002 and 2003, and specifically on July 2, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care as required by section 3.132 of the Regulations and Standards (9 C.F.R. § 3.132).

41. During spring and summer 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing incompatible animals in the same enclosure in violation of section 3.133 of the Regulations and Standards (9 C.F.R. § 3.133).

## Complainant's Appeal Petition

Complainant raises three issues in Complainant's Appeal Petition. First, Complainant contends the ALJ erroneously failed to issue conclusions of law that conform to the findings of fact and erroneously

concluded For The Birds, Inc., Jerry L. Korn, and Susan F. Korn[7] committed violations of the Regulations and Standards that are not alleged in the Complaint. (Complainant's Appeal Pet. at 3-10.)

For The Birds, Inc., and Jerry L. Korn are deemed, by their failures to file timely answers, to have admitted the allegations of the Complaint.[8] There is no record that would support a conclusion that For The Birds, Inc., or Jerry L. Korn committed violations of the Regulations and Standards other than those alleged in the Complaint; therefore, I do not adopt the ALJ's Initial Decision.

Second, Complainant contends the ALJ erroneously failed to revoke Jerry L. Korn's and Susan F. Korn's[9] Animal Welfare Act license (Complainant's Appeal Pet. at 10).

Jerry L. Korn is deemed, by his failure to file a timely answer to the Complaint, to have admitted at least 749 willful violations of the Regulations and Standards over a 2-year 5-month period. Many of these violations are very serious violations which jeopardized the health and well-being of Jerry L. Korn's animals. In light of the number and gravity of the violations and the period of time during which the violations occurred, I find revocation of Jerry L. Korn's Animal Welfare Act license appropriate and necessary to ensure Jerry L. Korn's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Complainant contends the $28,050 civil penalty the ALJ assessed For The Birds, Inc., Jerry L. Korn, and Susan F. Korn,[10] jointly and severally, is inadequate. Complainant asserts For The Birds, Inc.,

---

[7]See note 6.

[8]7 C.F.R. § 1.136(c).

[9]See note 6.

[10]See note 6.

Jerry L. Korn, and Susan F. Korn[11] should each be assessed a $28,050 civil penalty. (Complainant's Appeal Pet. at 10-11.)

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[12]

For The Birds, Inc., and Jerry L. Korn are deemed to have admitted they have a moderate-sized business with approximately 50 animals.[13] Many of For The Birds, Inc.'s and Jerry L. Korn's violations are serious violations which directly jeopardized the health and well-being of For The Birds, Inc.'s and Jerry L. Korn's animals. Moreover, For The Birds, Inc., and Jerry L. Korn are deemed to have admitted the gravity of their violations is great.[14]

For The Birds, Inc.'s and Jerry L. Korn's willful violations during the period March 2001 through August 2003, reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances,

---

[11]See note 6.

[12]7 U.S.C. § 2149(b).

[13]Compl. ¶ 5.

[14]Compl. ¶ 5.

> always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks assessment of a $28,050 civil penalty against For The Birds, Inc., and assessment of a $28,050 civil penalty against Jerry L. Korn or 1 percent of the maximum civil penalty that Complainant asserts the Secretary of Agriculture may assess against For The Birds, Inc., and Jerry L. Korn.

I find For The Birds, Inc., committed at least 1,545 violations of the Regulations and Standards and Jerry L. Korn committed at least 749 violations of the Regulations and Standards. For The Birds, Inc., and Jerry L. Korn could be assessed a maximum civil penalty of $2,750 for each of their violations of the Regulations and Standards.[15] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $28,050 civil penalty against For The Birds, Inc., and assessment of a $20,597 civil penalty against Jerry L.

---

[15]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, For The Birds, Inc., could be assessed a maximum civil penalty of $4,248,750, and Jerry L. Korn could be assessed a maximum civil penalty of $2,059,750.

Korn[16] are appropriate and necessary to ensure For The Birds, Inc.'s and Jerry L. Korn's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

**Paragraph 12 of the Complaint**

Complainant alleges that, on February 11, 2003, Jerry L. Korn failed and refused to accept delivery of notice of registered or certified mail from the Animal and Plant Health Inspection Service, in willful violation of section 1.5 of the Regulations and Standards (9 C.F.R. § 1.5) (Compl. ¶ 12). No such provision existed on February 11, 2003; therefore, I decline to conclude that Jerry L. Korn violated section 1.5 of the Regulations and Standards (9 C.F.R. § 1.5) on February 11, 2003.

**Paragraphs 13f and 13j of the Complaint**

Complainant alleges that, on or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to care for their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a giraffe whose hooves were overgrown, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)). (Compl. ¶¶ 13f, 13j.) Based on the limited record before me, it appears Complainant may have alleged the same violation twice. I give For The Birds, Inc., and Jerry L. Korn the benefit of my doubt and find only one violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) based upon For The Birds, Inc.'s and Jerry L. Korn's August 12, 2003, failure to obtain any veterinary care for a giraffe whose hooves were

[16]The $28,050 civil penalty which I assess For The Birds, Inc., represents the amount of the civil penalty that administrative officials recommended that I assess For The Birds, Inc., for its violations of the Regulations and Standards. The $20,597 civil penalty which I assess Jerry L. Korn represents 1 percent of the maximum civil penalty which I conclude could be assessed against Jerry L. Korn for his violations of the Regulations and Standards.

overgrown.

**Paragraphs 50b and 50e of the Complaint**

Complainant alleges that, on or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material,[17] in willful violation of section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)). (Compl. ¶¶ 50b, 50e.) Based on the limited record before me, it appears Complainant may have alleged the same violation twice. I give For The Birds, Inc., and Jerry L. Korn the benefit of my doubt and find only one violation of section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)) based upon For The Birds, Inc.'s and Jerry L. Korn's August 24, 2003, failure to remove excessive fecal material from the giraffe enclosure.

**The Number of For The Birds, Inc.'s and Jerry L. Korn's Violations**

A few of Complainant's allegations are framed so that I cannot determine the exact number of For The Bird, Inc.'s and Jerry L. Korn's violations. For example, Complainant alleges between May 2003 and August 16, 2003, For The Birds, Inc., and Jerry L. Korn *regularly* allowed customers to enter the primary enclosure containing two tigers without any distance or barriers between the animals and the public, in willful violation of section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]) (Compl. ¶ 39); Complainant alleges between March 2002 and February 2003, For The Birds, Inc., and Jerry L. Korn *repeatedly* failed to provide tigers with a sufficient quantity of wholesome, palatable food and *routinely* failed to feed tigers for 4 days in a row, in willful violation of section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129) (Compl. ¶

[17]Complainant uses the term "fecal material" in paragraph 50b of the Complaint and the word "excreta" in paragraph 50e of the Complaint.

48a); and, in some instances, Complainant's use of the words *approximately* and *between* makes the number of days during which a violation continued indeterminate (Compl. ¶¶ 13b, 13c, 13d, 13e, 44p).[18] In each instance, I have given For The Birds, Inc., and Jerry L. Korn the benefit of my doubt regarding the number of violations alleged and deemed to be admitted.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. For The Birds, Inc., and Jerry L. Korn, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

Paragraph 1 of this Order shall become effective on the day after service of this Order on For The Birds, Inc., and Jerry L. Korn.

2. Jerry L. Korn's Animal Welfare Act license (Animal Welfare Act license number 82-C-0035) is revoked.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Order on Jerry L. Korn.

3. For The Birds, Inc., is assessed a $28,050 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by,

[18]Each violation and each day during which a violation continues constitutes a separate offense (7 U.S.C. § 2149(b)).

Colleen A. Carroll within 60 days after service of this Order on For The Birds, Inc. For The Birds, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0033.

4. Jerry L. Korn is assessed a $20,597 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Jerry L. Korn. Jerry L. Korn shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0033.

## RIGHT TO JUDICIAL REVIEW

For The Birds, Inc., and Jerry L. Korn have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. For The Birds, Inc., and Jerry L. Korn must seek judicial review within 60 days after entry of this Order.[19] The date of entry of this Order is June 22, 2005.

---

**In re: MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL; AND DEBORAH ANN MILETTE, AN INDIVIDUAL.**
**AWA Docket No. 04-0023.**

[19] 7 U.S.C. § 2149(c).

**Decision and Order as to Deborah Ann Milette.**
**Filed June 29, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Effect of license revocation on respondent personally – Effect of license revocation on educational programs – Interstate movement – Lacey Act Amendments of 1981 – Cease and desist order – Civil penalty – License revocation.**

The Judicial Officer issued a decision in which he found Deborah Ann Milette (Respondent) violated regulations (9 C.F.R. §§ 2.40(a), (b)(1), .131(a)(1) (2004)) issued under the Animal Welfare Act. The Judicial Officer concluded Respondent failed to file a timely answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), was deemed to have admitted the allegations of the Complaint and waived opportunity for hearing. The Judicial Officer found Respondent's denial of the allegations of the Complaint in her appeal petition far too late to be considered. The Judicial Officer rejected Respondent's contention that interstate movement of an animal was a prerequisite to finding a violation of the Animal Welfare Act stating the Animal Welfare Act applies to activities that take place entirely in one state, as well as to those that involve traffic across state lines. The Judicial Officer also rejected Respondent's contention that a violation of the Lacey Act Amendments of 1981 is a prerequisite to finding a violation of the Animal Welfare Act. The Judicial Officer issued a cease and desist order against Respondent and assessed Respondent a $2,500 civil penalty.

Colleen A. Carroll, for Complainant.
Respondent Deborah Ann Milette, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and a service letter on February 18, 2005.[1] Respondent Deborah Ann Milette failed to file an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Respondent Deborah Ann Milette [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Respondent Deborah Ann Milette [hereinafter Proposed Default Decision]. On April 14, 2005, Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

On May 17, 2005, Respondent Deborah Ann Milette appealed the ALJ's Initial Decision to the Judicial Officer. On June 6, 2005, Complainant filed "Complainant's Response to Respondent Deborah Ann Milette's Appeal Petition." On June 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Deborah Ann Milette.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision as it relates to Respondent Deborah Ann Milette, except that I disagree with the ALJ's failure to conclude Respondent Deborah

[1]United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3953.

Ann Milette willfully violated section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)), as alleged in the Complaint, and the ALJ's revocation of Respondent Deborah Ann Milette's Animal Welfare Act license. Therefore, I adopt the ALJ's Initial Decision as it relates to Respondent Deborah Ann Milette as the final Decision and Order as to Deborah Ann Milette, with exceptions. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

**§ 2131. Congressional statement of policy**

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their

animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

**§ 2132. Definitions**

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

**§ 2149. Violations by licensees**

**(a) Temporary license suspension; notice and hearing; revocation**

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such

person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

**(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and

such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

**(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

**§ 2151. Rules and regulations**

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2149(a)-(c), 2151.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary

penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986

[26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

**PART 1—DEFINITION OF TERMS**

**§ 1.1 Definitions.**

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and

educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

## PART 2—REGULATIONS

. . . .

### SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

### § 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter[.]

**SUBPART I—MISCELLANEOUS**

. . . .

**§ 2.131 Handling of animals.**

(a)(1) 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. §§ 1.1; 2.40(a), (b)(1), .131(a)(1) (2004).

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

### Statement of the Case

Respondent Deborah Ann Milette failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondent Deborah Ann Milette are adopted as findings of fact. This Decision and Order as to Deborah Ann Milette is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. Respondent Deborah Ann Milette is an individual whose business mailing address is 30-8 Needle Park Circle, Queensbury, New York 12804. At all times material to this proceeding, Respondent Deborah Ann Milette was a licensed *exhibitor*, as that word is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 21-C-0218.

2. Respondent Deborah Ann Milette has a small business. The gravity of Respondent Deborah Ann Milette's violations of the Regulations is great. Respondent Deborah Ann Milette has no record of previous violations of the Animal Welfare Act, the Regulations, or the Standards.

3. On September 27, 2002, Respondent Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, provided a sedative solution, which was administered to a young tiger. (9 C.F.R. § 2.40(a) (2004).)

4. On September 27, 2002, Respondent Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Deborah Ann Milette failed to provide personnel capable of handling a tiger safely. (9 C.F.R. § 2.40(b)(1) (2004).)

5. On September 27, 2002, Respondent Deborah Ann Milette failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, administered or attempted to administer sedatives to a young tiger. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

## Conclusions of Law

1. On September 27, 2002, Respondent Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, provided a sedative solution, which was administered to a young tiger, in willful violation of section 2.40(a) of the Regulations

(9 C.F.R. § 2.40(a) (2004)).

2. On September 27, 2002, Respondent Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Deborah Ann Milette failed to provide personnel capable of handling tigers safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)).

3. On September 27, 2002, Respondent Deborah Ann Milette failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, administered or attempted to administer sedatives to a young tiger, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)])

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Deborah Ann Milette raises four issues in her appeal petition. First, Respondent Deborah Ann Milette denies the material allegations of the Complaint.

Respondent Deborah Ann Milette's denial of the allegations in the Complaint comes far too late to be considered. Respondent Deborah Ann Milette is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on February 18, 2005.[2] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

**§ 1.136 Answer.**

[2]See note 1.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the

answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent Deborah Ann Milette of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon the respondents, who shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 4.

Similarly, the Hearing Clerk informed Respondent Deborah Ann Milette in the August 20, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 20, 2004

Ms. Mary Jean Williams
Mr. John Bryan Williams
Route 1, Box 67
Ivanhoe, Texas 75447

Ms. Deborah Ann Milette
30-8 Needle Park Circle
Queensbury, New York 12804

Dear Sir/Madame:

Subject: In re: Mary Jean Williams, an individual; John B. Williams, an individual; and Deborah Ann Milette, an

individual, Respondents -
AWA Docket No. 04-0023

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may

hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent Deborah Ann Milette's answer was due no later than March 10, 2005. Respondent Deborah Ann Milette's first filing in this proceeding is dated April 9, 2005, and was filed April 14, 2005, 1 month 4 days after Respondent Deborah Ann Milette's answer was due. Respondent Deborah Ann Milette's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On March 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on April 14, 2005.

On April 28, 2005, the ALJ issued an Initial Decision: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[3] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[4]

---

[3]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[4]*See generally In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005) (holding the default decision was properly issued where the respondent filed his answer 1 month 15 days after his answer was due and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued

(continued...)

[4](...continued)
where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have
(continued...)

[4](...continued)
admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994)
(continued...)

Respondent Deborah Ann Milette's first filing in this proceeding was filed with the Hearing Clerk 1 month 4 days after Respondent Deborah Ann Milette's answer was due. Respondent Deborah Ann Milette's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly deemed Respondent Deborah Ann Milette to have admitted the allegations of the Complaint, except that the ALJ failed to conclude Respondent Deborah Ann Milette willfully violated section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)), as alleged in the Complaint.

Moreover, application of the default provisions of the Rules of

---

[4](...continued)
(holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Practice does not deprive Respondent Deborah Ann Milette of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[5]

Second, Respondent Deborah Ann Milette asserts her Animal Welfare Act license "keeps [her] going on a daily basis" and revocation of her Animal Welfare Act license is a "severe disservice" to her educational programs.

The effect of license revocation on Respondent Deborah Ann Milette's educational programs and on Respondent Deborah Ann Milette's ability to keep going on a daily basis are not relevant to my determination whether to revoke Respondent Deborah Ann Milette's Animal Welfare Act license. However, for the reasons discussed in this Decision and Order as to Deborah Ann Milette, *infra*, I do not revoke Respondent Deborah Ann Milette's Animal Welfare Act license.

A sanction by an administrative agency must be warranted in law and justified in fact.[6] The Secretary of Agriculture has authority to revoke

---

[5]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[6]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987);

(continued...)

the Animal Welfare Act license of any person who has violated the Animal Welfare Act, the Regulations, or the Standards.[7] Respondent Deborah Ann Milette violated sections 2.40(a), 2.40(b)(1), and 2.131(a)(1) of the Regulations (7 C.F.R. §§ 2.40(a), (b)(1), .131(a)(1) (2004)). Therefore, the ALJ's revocation of Respondent Deborah Ann Milette's Animal Welfare Act license is warranted in law. However, based on the limited record before me, I find revocation of Respondent Deborah Ann Milette's Animal Welfare Act license is not justified in fact; instead, I assess Respondent Deborah Ann Milette a civil penalty.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[8]

Respondent Deborah Ann Milette is deemed to have admitted she has a small business, the gravity of her violations of the Regulations is great, and she has no record of previous violations of the Animal

---

[6](...continued)
*Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[7]7 U.S.C. § 2149(a).

[8]7 U.S.C. § 2149(b).

Welfare Act, the Regulations, or the Standards.[9]

Respondent Deborah Ann Milette's three violations of the Regulations all occurred on the same date, September 27, 2002, and concern one animal. Based on the limited record before me, I find no ongoing pattern of violations establishing a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[10]

---

[9]Compl. ¶ 4.

[10]*In re Dennis Hill*, 63 Agric. Dec., slip op. at 74 (Oct. 8, 2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir.

(continued...)

Complainant seeks revocation of Respondent Deborah Ann Milette's Animal Welfare Act license and an order that Respondent Deborah Ann Milette cease and desist from violating the Animal Welfare Act and the Regulations (Complainant's Motion for Default Decision at 6). In support of his sanction recommendation, Complainant contends Respondent Deborah Ann Milette handled a tiger in a manner that allowed the tiger to escape in a restaurant parking lot, where the tiger represented a grave danger to the public (Complainant's Motion for Default at 6). While Complainant alleges an incident in which a tiger escaped in a restaurant parking lot, Complainant only alleges involvement by John Bryan Williams, Mary Jean Williams, and unnamed local authorities, as follows:

11. On September 28, 2002, respondents John Bryan Williams

---

[10](...continued)
2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packin*g *Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

> and Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, said respondents allowed a young tiger to exit its transport enclosure and escape in the parking lot of a restaurant, whereupon local authorities eventually shot and killed the animal, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(1).

Compl. ¶ 11.

Moreover, while Complainant alleges, and Respondent Deborah Ann Milette is deemed to have admitted, that the violations alleged in the Complaint resulted in the death of a young tiger (Compl. ¶ 4), only paragraph 11 of the Complaint, which does not implicate Respondent Deborah Ann Milette, specifically references the death of a young tiger. Therefore, I am uncertain whether Respondent Deborah Ann Milette is deemed to have admitted that *her* violations resulted in the death of a young tiger. I give Respondent Deborah Ann Milette the benefit of my doubt and decline to find that Respondent Deborah Ann Milette's violations resulted in the death of a young tiger.

I find Respondent Deborah Ann Milette committed three violations of the Regulations. Respondent Deborah Ann Milette could be assessed a maximum civil penalty of $2,750 for each of her violations of the Regulations.[11] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal

[11]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act, the Regulations, or the Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act, the Regulations, or the Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, Respondent Deborah Ann Milette could be assessed a maximum civil penalty of $8,250.

Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order and assessment of a $2,500 civil penalty against Respondent Deborah Ann Milette are appropriate and necessary to ensure Respondent Deborah Ann Milette's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent Deborah Ann Milette contends she did not violate the Animal Welfare Act or the Regulations because the tiger, which is the subject of the allegations in the Complaint, was not moved interstate.

I do not agree with Respondent Deborah Ann Milette's position that interstate movement of an animal is a necessary prerequisite for my finding a violation of the Animal Welfare Act or the Regulations. The Animal Welfare Act and the Regulations apply to activities that take place entirely within one state, as well as to those that involve traffic across state lines.[12]

Fourth, Respondent Deborah Ann Milette contends she did not violate the Regulations because she did not violate the "Lacy Act."

Respondent Deborah Ann Milette does not provide a citation to the "Lacy Act," and I cannot locate any federal statute referred to as the "Lacy Act"; however, I surmise Respondent Deborah Ann Milette's reference to the "Lacy Act" is a typographical error and Respondent Deborah Ann Milette intends to reference the Lacey Act Amendments of 1981. In any event, a violation of the Lacey Act Amendments of 1981 is not a necessary prerequisite for my finding a violation of the Animal Welfare Act or the Regulations.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondent Deborah Ann Milette, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

---

[12] 3 Off. Legal Counsel 326 (1979).

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Deborah Ann Milette.

2. Respondent Deborah Ann Milette is assessed a $2,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Deborah Ann Milette. Respondent Deborah Ann Milette shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

## RIGHT TO JUDICIAL REVIEW

Respondent Deborah Ann Milette has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Deborah Ann Milette must seek judicial review within 60 days after entry of this Order.[13] The date of entry of this Order is June 29, 2005.

———————

[13] 7 U.S.C. § 2149(c).

## HORSE PROTECTION ACT

## DEPARTMENTAL DECISIONS

**In re: TIM GRAY.**
**HPA Docket No. 01-D022 (formerly HPA Docket No. 01-A022, formerly HPA Docket No. 01-0022.**
**Decision and Order.**
**Filed March 1, 2005.**

**HPA – Soring.**

Frank Martin, Jr., for Complainant.
Ted W. Daniel, for Respondent.
*Decision and Order issued by Administrative Law Judge Jill S. Clifton*

## CONFIRMATION OF ORAL DECISION and ORDER

Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, is represented by Colleen A. Carroll, Esq. Respondent, Tim Gray, is representing himself.

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Tim Gray violated section 5(2)(B) of the Act by entering a horse named "JFK All Over" in a horse show while the horse was sore. Respondent Tim Gray timely filed an answer to the complaint, which, among other things, denied the horse was sore.

On March 7, 2005, I issued my Decision and Order as to Respondent Tim Gray **orally** at the close of the hearing, in accordance with 7 C.F.R. § 1.142(c)(1). The transcript may not be available to the Hearing Clerk or the parties for weeks, so I provide this documentation. This writing confirms my oral Decision and Order and instructs the Hearing Clerk to comply with 7 C.F.R. § 1.142 (c)(2): see attached Appendix 2.

Four witnesses testified and I now identify the exhibits that were

admitted into evidence. The four videotapes (CX10, CX11, CX12, and CX13) and CX2 are all located in Complainant's exhibit notebook marked HPA Docket No. 01-0022 and used for the first time in HPA Docket No. 01-B022. The remainer of the exhibits admitted in this case are located with this record file: CX3, CX4a, CX4b, CX4c, CX7 and CX20.

**Abbreviated Summary of Findings of Fact Announced Orally**

1. Respondent Tim Gray is an individual whose mailing address is 3125 Highway 231 North, Shelbyville, Tennessee 37160, and who is engaged in the business of training and showing Tennessee Walking Horses.

2. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

3. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

**Abbreviated Summary of Conclusions Announced Orally**

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent Tim Gray has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

3. The following order is authorized by the Act and warranted under the circumstances.

**Abbreviated Summary of Order Announced Orally**

1. Respondent Tim Gray is assessed a civil penalty of $2,200, which

shall be paid by May 6, 2005, by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

2. Respondent Tim Gray is disqualified for two years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.[1]

3. Respondent Tim Gray, his agents and employees, successors and assigns, directly or indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder.

My oral Decision and Order becomes final and effective without further proceedings on **Monday, April 11, 2005**, UNLESS an appeal to the Judicial Officer is filed with the Hearing Clerk by **Wednesday, April 6, 2005**, in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1).

Copies of this Confirmation shall be served by the Hearing Clerk upon the parties; Respondent's copy shall be sent by ordinary mail, and also by FAX to 931-684-0379, in addition to being served by certified mail. Further, the Hearing Clerk shall use the same means to serve the transcript excerpt when it is available.

* * *

## APPENDIX

**7 C.F.R.**:

**TITLE 7—-AGRICULTURE**

[1]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

**SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE**

**PART 1—-ADMINISTRATIVE REGULATIONS**

. . . .

**SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

**VARIOUS STATUTES**

. . .

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's

decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145.

* * *

## APPENDIX 2

**7 C.F.R.**:

**TITLE 7—-AGRICULTURE**

**SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE**

**PART 1—-ADMINISTRATIVE REGULATIONS**

. . . .

**SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

**VARIOUS STATUTES**

. . .

**§ 1.142(c) Judge's Decision**

(1) The Judge may, upon motion of any party or in his or her own discretion, issue a

decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in §1.147.

(4) The Judge's decision shall become final and effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to §1.145; *Provided*, *however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142 (c).

---

**In re: CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.**
**HPA Docket No. 03-0005.**
**Decision and Order.**
**Filed April 11, 2005.**

**HPA – Horse Protection Act – Default – Failure to file timely answer to amended complaint – Failure or refusal to permit inspection – Prohibited substances – Effective date of filing – Hearing Clerk's Office business hours – Civil penalty – Disqualification.**

The Judicial Officer reversed Administrative Law Judge Peter M. Davenport's denial of Complainant's motion for default decision. The Judicial Officer issued a decision in which he found Respondents failed and refused to permit the Secretary of Agriculture to inspect a horse and entered a horse in a horse show while the horse was wearing a prohibited substance in violation of the Horse Protection Act (15 U.S.C. § 1824(7), (9)) and the regulations issued under the Horse Protection Act (9 C.F.R. §§ 11.2(c), .4(b)). The Judicial Officer concluded Respondents filed a late answer to the Amended Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Amended Complaint and waived opportunity for hearing. The Judicial Officer found Respondents' objections to Complainant's motion for default decision timely filed; however, the Judicial Officer did not find Respondents' objections meritorious. The Judicial Officer found Respondents' decision to proceed pro se did not excuse Respondents from failing to file a timely answer to the Amended Complaint and found no basis for Respondents' mistaken belief that a timely answer to the Complaint operated as an answer to the Amended Complaint. The Judicial Officer assessed Respondents, jointly and severally, a $4,400 civil penalty and disqualified Respondents from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction for 2 years.

Bernadette R. Juarez, for Complainant.
Aubrey B. Harwell, III, Nashville, TN, for Respondents.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2003. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various

Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On May 9, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on August 25, 2001, Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], failed and refused to permit the Secretary of Agriculture to inspect a horse known as "Jose Jose," in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)); and (2) on August 25, 2001, Respondents entered Jose Jose, as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Jose Jose in the horse show while Jose Jose was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)) (Amended Compl. ¶¶ II(1)-(2)).

The Hearing Clerk served Respondents with the Amended Complaint and a service letter by certified mail no later than May 28, 2003,[1] and also served Respondents with the Amended Complaint and the service letter by regular mail on July 29, 2003.[2] Respondents failed to file an answer to the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On February 9, 2004, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Amended Complaint had not been filed within the time required in the Rules of Practice.[3]

On May 21, 2004, in accordance with section 1.139 of the Rules of

---

[1]Domestic Return Receipt for Article Number 7001 2510 0002 0111 5095.

[2]Memorandum to the File by Lolita Ellis, Assistant Hearing Clerk, dated July 29, 2003.

[3]Letter dated February 9, 2004, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondents.

Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc." [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc. Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4] On June 28, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, a motion to file an answer to the Amended Complaint,[5] and "Answer of Chad Way and Chad Way Stables, Inc. to Complainant's Amended Complaint" [hereinafter Answer to Amended Complaint].

On January 19, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) denying Complainant's Motion for Default Decision; (2) finding good cause for the late filing of Respondents' Answer to Amended Complaint; and (3) deeming Respondents' Answer to Amended Complaint timely filed (January 19, 2005, Order at 2-3).

On January 28, 2005, Complainant appealed the ALJ's January 19, 2005, Order to the Judicial Officer. On March 1, 2005, Respondents filed Respondents' Response to Complainant's Appeal Petition. On March 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's January 19, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Amended Complaint.

---

[4]Domestic Return Receipt for Article Number 7099 3400 0014 4581 6584.

[5]Respondents' Response and Objection to Complainant's Motion for Adoption of Proposed Decision and Order and Respondents' Motion to File Their Answer to Amended Complainant and Proceed on the Merits.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

### TITLE 15—COMMERCE AND TRADE

. . . .

### CHAPTER 44—PROTECTION OF HORSES

**§ 1821. Definitions**

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection,

use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

**§ 1823. Horse shows and exhibitions**

. . . .

**(e) Inspection by Secretary or duly appointed representative**

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

**§ 1824. Unlawful acts**

The following conduct is prohibited:

. . . .

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any

horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 1828 if this title prohibits to prevent the soring of horses.

. . . .

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

**§ 1825. Violations and penalties**

. . . .

**(b) Civil penalties; review and enforcement**

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy

of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if unsupported by substantial evidence.

. . . .

**(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

**§ 1828. Rules and regulations**

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1823(e), 1824(7), (9), 1825(b)(1)-(2), (c), 1828.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

## PART VI—PARTICULAR PROCEEDINGS

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days

after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*– . . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200.

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

. . . .

**PART 11—HORSE PROTECTION REGULATIONS**

. . . .

**§ 11.2 Prohibitions concerning exhibitors.**

. . . .

(c) *Substances*. All substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction, except lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof: *Provided*, That:

(1) The horse show, horse exhibition, or horse sale or auction management agrees to furnish all such lubricants and to maintain control over them when used at the horse show, horse exhibition, or horse sale or auction.

(2) Any such lubricants shall be applied only after the horse has been inspected by management or by a DQP and shall only be applied under the supervision of the horse show, horse exhibition, or horse sale or auction management.

(3) Horse show, horse exhibition, or horse sale or auction management makes such lubricants available to Department personnel for inspection and sampling as they deem necessary.

**§ 11.4 Inspection and detention of horses.**

For the purpose of effective enforcement of the Act:

. . . .

(b) When any APHIS representative notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or auction until such inspection has been completed and the horse has been released by an APHIS representative.

9 C.F.R. §§ 11.2(c), .4(b).

**DECISION**

## Statement of the Case

Respondents failed to file an answer to the Amended Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

## Findings of Fact

1. Respondent Chad Way is an individual whose mailing address is 728 Sir Winston Place, Franklin, Tennessee 37064.

2. Respondent Chad Way Stables, Inc., is a corporation whose business mailing address is 2692 Midland Road, Shelbyville, Tennessee 37160.

3. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse.

## Conclusions of Law

1. On August 25, 2001, Respondents failed and refused to permit the Secretary of Agriculture to inspect Jose Jose, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)).

2. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of

showing or exhibiting the horse in that show, while the horse was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)).

## COMPLAINANT'S APPEAL PETITION

Complainant raises two issues in Complainant's Appeal Petition. First, Complainant asserts Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were not timely filed; therefore, the ALJ erroneously considered Respondents' objections (Complainant's Appeal Pet. at 3-5).

On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[6] Respondents objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than June 28, 2004. Complainant concedes the Hearing Clerk received one faxed copy of Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision at 5:14 p.m., on June 28, 2004; however, Complainant argues the effective date of filing Respondents' objections is June 29, 2004, because the Hearing Clerk's Office is only open to receive documents until 4:30 p.m. and section 1.147(a) of the Rules of Practice (7 C.F.R. § 1.147(a)) requires that all documents required or authorized to be filed with the Hearing Clerk shall be filed in quadruplicate (Complainant's Appeal Pet. at 4).

Section 1.147(g) of the Rules of Practice provides that the effective date of filing a document is the date the document reaches the Hearing Clerk, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

[6]See note 4.

. . . .

(g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

The former Acting Chief Administrative Law Judge set the hours during which the Hearing Clerk's Office is open for the purpose of receiving documents, as follows:

January 28, 1999

TO: OALJ Staff

FROM: Edwin S. Bernstein
Acting Chief Administrative Law Judge

SUBJECT: New Hours of Operation

Effective February 1, 1999, the hours that the Hearing Clerk's Office will be open to receive documents will be 8:30 a.m. to 4:30 p.m., Monday through Friday, except for holidays.[7]

However, as Respondents correctly point out, the Rules of Practice do not set forth the hours during which the Hearing Clerk's Office is open to receive documents. Moreover, I find no indication in the record that the Hearing Clerk provided Respondents with the Acting Chief

[7]*See also In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 Fed. Appx. 941, 2003 WL 21147808 (6th Cir. May 15, 2003).

Administrative Law Judge's January 28, 1999, memorandum. Therefore, since Complainant concedes the Hearing Clerk received Respondents' objections on June 28, 2004,[8] and Respondents did not have notice of the hours during which the Hearing Clerk's Office was open to receive documents, I find the effective date of filing Respondents' objections is June 28, 2004, and I find Respondents' objections timely filed. Moreover, Respondents' failure to fax Respondents' objections in quadruplicate does not change the effective date of filing. Parties have long been allowed to establish the effective date of filing by faxing a single copy of a document to the Hearing Clerk's Office, which then must be followed by filing the original and appropriate number of copies of the document.

Second, Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I reverse the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision or vacate the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 5-12.)

The ALJ denied Complainant's Motion for Default Decision on the ground that decisions on the merits have traditionally been preferred over default procedures particularly when, as in the instant proceeding, a pro se respondent files a timely answer to the complaint and mistakenly believes the answer to the complaint operates as an answer to an amended complaint (January 19, 2005, Order at 2).

The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel. The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the

[8]Generally, the Hearing Clerk's time and date stamp establishes the time and date a document reaches the Hearing Clerk. Here, however, the parties agree that the Hearing Clerk received Respondents' objections at 5:14 p.m., on June 28, 2004, rather than at 9:04 a.m., June 29, 2004, as indicated by the Hearing Clerk's time and date stamp.

complaint and provides that failure to file a timely answer shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[9] Respondents' decision to proceed pro se does not excuse them from failing to file a timely answer to the Amended Complaint and is not a meritorious basis for denying Complainant's Motion for Default Decision.[10] Moreover, I find no basis for Respondents' mistaken belief that a timely answer to the Complaint operates as an answer to the Amended Complaint. The Amended Complaint, served on Respondents no later than May 28, 2003, informs Respondents of the consequences of failing to file a timely answer to the Amended Complaint, as follows:

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Amended Compl. at second unnumbered page.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the Amended Complaint, that they had 20 days in which to file a response to the Amended Complaint, as follows:

**CERTIFIED RECEIPT REQUESTED**

---

[9]7 C.F.R. §§ 1.136(a), (c), .139.

[10]*See In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

May 13, 2003

Aubrey B. Harwell, Jr., Esq.
Neal & Harwell, PLC
2000 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Chad Way
Chad Way Stables, Inc.
2692 Midland Road
Shelbyville,Tennessee 37160

Dear Gentlemen:

Subject: In re: Chad Way, Chad Way Stables, Inc., William B. Johnson and Sandra Johnson; Respondents - HPA Docket No. 03-0005

*Amended Complaint* was received and filed with this office on May 9, 2003 in the above-entitled proceeding.

In accordance with the applicable Rules of Practice, Respondents will have 20 days from receipt of this letter in which to file a response with this office.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On February 9, 2004, the Hearing Clerk informed Respondents that their answer to the Amended Complaint had not been received within the allotted time, as follows:

February 9, 2004

Chad Way

Chad Way Stables
2692 Midland Road
Shelbyville, Tennessee 37160

Dear Mr. Way:

Subject: In re: Chad Way and Chad Way Stables; Respondents - HPA Docket No. 03-0005

A copy of the *Amended Complaint* was mailed to you via certified return receipt on May 13, 2003, which was signed for by Brooke Way, and resent through regular mail on July 29, 2003. You have failed to file an Answer to the *Amended Complaint* within the time prescribed in accordance with Section 1.136 of the Rules of Practice.

You will be informed of any future action taken in this matter.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondents failed to respond to the Hearing Clerk's February 9, 2004, letter.

Respondents' answer to the Amended Complaint was due no later than June 17, 2003. Respondents filed a response to the Amended Complaint on June 28, 2004, 1 year 11 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed an admission of the allegations of the Amended Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Amended Complaint. Respondents' mistaken belief that their timely answer to the Complaint operated as an answer to the Amended Complaint is not a meritorious basis upon which

to deny Complainant's Motion for Default Decision.[11]

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondents are jointly and severally assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents' payment of the civil penalty shall be forwarded to, and received by, Ms. Juarez within 60 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 03-0005.

2. Respondents are each disqualified for 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors;

[11] *In re Dennis Hill*, 63 Agric. Dec. 91, 147 (2004) (finding the respondent's answer to the complaint is not an answer to the amended complaint); *In re Erica Nicole Mashburn*, 63 Agric. Dec. 254, 257-58 (2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn) (stating the respondent's timely answer to the complaint does not operate as an answer to the amended complaint).

(3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. This disqualification shall continue until the civil penalty assessed in paragraph 1 of this Order and any costs associated with collecting the civil penalty are paid in full.

The disqualification of Respondents shall become effective on the 60th day after service of this Order on Respondents.

## RIGHT TO JUDICIAL REVIEW

Respondents have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondents must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[12] The date of this Order is April 11, 2005.

---

**In re: SAND CREEK FARMS, INC.**
**HPA Docket No. 01-C022 formerly HPA Docket No. 01-A022; formerly HPA Docket No. 01-0022.**
**Decision and Order Upon Admission of Facts.**
**Filed April 11, 2005.**

**HPA – Showing, included in bundle of activities of "Entering"is.**

Colleen Carroll, for Complainant.
John Norton, III, for Respondent.
*Decision and Order issued by Administrative Law Judge, Jill S. Clifton.*

## DECISION

[1] Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), is

[12] 15 U.S.C. § 1825(b)(2), (c).

represented by Colleen A. Carroll, Esq. Respondent, Sand Creek Farms, Inc., is represented by John H. Norton, III, Esq.

[2] This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Sand Creek Farms, Inc. violated section 5(2)(***B***) of the Act by ***entering*** a horse named "JFK All Over" in a horse show while the horse was sore.

[3] Respondent Sand Creek Farms, Inc. timely filed an answer to the complaint, and thereafter was permitted to file an amended answer to the complaint, on February 2 and 6, 2004 (First Amended Answer), which, among other things, denied ***showing*** the horse while he was sore, as prohibited by section 5(2)(***A***) of the Act.

[4] *See* HPA Docket No. 01-0022 and HPA Docket No. 01-A022, by which this case was formerly known, and which contain the majority of the case file.

[5] I have carefully considered APHIS's Motion filed March 3, 2005, requesting the issuance of a Decision and Order Upon Admission of Facts; Respondent's response filed March 23, 2005; and Complainant's Opposition to Respondent's Motion to File Second Amended Answer, filed April 4, 2005. Earlier, I ruled that it would be futile to allow Sand Creek Farms, Inc. to file its proposed Second Amended Answer. The proposed Second Amended Answer still failed to deny adequately the allegation that Sand Creek Farms, Inc. ***entered*** the horse while he was sore.

[6] I conclude that the First Amended Answer fails to deny the material allegations of the complaint, specifically, that Sand Creek Farms, Inc. entered the horse while he was sore. The First Amended Answer denies a statutory section that is not alleged, the section that prohibits "showing" rather than the section that prohibits "entering".

[7] Consequently, I issue this Decision and Order Upon Admission of Facts, in accordance with the Rules of Practice. *See* 7 C.F.R. § 1.130 *et seq.*; especially 7 C.F.R. § 1.136 and 7 C.F.R. § 1.139.

## Findings of Fact

[8] Respondent Sand Creek Farms, Inc. is a Tennessee corporation with a mailing address of 3125 Highway 231 North, Shelbyville, Tennessee 37160, which was, at all times material to this Decision, engaged in the business of breeding, boarding, training and showing Tennessee Walking Horses.

[9] On or about May 27, 2000, Respondent Sand Creek Farms, Inc. entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

[10] On or about May 27, 2000, Respondent Sand Creek Farms, Inc. entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

## Conclusions

[11] The Secretary of Agriculture has jurisdiction in this matter.

[12] Respondent Sand Creek Farms, Inc. has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

[13] The following order is authorized by the Act and warranted under the circumstances.

## Order

[14] Respondent Sand Creek Farms, Inc. is assessed a civil penalty of ***$2,200***, which shall be paid by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

[15] Such check shall be marked with HPA Docket No. 01-C022 and forwarded to counsel for APHIS as follows:

Colleen A. Carroll, Esq.
Office of the General Counsel
United States Department of Agriculture

South Building, Mail Stop 1417
1400 Independence Avenue SW
Washington DC 20250-1417

[16] Respondent Sand Creek Farms, Inc. is ***disqualified for two years*** from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. [1]

[17] Respondent Sand Creek Farms, Inc., its agents and employees, successors and assigns, directly or indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder.

[18] This Decision and Order shall have the same force and effect as if entered after a full hearing. The Decision shall be final 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, see attached Appendix A). The Order shall be effective on the first day after the Decision becomes final.

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

* *

## APPENDIX A

**7 C.F.R.**:

**TITLE 7—-AGRICULTURE**

[1]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

**SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE**

**PART 1—-ADMINISTRATIVE REGULATIONS**

. . . .

**SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

**VARIOUS STATUTES**

. . .

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the

record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may

be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145.

---

**In re: MIKE TURNER AND SUSIE HARMON.**
**HPA Docket No. 01-0023.**
**Decision and Order.**
**Filed June 2, 2005.**

**HPA – Evidence, No present recollection as – Evidence, affidavit as – Evidence, usual and customary practice as.**

Brian Hill, for Complainant.
Brenda S. Bramlett, for Respondent.
*Decision and Order issued by Administrative Law Judge Peter M. Davenport.*

## Preliminary Statement

This is a disciplinary proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.)* (the "Act"). This action was instituted by a complaint filed by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture ("APHIS") charging Respondent Mike Turner, the trainer, with entering a horse for the purpose of showing or exhibiting while it was sore at the May 26, 2000 Annual Spring Fun Show at Shelbyville, Tennessee. The complaint also charges Respondent Susie Harmon with entering and allowing the horse to be entered at the same show for the purpose of showing or exhibiting it while it was sore.

The Respondents filed answers denying the material allegations of the complaint. An oral hearing was held on March 29, 2005 in Shelbyville, Tennessee. The Complainant was represented by Robert A. Ertman, Esq., Office of General Counsel, United States Department of Agriculture, Washington, DC and the Respondents were represented by Brenda S. Bramlett, Esq., Bramlett & White, Shelbyville, Tennessee.

Upon consideration of the evidence of record and the proposed findings, conclusions and the brief filed by the Complainant,[1] I conclude that the Complainant failed to prove that either of the Respondents violated the Act and that the Complaint should therefore be dismissed.

Any proposed finding or conclusion not included as part of those that follow are rejected as not in accordance with the credible, relevant, and material evidence of record.

## Findings of Fact

[1] The transcript was filed with the Hearing Clerk on April 21, 2005. As announced at the hearing, briefs were to be submitted within 30 days of the filing of the transcript. (TR p. 101-103) The Complainant's proposed findings, conclusions and brief were filed on May 23, 2005. On May 26, 2005, the Respondents' counsel sought a 30 day extension, indicating that she had just received her copy of the transcript on May 25, 2005. No explanation was given as to whether she had inquired as to whether the transcript had been filed prior to that time; however, given the separate extensions granted in filing answers for each of the Respondents, the continuance of the hearing set for September 28, 2004, her tardiness in appearing for the hearing (TR p. 4-5), further delay in issuing a decision appeared unwarranted.

1. Respondent Mike Turner is an individual whose mailing address is 2225 Liberty Valley Road, Lewisburg, Tennessee 37091.

2. Respondent Susie Harmon, whose full name is Molly Sue Harmon (TR p. 60),[2] is an individual whose mailing address is 42 Riverside, Fort Thompson, South Dakota 57339.

3. At all times relevant to this proceeding, Mike Turner was the trainer of the horse known as "The Ultra Doc". (TR p. 54). Mike Turner determined that "The Ultra Doc" would be entered in the Annual Spring Fun Show held at Shelbyville, Tennessee on May 26, 2000, and entered the horse by completing the entry form, paying the entry fee and transporting the horse to the show grounds. *Id.*

4. At all times relevant to these proceedings, Susie Harmon was the owner of "The Ultra Doc" and acquiesced in the decision to enter the horse in the May 26, 2000 show. (Answer of Susie Harmon, ¶D; TR p. 61, 69).

5. Respondent Mike Turner presented "The Ultra Doc" for pre-show inspection in Class No. 21 at the 30th Annual Spring Fun Show at Shelbyville, Tennessee on May 26, 2000 where the horse was inspected first by Charles Thomas, a "Designated Qualified Person" ("DQP") and then by two USDA Veterinary Medical Officers ("VMOs") John Michael Guedron, DVM and Clement A. Dussault, VMD. (TR p. 15-21, 22-24, 50-52, 94-96; Government Ex. 12, 14).

6. The DQP, Charles Thomas, first visually inspected, and then performed a physical examination of the horse by palpation, noting the horse's reaction to the procedure. Based upon the reactions to his palpation of the horse,[3] he excused the horse from competition, finding no problem with locomotion (evidenced by a rating of 1), but gave "The Ultra Doc" ratings of 2 (defined as "suspect, but meeting minimum standards") in the categories of physical examination and appearance.

---

[2] References to the Transcript will be abbreviated as TR.

[3] The video tapes reflect that after conducting his initial inspection, Mr. Thomas examined the horse a second time.

(Government Exhibit 6; TR p. 94-96[4]). Using his ratings, the total rating of 5 precluded competition for the day, but failed to rise to the level of an Act violation. (Government Ex. 5). [5]

7. John Michael Guedron, DVM and Clement A. Dussault, VMD, veterinarians employed by the USDA were assigned to the show for evaluating the performance of the DQP and examining horses to enforce the Act. Both veterinarians separately inspected "The Ultra Doc" after the inspection performed by the DQP and checked the box indicating that the horse was sore as defined by the Act.[6] As the "secondary" veterinarian, Dr. Dussault did not complete the government form designated as APHIS Form 7077 (Government Ex. 2), but merely added his signature to the form after it had been completed by others[7] and that evening at his motel executed an affidavit prepared by Michael Nottingham (Government Ex. 10)[8]. Although Dr. Dussault acknowledged signing the APHIS Form 7077 and his affidavit, at the time of the hearing, in response to repeated questions, he stated he had

---

[4] The ratings are found in the National Horse Show Commission Official Rule Book. (RX 2 at page 118).

[5] The ratings and the DQP Ticket and NHSC DQP Examination Form were discussed in some detail in Lonnie Messick's testimony. (TR. p. 73-78). Mr. Messick is the Executive Vice President of the National Show Horse Commission and has responsibility for the daily operation of the organization as well as the assignment and training of DQPs.

[6] Apparently this portion of the form was completed by Dr. Guedron as Dr. Dussault testified that he only signed his name to the form.(TR p.40).

[7] Dr. Dussault's testimony at the hearing was unequivocal on this point:

Q What portion of this form did you actually complete?

A. I did not complete, except for my signature....(TR. p.40)

[8] Dr. Dussault's affidavit, while more informative than his testimony at the hearing is problematic in that it characterizes the reaction to his palpation as being "mild" on the left foot. This is consistent with the examination of Charles Thomas, the DQP who while noting the reaction did not feel that it rose to the level of a Horse Protection Act violation.

no present recollection of the events on the date in question. [9]

8. The APHIS Form 7077 (Government Ex. 2) submitted in connection with this case has significant omissions and errors which are inconsistent with actual facts, including characterizing the horse as a gelding rather than a stallion and misstating the owner of the horse as being John Harmon rather than Susie Harmon, the individual against whom the complaint was brought.

## Conclusion

**Complainant failed to prove that "the Ultra Doc" was sore when entered at the May 26, 2000 Spring Fun Show in Shelbyville, Tennessee.**

The evidence in this case against the Respondents is based upon two video tapes of the inspection of the horse at the show, the affidavit of one of the two USDA veterinarians attending the show and the APHIS violation form which was signed by, but not prepared by the veterinarian.[10] The veterinarian testified that he has no present recollection of the events that took place on the day of the show. The threshold question is thus whether this evidence supports a prima facie case under the Act and the Administrative Procedures Act, 5 U.S.C. §556(d).

The APHIS violation form as completed lacks probative force. The

---

[9] Dr. Dussault denied having any present recollection of his inspection of the horse in question on May 26, 2000 (TR. p.38), indicated that he did not complete any portion of the APHIS Form 7077 except to sign it (TR. p.40), did not remember when the form was completed (TR. p.41) and limited his testimony to what his affidavit stated as he didn't have any present day recollection of the show even after reviewing the tapes which were admitted as evidence. (TR. p. 44) He went on to state that it was his practice to destroy any notes that he had made once his affidavit was prepared. (TR. p. 45-47)

[10] In addition to Dr. Dussault's testimony, Government Exhibits 2, 5,6, 7, 10, 12 and 14 were admitted into evidence. Significantly, there was no testimony from the primary veterinarian who had left USDA employment and is now private veterinary practice or from the investigator who prepared the affidavits and presumably assembled the other exhibits which were not admitted.

veterinarian who testified at the hearing indicated that he did not complete the form, but merely added his signature to what had been prepared by others. Given the errors which appear in the preparation of the form, it is evidence more of sloppiness and inaccuracy than it is of any violation. Compounding the problems with the APHIS Form 7077 is the affidavit of Dr. Dussault which recounts only a "mild" response to palpation on the left side. 15 U.S.C. § 1825(d)(5) requires the manifestation of "abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs"[11] to trigger a presumption of soreness.

Charles Thomas, the DQP[12] who examined the horse not once, but twice, testified that he observed no difficulty with the horse's locomotion, an observation confirmed by the viewing of the two video tapes that were shown at the hearing, but noted reaction upon palpation, with the left side being "lighter" than on the right. (TR p. 94-96) The DQP's opinion that the horse was "suspect, but met minimum standards" excused the horse from showing, but did not result in the DQP's receiving a letter of warning for any deficiency in the performance of his duties despite the presence of USDA officials at the show whose duties included evaluating his performance[13]. The DQP's testimony was forthright and credible, his notes were more detailed than those of the USDA veterinarians and his findings were consistent with all but the conclusion found in Dr. Dussault's affidavit.

While Dr. Dussault's affidavit and the APHIS Form 7077 might establish a prima facie case of a violation, it is not conclusive or binding upon the trier of fact as to the ultimate issue of whether the horse was

---

[11] In his testimony, Dr. Dussault noted that the responses were mild on the left side and noted that his examination was the fourth time that the horse had been subjected to being palpated. (TR p.23)

[12] Mr. Thomas testified that he had been a DQP since 1983 and has been around horses all his life and has inspected over 100,000 horses. Significantly, in all of his tenure as a DQP, he has never received a letter of warning from USDA concerning his work as a DQP. (TR p.90-91)

[13] Dr. Dussault testified that his duties at the show were to monitor the performance of the DQPs as well as to examine horses. (TR. p.12)

"sore" and in violation of the Act. *Elliott v. Administrator,* 990 F.2d 140, 145-146 (4th Cir. 1993). While probative, such evidence is well recognized to be subjective and must be considered along with all of the other relevant and material evidence presented at the hearing. *Fleming v. USDA,* 713 F.2d 179, 186 (6th Cir. 1983) Given the serious nature of civil proceedings under the Horse Protection Act, due process precludes the presumption of section 1825(d)(5) from shifting the burden of persuasion to the Respondents. *Landrum v. Block,* 40 Agric. Dec. 922 (1981) The burden of persuasion that the horse was artificially sored remains with the Secretary throughout the administrative process. *Id.*

In order to accept the opinion of Dr. Dussault that the horse was "sore" within the meaning of the Act as is recited in his affidavit, I must totally discount the opinion and findings of a highly qualified and experienced DQP with a lengthy tenure, whose memory of his examination was far superior to that of the VMO testifying at the hearing, who has undergone the same USDA sponsored training relating to the Act and who was not called to task for failing to perform his duties satisfactorily at this particular show or any other show as of the date of the hearing in this case.

Complainant seeks to bolster the affidavit and violation form by introducing testimony of their usual examination and documentation practices. In this case, given lack of recollection of facts on the part of the USDA veterinarian, such general testimony about "usual procedures" is not a sufficient basis for making a determination as to what occurred in this case. As was suggested in *In re William Jackson, et al.,* 57 Agric. Dec. 1145 (1992), it would be fundamentally unfair to allow the complainant to create a case from the general testimony of one of the very individuals whose entries (or absence of them) cast doubt upon the reliability of the documents being used to seek sanctions in this case.

As I conclude that the complainant has failed to offer sufficient proof to support a violation of the Act, it is unnecessary to decide whether the Respondent Susie Harmon's oral and written instructions to her trainer together with the other precautionary actions taken by her, including the periodic unannounced visits by a number of different veterinarians would insulate her from liability consistent with the holding of *Baird v.*

*USDA,* 39 F. 3d 131 (6th Cir. 1994).

For the above reasons, the following Order is entered.

## Order

The Complaint is dismissed as to all respondents with prejudice.

---

**In re: JACKIE McCONNELL, AN INDIVIDUAL; CYNTHIA McCONNELL, AN INDIVIDUAL; AND WHITTER STABLES, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.**
**HPA Docket No. 99-0034.**
**Decision and Order.**
**Filed June 23, 2005.**

**HPA – Horse protection – Sore – Entry – Shipping – Selective prosecution – Malicious prosecution – Civil penalty – Disqualification.**

The Judicial Officer concluded Cynthia McConnell shipped a horse to a horse show with reason to believe that the horse may be shown or exhibited while sore, in violation of 15 U.S.C. § 1824(1) and Jackie McConnell and Cynthia McConnell entered a horse in a horse show while the horse was sore, in violation 15 U.S.C. § 1824(2)(B). The Judicial Officer rejected Respondents' contentions that they were the subjects of selective prosecution and malicious prosecution. The Judicial Officer rejected Cynthia McConnell's contention that Complainant could not institute a Horse Protection Act proceeding against her for her violations because she previously paid a fine and completed a suspension imposed by a Horse Industry Organization for the same violations. The Judicial Officer rejected Jackie McConnell's contention that the Secretary of Agriculture's past practice has been to forgo enforcement of the Horse Protection Act against persons who are merely custodians of horses and merely present those horses for pre-show inspections. The Judicial Officer assessed Jackie McConnell a $2,200 civil penalty, disqualified Jackie McConnell for 5 years, assessed Cynthia McConnell a $4,400 civil penalty, and disqualified Cynthia McConnell for 2 years.

Colleen A. Carroll, for Complainant.
Mike R. Wall, Oxford, Mississippi, for Respondents.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 7, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about August 26, 1998, Jackie McConnell, Cynthia McConnell, and Whitter Stables [hereinafter Respondents] shipped a horse known as "Regal By Generator" to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse, while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); and (2) on or about September 3, 1998, Respondents entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶¶ 11-12).[1]

On October 4, 1999, Cynthia McConnell and Whitter Stables filed

---

[1]Complainant also alleged Raymond F. Akin, Lillie Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services violated the Horse Protection Act (Compl. ¶ 13). Four of these respondents, Raymond F. Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services, entered into consent decisions with Complainant. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000); *In re Jackie McConnell* (Consent Decision as to Mark A. Akin, Camille C. Akin, and Akin Equine Veterinary Services), 59 Agric. Dec. 832 (2000). Further, Lillie Akin was dismissed as a respondent. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000). On May 12, 2003, Administrative Law Judge Jill S. Clifton amended the case caption to omit references to the "Akin" respondents (Order Amending Case Caption).

"Motion to Stay and Answer of Cynthia McConnell" and Jackie McConnell filed "Motion to Stay and Answer of Jackie McConnell" in which Respondents denied the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker presided at a hearing in Memphis, Tennessee, on August 8, 2000, through August 10, 2000, and March 12, 2002, through March 15, 2002. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Lee Ann Rickard of Steen, Reynolds & Dalehite, Jackson, Mississippi, represented Jackie McConnell. Mike R. Wall, Oxford, Mississippi, represented Cynthia McConnell and Whitter Stables.[2]

On July 22, 2002, Complainant filed three separate proposed findings of fact and proposed conclusions of law, one for each of the three Respondents.[3] On October 17, 2002, Jackie McConnell filed proposed findings of fact and conclusions of law. On October 25, 2002, Cynthia McConnell and Whitter Stables filed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On December 19, 2002, Jackie McConnell filed "Respondent Jackie McConnell's Response to Complainant's Proposed Findings of Fact and Conclusions of Law," and Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Jackie McConnell." On December 24, 2002, Cynthia McConnell and Whitter Stables filed "Respondent's [sic] Cynthia McConnell and Whitter Stables Reply Brief." On January 8, 2003,

---

[2]On February 10, 2004, Lee Ann Rickard withdrew as counsel for Jackie McConnell and Mike R. Wall was substituted as counsel for Jackie McConnell (Notice of Withdrawal and Substitution of Counsel for Respondent Jackie McConnell).

[3]"Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Jackie McConnell"; "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Cynthia McConnell"; and "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Whitter Stables."

Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Cynthia McConnell" and "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Whitter Stables."

On November 25, 2003, Administrative Law Judge Jill S. Clifton[4] [hereinafter the ALJ] issued a "Decision" [hereinafter Initial Decision]: (1) concluding that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) concluding that, on or about August 23, 1998, through August 26, 1998, Cynthia McConnell and Whitter Stables shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); (3) concluding that, on or about September 2, 1998, through September 3, 1998, Cynthia McConnell and Whitter Stables entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (4) assessing Jackie McConnell a $2,200 civil penalty; (5) assessing Cynthia McConnell and Whitter Stables a $2,200 civil penalty; (6) disqualifying Jackie McConnell from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 5 years; and (7) disqualifying Cynthia McConnell and Whitter Stables from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision at

[4]Administrative Law Judge Dorothea A. Baker retired from federal service, and former Chief Administrative Law Judge James W. Hunt assigned the proceeding to Administrative Law Judge Jill S. Clifton effective January 9, 2003, for a decision (Notice of Case Reassignment).

39-41).

On December 19, 2003, Complainant appealed to the Judicial Officer. On December 24, 2003, Respondents appealed to, and requested oral argument before, the Judicial Officer. On January 22, 2004, Complainant filed responses to Respondents' appeal petitions. On January 30, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondents' request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused, because Respondents and Complainant have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision, except that I find Whitter Stables is merely a name under which Cynthia McConnell does business and that I increase the sanction imposed against Cynthia McConnell. Therefore, except for the ALJ's findings, conclusions, and sanction regarding Whitter Stables, the sanction imposed on Cynthia McConnell, and minor modifications, I adopt the Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." Transcript references are designated by "Tr. I" for the August 2000 segment of the hearing and "Tr. II" for the March 2002 segment of the hearing.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

### TITLE 15—COMMERCE AND TRADE

. . . .

## CHAPTER 44—PROTECTION OF HORSES

### § 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

### § 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

**§ 1824. Unlawful acts**

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, horse sale, or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or the employee's employment unless the carrier or employee has reason to believe that such horse is sore.

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

**§ 1825. Violations and penalties**

. . . .

**(b) Civil penalties; review and enforcement**

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

**(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any fine, imprisonment, or civil penalty

authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

**(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

**§ 1828. Rules and regulations**

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1824(1)-(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

. . . .

**PART VI—PARTICULAR PROCEEDINGS**

. . . .

**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and

regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an

administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than

$100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

28 U.S.C. § 2461 note.

7 C.F.R.:

## TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

## PART 3—DEBT MANAGEMENT

. . . .

**Subpart E—Adjusted Civil Monetary Penalties**

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*– . . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE**

**SUBCHAPTER A—ANIMAL WELFARE**

. . . .

**PART 11—HORSE PROTECTION REGULATIONS**

**§ 11.1 Definitions.**

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

*Exhibitor* means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

. . . .

*Horse Exhibition* means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

. . . .

*Horse Industry Organization or Association* means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the

horse.

. . . .

*Horse Show* means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

*Inspection* means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

. . . .

*Person* means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.

. . . .

*Sore* when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse,

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) Any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(4) Any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic

> treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

9 C.F.R. § 11.1.

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

### Statement of the Case

Jackie McConnell and Cynthia McConnell are husband and wife, whose mailing address is 125 Valleywood, Collierville, Tennessee 38017. During all times relevant to this proceeding, Jackie McConnell and Cynthia McConnell held valid horse trainers' licenses. Cynthia McConnell is the owner of an unincorporated business known as "Whitter Stables" which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. Whitter Stables is a horse training facility for the care and training of Tennessee Walking Horses. Jackie McConnell and his business, Jackie McConnell Stables, buy and sell horses (Tr. II at 728-29). At the time of the alleged violations, Jackie McConnell Stables and Whitter Stables were situated on the same real estate.

Sanctions have been imposed on Jackie McConnell under the Horse Protection Act on three occasions: as the result of two consent decisions, where Jackie McConnell did not admit to violating the Horse Protection Act, a civil monetary penalty twice and a 6-month period of disqualification twice; and, in a case heard on the merits, a $2,000 civil penalty and a 2-year period of disqualification (CX 17).[5]

---

[5] *In re Jackie McConnell*, 52 Agric. Dec. 1156 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re Rose Day* (Consent Decision as to Jackie McConnell), 47 Agric Dec. 1756 (1988); *In re Jackie McConnell*, 44 Agric. Dec. 712 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (continued...)

Whitter Stables employed several professional trainers, including Jackie McConnell, to train horses under its care (Tr. II at 419-22). In 1998, Whitter Stables boarded and trained a horse known as "Regal By Generator." The horse is female and was 9 years old at the time of the alleged violations (CX 9). The owners of Regal By Generator wanted to have her entered in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (CX 10).

Cynthia McConnell engaged an independent contractor on August 23, 1998, to transport horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration, and on or about September 2, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 in the 1998 Tennessee Walking Horse National Celebration (Tr. I at 284; Tr. II at 124-25, 130, 180; CX 4, CX 7). In addition to the evidence presented by Complainant, Cynthia McConnell testified that she personally participated in the act of entering Regal By Generator in the 1998 Tennessee Walking Horse National Celebration (Tr. II at 141-42).

Cynthia McConnell testified that her business, Whitter Stables, was a sole proprietorship and that her husband, Jackie McConnell, was merely a salaried employee of Whitter Stables and had no business interest in Whitter Stables (Tr. II at 113, 115-16, 125, 138-39). Cynthia McConnell testified about her interest in Whitter Stables and Jackie McConnell's relationship to Whitter Stables, as follows:

> BY MR. WALL:
>
> Q. Before we proceed on with any other documents, let me ask some questions about Whitter Stables.
>
> [BY MS. McCONNELL:]
>
> A. Yes, sir.

---

[5](...continued)
(1992).

Q. It was formed in 1994?

A. Yes, sir.

Q. Why did you form Whitter Stables at that time?

A. Jackie was going on suspension and I decided to go in and take over the business and run it myself.

Q. How long have you been in the walking horse business?

A. Probably 31 or 32 years.

Q. All right. So in 1994 it would have been 23 or 24 years you had been in the business in some form or fashion?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When you opened up Whitter Stables, did you in fact take over the business?

A. Yes, sir.

Q. Have you maintained that business to this day?

A. Yes, sir.

. . . .

Q. What's entailed in running Whitter Stables? What are your job responsibilities just for running Whitter Stables?

A. Well, we take care of Tennessee walking horses for show, but when a horse is brought to me, I am solely responsible for the shoeing, the bedding, the feeding, the grooming, the employees. Anything that has to be done with them, I do it.

Q. You being Cyndi McConnell?

A. Cyndi McConnell.

Q. Do you have employees that work for you?

A. Yes, sir.

Q. Do you have trainers that work for you?

A. Yes, sir.

Q. There's been a document – I don't know that the deed was introduced into evidence where you and Jackie purchased some land in Fayette County.

A. Yes, sir.

Q. Who is paying that bill?

A. I am.

Q. And what account do you use to pay that bill?

A. Whitter Stables.

Q. And once again, does Jackie McConnell have any interest at all in Whitter Stables?

A. No, sir.

. . . .

Q. How is Jackie McConnell compensated by Whitter Stables?

A. I pay him.

Q. Do you pay him a commission, do you pay him a monthly salary, how do you pay him?

A. I pay him a monthly salary.

Q. All right. Are you all in any type of partnership?

A. It's Whitter Stables. I'm the sole proprietor.

Q. Other than Whitter Stables, are you and Jackie in a partnership?

A. No, sir.

Q. Okay. Did Jackie McConnell have anything to do with hauling Regal by Generator to the 1998 Celebration?

A. No, sir.

. . . .

Q. What activities did Jackie McConnell have to do with getting Regal by Generator from Fayette County, Tennessee to the celebration?

A. He didn't.

Q. What activities or responsibilities did Jackie McConnell

have in getting Regal by Generator eligible to show at the celebration?

A. He didn't.

Tr. II at 135-40.

Complainant offered evidence in an attempt to show that Whitter Stables was not a sole proprietorship but was, in fact, a general partnership between Cynthia McConnell and Jackie McConnell. Specifically, Complainant offered: (1) the affidavit of Camille C. Akin tending to show that people who do business with Whitter Stables had a belief that Jackie McConnell was part owner of Whitter Stables (CX 10); (2) a paid advertisement in a horse show magazine showing Sarah Akin riding Regal By Generator which also indicated that Jackie McConnell was a "manager" at Whitter Stables (CX 11); (3) a paid advertisement in a horse show magazine indicating that Jackie McConnell was getting the major credit for work done by Whitter Stables (CX 28); (4) an article from a horse show magazine which mentioned "Jackie McConnell's Whitter Stables" tending to show that Jackie McConnell was believed by the horse show industry to be more than just an employee (CX 29); (5) a recorded warranty deed from Fayette County, Tennessee, dated December 28, 1989, showing the land occupied by Whitter Stables was titled in joint ownership by Jackie McConnell and Cynthia McConnell; and (6) a copy of a Fayette County, Tennessee, real property tax receipt dated November 20, 1998, for the same property tending to show that the tax was paid by check by Jackie McConnell (CX 1).

Animal and Plant Health Inspection Service [hereinafter APHIS] investigator James Odle tried to recall at the hearing the basis for his opinion that Jackie McConnell "owned" Whitter Stables (Tr. I at 450-54, 560-61). Complainant contends, during the time of the alleged violations of the Horse Protection Act, Jackie McConnell had an ownership stake (a general partnership interest) in Whitter Stables because Whitter Stables occupied the same real estate, used the same physical facilities, had some of the same clients, and employed some of the same employees as Jackie McConnell Stables (Tr. II at 415-17,

437-39). James Odle stated he "knew" Whitter Stables was owned by both Jackie McConnell and Cynthia McConnell and he was "convinced" that Jackie McConnell was the trainer of Regal By Generator (Tr. I at 607-08, 684).

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

At the pre-show inspection on September 3, 1998, John Michael Guedron, a doctor of veterinary medicine, an APHIS veterinary medical officer, and an experienced examiner of Tennessee Walking Horses, inspected Regal By Generator. Dr. Guedron observed Regal By Generator's movements and examined the horse's front legs and feet. Dr. Guedron testified that he prepared a report of his examination that same day (by completing portions of APHIS Form 7077) and prepared an affidavit the following day (Tr. I at 52-54; CX 9).

In their affidavits and on APHIS Form 7077, Dr. Guedron and Dr. Peter R. Kirsten, also an experienced doctor of veterinary medicine and an APHIS veterinary medical officer, described Regal By Generator's pain responses during their inspections (CX 9). Dr. Guedron stated in his affidavit:

> I began my physical exam on the left leg and foot and elicited strong, consistent and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot and rearing its head - to digital palpation of the anterior aspect of the pastern, approximately 1-2 inches above the coronary band, and the lateral aspect just above the coronary band. I also noted several thick, firm, abraded ridges of tissue on the posterior pastern that extended onto the medial and lateral aspects of the pastern. I continued with the right leg and foot and elicited the same consistent and repeatable pain responses to digital palpation of the medial, anterior, and lateral aspects of the pastern above the

> coronary band. In addition, there were several firm, raised red "button lesions" noted in the sulcus or "pocket" of the posterior pastern.

CX 9 at 2-3.

Dr. Guedron testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. Now, in paragraph 4 of page 2, it states: "As evidenced by the horse forcefully withdrawing its foot and rearing its head."
>
> What does rearing its head indicate, if anything, to you?
>
> [BY DR. GUEDRON:]
>
> A. The rearing of the head was in conjunction with withdrawal of the foot which would indicate that the horse was trying to remove its foot and leg from my grasp to avoid the painful sensations that I was eliciting through palpation.
>
> Q. At the end of that paragraph which continues on page 3 of Exhibit 9, it says:
>
> > "I continued with the right leg and foot and elicited the same consistent and repeatable pain response to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band."
>
> Are those depicted anywhere else in this exhibit?
>
> A. Yes, they are depicted in the schematics under block 31 on the APHIS Form 7077.

Q. And what were those consistent and repeatable pain responses you are describing in here?

A. There was a forcible withdrawal of the leg in conjunction with the rearing of the head.

Q. And the last sentence of that paragraph says:

"There were several firm, raised, red 'button lesions' noted in the sulcus or 'pocket' of the posterior pastern."

Where, if anywhere, are those noted on the documentation?

A. Again, they are noted under block 31 on the APHIS Form 7077.

Q. What is the sulcus or pockets?

A. That is the posterior or back of the pastern, that area in the center is commonly referred to as the sulcus or the pocket pastern.

Q. Do you have an opinion whether this horse was in pain during your examination?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is the horse was in pain.

Q. And what is the basis for that opinion?

A. The locomotion of the horse as well as the response to digital palpation.

Q. What did the locomotion tell you that led you to believe that the horse was in pain?

A. Locomotion indicates to me that the horse didn't want to place the normal amount of weight carried by the front feet on its front feet due to the painful condition.

Q. How was that indicated?

A. By the horse being back on its rear feet, having its weight back on its rear feet, its rear feet further up underneath the horse's body to support more of the weight.

Q. And in locomotion?

A. As it walked and as it stood, yes.

Q. And did you note that anywhere in your documentation?

A. I noted under block 31 on the APHIS Form 7077 a description to the right that the horse led and turned around the cone and that same description is in my affidavit, paragraph 4.

Q. What does that say?

A. That the horse led slowly and had difficulty turning around the cone.

Q. Do you have an opinion as to whether this horse would have been in pain if it had been exhibited after your examination?

A. Yes, I do.

Q. And what is that opinion?

A. I believe it would have been in pain.

> Q. And what is the basis for that opinion?
>
> A. Again, the basis for that opinion is the painful responses that I elicited upon my physical exam through digital palpation in conjunction with my observation of its locomotion and its stance would indicate to me that if this horse under saddle was forced to suffer concussive forces on its front feet that he would indeed experience pain.
>
> Q. Do you have an opinion as to whether the conditions of this horse's posterior pasterns would have existed previously? That is before the date of your examination.
>
> A. Yes, I believe these conditions would have taken, as I stated before, weeks to become that severe.

Tr. I at 70-73.

At the conclusion of his examination of Regal By Generator, Dr. Kirsten signed APHIS Form 7077 (CX 9; Tr. I at 302). In his affidavit, Dr. Kirsten described both his inspection and Dr. Guedron's inspection of Regal By Generator, as follows:

> I then observed Dr. Guedron examine the horse. He elicited a painful response to palpation, evidenced by a strong leg withdrawal, when he palpated the lateral bulb of the left foot extending around the lateral aspect to the anterior of the pastern. There also was a response to palpation on the right foot from medial to lateral extending across the anterior of the pastern, evidenced by a strong leg withdrawal.
>
> I then palpated the horse and got a strong leg withdrawal when I palpated the lateral and anterior aspect of the left pastern, and a mild leg withdrawal when I palpated the anterior and medial aspect of the right pastern. These responses were consistent and

> repeatable. I also observed that this horse had his rear legs tucked under. I also observed button lesions on the posterior of the right pastern and raised and thickened ridges on the posterior of the left pastern. . . .
>
> Dr. Guedron and I conferred and agreed on our findings. Dr. Guedron notified the custodian that we intended to write a government case on the horse.

CX 9 at 4-5.

Dr. Kirsten testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. What is your opinion, Dr. Kirsten, as to the length of time that it would take for a normal pastern to develop the abraded ridges and button lesions that you have just described?
>
> [BY DR. KIRSTEN:]
>
> A. My opinion is that it would occur chronically over a longer period of time. This is not, in my opinion, an acute suddenly onset lesion. It would be chronic and I would not give you a length of time. I don't have an opinion on that.
>
> Q. It would not have occurred overnight?
>
> A. It would not.
>
> . . . .
>
> Q. And what is the basis for your opinion?

A. The granulomatous lesion is, in my opinion, the response to chronic inflammation, chronic irritation.

Q. And is that the same for -- are you speaking of the button lesions or the ridges?

A. To both.

Q. And how does a granulomatous condition occur?

A. As a result of chronic, repeated inflammation or irritation.

Q. Do you have an opinion as to what the cause was of this condition on this horse?

. . . .

Q. Do you have an opinion?

A. That these lesions were caused by chemicals and/or mechanical devices.

Q. What is the basis for your opinion?

. . . .

THE WITNESS: This is my professional opinion as an inspector with the U. S. Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care.

Q. Dr. Kirsten, do you have an opinion as to whether this horse would have been in pain?

. . . .

MS. CARROLL: If it had been exhibited following your examination?

. . . .

THE WITNESS: My opinion is that the horse would have been in pain if exhibited following my inspection, yes.

Q. What is the basis for your opinion?

A. The basis for my opinion is based upon my inspection of the horse, my observation of its movements and appearance and the results of my digital palpation.

Q. Dr. Kirsten, do you have an opinion as to a cause of the pain you elicited on the areas marked as X's in item 31?

. . . .

Q. Do you have an opinion?

A. Could you repeat the question, please?

Q. Do you have an opinion as to the cause of the responses of this horse that you elicited in the areas identified on item 31 in Exhibit 9, page 1?

A. My opinion is that a person applied chemicals and/or mechanical devices to the pasterns of this horse's feet in order to inflict pain and distress to this animal.

Q. What is the basis for your opinion?

A. The basis for my opinion is my professional experience as a veterinarian and my training and experience as an animal care VMO working the Horse Protection Act program for 11 years.

Nine years at the time of this inspection.

Tr. I at 316-19.

James Odle was present in the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration. He completed a portion of APHIS Form 7077. (Tr. I at 429.) Mr. Odle told Jackie McConnell that Regal By Generator was "excused" from the horse show and that further information would be required (Tr. I at 430). Mr. Odle testified about his recollection of his encounter with Jackie McConnell on September 3, 1998, as follows:

> [BY MR. ODLE:]
>
> A. Well, I remember on the evening that Mr. McConnell presented the horse for inspection and upon completion of the DQP examination and inspection by the USDA veterinarians, they alleged that the horse was sore in violation of the Horse Protection Act and we had this form prepared and I approached Mr. Jackie McConnell for the information to complete the form, explained the allegations and told him that he could excuse the horse and come back and give me the information at which time he told me that Cyndi would come, his wife, Mrs. McConnell would come and give me the information.

Tr. I at 430.

Cynthia McConnell was not present when Regal By Generator was inspected on September 3, 1998 (Tr. II at 150-51).

Respondents presented no evidence to refute the testimony and documentation of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show inspections and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

## Discussion

### *I. Constitutional and Administrative Law Issues*

#### *A. Respondents Did Not Prove the Existence of an Agreement Between APHIS and the National Horse Show Commission*

A significant portion of the testimony was devoted to an alleged agreement between APHIS and the National Horse Show Commission. Respondents contend there was an agreement, known throughout the Tennessee Walking Horse industry, that, if the National Horse Show Commission imposed an appropriate penalty for a Horse Protection Act violation, APHIS would not institute an administrative proceeding under the Horse Protection Act (Tr. II at 370).

Cynthia McConnell believed, if she accepted an 8-month suspension and paid a $500 fine to the National Horse Show Commission for her violations of the Horse Protection Act related to the entry of Regal By Generator in the 1998 Tennessee Walking Horse National Celebration, APHIS would not initiate a proceeding for the same violations. Cynthia McConnell testified she completed the National Horse Show Commission suspension on May 5, 1999, and paid the $500 fine. (Tr. II at 156-57, 166-71.)

Respondents provided evidence of the agreement between APHIS and the National Horse Show Commission through National Horse Show Commission executive vice president, Lonnie Messick (Tr. II at 362, 389, 395-96), and through National Horse Show Commission attorney, Craig Evans (Tr. II at 296-97).

Lonnie Messick testified he heard Dr. Ronald DeHaven, Acting Associate Administrator of APHIS, talk to horse owners and horse trainers about the agreement between APHIS and the National Horse Show Commission regarding a Horse Industry Organization penalty in lieu of the APHIS penalty (Tr. II at 403).

Respondents asserted the agreement between APHIS and the National Horse Show Commission was not in writing (Tr. II at 297). To demonstrate the parameters of the oral agreement, Respondents' witness, Craig Evans, described one occasion, where another horse trainer, Bill

Barnett, asked Dr. Dehaven if he could have the agreement in writing "that if he accepted [the National Horse Show Commission penalty] . . . there would be no Federal initiation of a complaint. And I carried that to Dr. DeHaven and he responded that what he said was enough. And it was." (Tr. II at 298.)

Complainant's witness, Dr. Ronald DeHaven, testified that "there was no specific agreement between APHIS, the agency, and any of the [Horse Industry Organizations]" (Tr. II at 962). Dr. DeHaven's version of APHIS' position was that "I made it known through discussions and meetings with industry, that included the National Horse Show Commission, but as well as others, that we would certainly consider penalties imposed by a [Horse Industry Organization] in exercising our prosecutorial [discretion]. There was no agreement per se." (Tr. II at 963.) Dr. DeHaven stated a proposed "Strategic Plan" did include terms concerning non-enforcement by APHIS if certain criteria were met; however, he also stated "[the proposed Strategic Plan] was rejected by all but one of the certified [Horse Industry Organizations]. So that constituted no agreement. So, again, to the best of my recollection, there was nothing official put out by [APHIS] . . . that would have made that kind of commitment." (Tr. II at 964.) Dr. DeHaven believed that he committed APHIS to the extent that "[APHIS] would in its exercising prosecutorial discretion, would certainly take such an industry penalty into consideration. And that would be a significant factor." (Tr. II at 966.) He stated "I had no specific agreement with Craig Evans." (Tr. II at 968.) In response to a hypothetical question, Dr. DeHaven described the various factors that would have been considered as to whether APHIS would have instituted an administrative proceeding instead of allowing a Horse Industry Organization to administer a penalty for a violation of the Horse Protection Act. Dr. DeHaven said the factors would be the timing of the penalty, the involvement of other persons in the violations, and the backdating of the suspension (Tr. II at 1028).

Proof of an agreement between APHIS and the National Horse Show Commission is lacking, even accepting all the testimony as credible, because there was no meeting of the minds. Even if I were to assume arguendo that there was an oral agreement, APHIS retained prosecutorial

discretion to institute administrative proceedings based on several factors, including, most relevant here – the involvement of parties other than the party who is subject to a Horse Industry Organization penalty.

Jackie McConnell is a party well known to APHIS and believed by the APHIS investigator to have been involved with the soring of horses on other occasions over a long period of time. When APHIS found evidence of the soring of Regal By Generator during the 1998 Tennessee Walking Horse National Celebration pre-show inspection, it is reasonable that APHIS would not be content to forgo instituting an administrative proceeding against Jackie McConnell as one of the alleged offenders, but would instead present a case against all alleged offenders.

During cross-examination, Dr. Guedron stated he told Jackie McConnell at the pre-show inspection area that "[a] federal case would be initiated." (Tr. I at 205.) There is no evidence that Cynthia McConnell or Jackie McConnell received assurances from APHIS that it would retract its stated intent to institute an administrative proceeding in this matter as a result of Cynthia McConnell taking an 8-month suspension and paying a $500 fine through the National Horse Show Commission. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that Complainant instituted this proceeding contrary to an agreement between APHIS and the National Horse Show Commission.

*B. Respondents Did Not Prove Selective Enforcement of the Horse Protection Act Against Jackie McConnell*

Jackie McConnell contends no other person who was merely a custodian of a horse has been found to have entered a sore horse in a horse show or horse exhibition in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Jackie McConnell asserts he was merely the custodian of Regal By Generator, and, in light of the Secretary of Agriculture's past practice, a conclusion that he has violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) constitutes selective enforcement of the Horse Protection Act.

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[6] Therefore, even though Jackie McConnell was

[6]*Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (stating entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 143, 145 (4th Cir.) (stating entering a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited), *cert. denied*, 510 U.S. 867 (1993); *In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 611-12 (2003) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re William J. Reinhart*, 60 Agric. Dec. 241, 253 (2001) (Order Denying William J. Reinhart's Pet. for Recons.) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re Jack Stepp*, 57 Agric. Dec. 297, 309 (1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by designated qualified persons or United States Department of Agriculture veterinarian or both), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th

(continued...)

merely the custodian of Regal By Generator, Jackie McConnell may be found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Moreover, I find no basis for Jackie McConnell's contention that the Secretary of Agriculture's past practice has been to forgo enforcement of the Horse Protection Act against persons who are merely custodians of horses and who merely present those horses for pre-show inspections.[7] Therefore, I find no basis for Jackie McConnell's argument that the Secretary of Agriculture is selectively enforcing the Horse Protection Act against him.

---

[6](...continued)
Circuit Rule 206); *In re Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering," as used in the Horse Protection Act, is limited to doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 206 (1994) (stating the United States Department of Agriculture has always construed entry to be a process), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Billy Gray*, 52 Agric. Dec. 1044, 1055 (1993) (stating the United States Department of Agriculture has considered entry to be a process which includes pre-show inspection for at least 13 years), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering" a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out forms and presenting the horse to the designated qualified person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee).

[7]In *In re A.P "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990), the Judicial Officer dismissed Richard Wall, an assistant trainer, whose sole participation in the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) was to lead the horse in question to the pre-show inspection area. However, the Judicial Officer based his dismissal of Richard Wall not only on Richard Wall's minimal involvement in the violation, but also, on the lack of any proposed findings, conclusion, or order in complainant's post-hearing brief relating to Richard Wall. I find *In re A.P. "Sonny" Holt* is not analogous to the situation presented in the instant proceeding.

*C. Respondents Did Not Prove Malicious Prosecution by APHIS Against Cynthia McConnell*

Respondents contend Cynthia McConnell is the only alleged violator of the Horse Protection Act in 1998 or 1999 who accepted a National Horse Show Commission suspension and fine against whom APHIS subsequently instituted a Horse Protection Act case. Respondents contend the institution of this proceeding against Cynthia McConnell constitutes malicious prosecution.

Respondents filed a Freedom of Information Act request with APHIS on or about October 5, 2000, requesting the disclosure of other Horse Protection Act cases with fact patterns similar to the instant proceeding. Respondents then proposed that instituting an administrative proceeding against Respondents was unique because no response was supplied by APHIS satisfying their Freedom of Information Act request. (Tr. II at 802-10.) Respondents' confidence in the inference to be drawn from APHIS' failure to respond to their Freedom of Information Act request is misplaced. The lack of a search result cannot be conclusive. Further, even if Cynthia McConnell is the only violator to face both a private National Horse Show Commission sanction and an administrative proceeding, it may be that this situation was the only situation that warranted an administrative action where a private National Horse Show Commission sanction had been imposed. The totality of the circumstances must be considered. Respondents have not shown that APHIS' discretion in choosing to institute the instant proceeding against Cynthia McConnell constitutes malicious prosecution.

*D. Respondents Did Not Prove an APHIS Authorized Mechanism Shielding Respondents from Administrative Action*

When Regal By Generator was found to have been sored at the pre-show inspection on September 3, 1998, Dr. Guerdon informed Jackie McConnell that an administrative proceeding would be initiated (Tr. I at 204-05). On or about September 4, 1998, Cynthia McConnell accepted an 8-month National Horse Show Commission suspension and $500

fine, believing she could avoid the institution of an administrative proceeding. Cynthia McConnell received the official National Horse Show Commission suspension notice on or about September 16, 1998 (RX 18). The APHIS investigator did not complete his work on this case until at or near the date he left employment at APHIS in May 1999. Cynthia McConnell paid her $500 fine in December 1998 (Tr. II at 307). Her 8-month National Horse Show Commission suspension period ended in May 1999, and APHIS could not have known until then, even if APHIS had been considering forbearance in instituting the instant proceeding, whether Cynthia McConnell satisfied all the National Horse Show Commission suspension criteria. (Such a suspension, by a private organization, is not the same as a disqualification under the Horse Protection Act. *See* the testimony of Craig Evans, who said, "And recognize that there was a difference in 1998 between the National Horse Show Commission suspension versus a USDA suspension." (Tr. II at 209-10.)) As the administrative case evolved, violations of the Horse Protection Act were alleged not only against Cynthia McConnell, but also against Jackie McConnell and Whitter Stables for "entering" a sore horse, against those responsible for shipping a sore horse, and against the owners for allowing a sore horse to be entered. Dr. DeHaven explained the lengthy process involved in the preparation of an administrative case, together with the multiple levels of review (Tr. II at 998-99). Complainant filed the Complaint on September 7, 1999. APHIS' case development process appears to have been rigorous and reasonable in nature and implemented with a view toward meeting APHIS' objectives. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding against Respondents. Cynthia McConnell was mistaken in her belief that she was finished with the matter, when she complied with National Horse Show Commission requirements.

### *II. Substantive Law Issues*

#### *A. Whitter Stables Is Not a Legal Entity That Can Be Found to Have Violated the Horse Protection Act*

The record supports a conclusion that Whitter Stables is merely a name under which Cynthia McConnell does business. Complainant, as the proponent of an order, has the burden of proof in this proceeding,[8] and the standard of proof by which this burden is met is the preponderance of the evidence standard.[9] While the record contains

---

[8]*See* 5 U.S.C. § 556(d).

[9]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 ( 2004), *aff'd sub nom. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir.October 31, 2005)(unpublished); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat*

(continued...)

some evidence that Whitter Stables is a legal entity which may be found to have violated the Horse Protection Act, I do not find Complainant's evidence is sufficiently strong to conclude that Whitter Stables is such a legal entity.

*B. Cynthia McConnell Shipped a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)*

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4).

Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Respondents argue the evidence shows that Regal By Generator had already passed through the inspection process at the 1998 Tennessee Walking Horse National Celebration with three pre-show inspections and at least one post-show inspection without being found in violation of the Horse Protection Act (Tr. I at 123). Respondents argue the United States Department of Agriculture inspection process is inherently unreliable since the Complainant's evidence that the horse's condition would have developed "over weeks," conflicts with the evidence that Regal By Generator passed both pre-show and post-show inspections within a few days of September 3, 1998. Even so, evidence of prior

---

[9](...continued)
*Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

inspections is not worthy of great weight.[10]

*C. Jackie McConnell Did Not Ship a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)*

Complainant urges that I find Jackie McConnell to be a general partner with Cynthia McConnell in Whitter Stables and thus liable under the Horse Protection Act for acts of the partnership. Despite the firmly held conviction of APHIS investigator James Odle that Jackie McConnell was the trainer of Regal By Generator, Complainant's effort to prove Jackie McConnell was in partnership did not succeed in rising above suspicion (Tr. I at 684). The evidence presented by Complainant is relevant and material to the partnership question, but does not reach the level of a preponderance of the evidence to show Jackie McConnell was a partner of Whitter Stables or that he participated in any conduct prohibited by section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

During her cross-examination, Cynthia McConnell maintained that she alone owned and controlled Whitter Stables. Her testimony is credible. Additionally, there is no evidence that Jackie McConnell acted individually or directed any person to ship Regal By Generator to the 1998 Tennessee Walking Horse National Celebration.

James Odle had left United States Department of Agriculture employment approximately 15 months prior to the hearing (Tr. I at 467). He had not seen the case file since May 1999 (Tr. I at 499). He did not have contemporaneous notes or tape recordings of his conversation with Jackie McConnell wherein Jackie McConnell was alleged to have acknowledged ownership of Whitter Stables (Tr. I at 478, 491, 493-95, 503, 521).

The affidavit of Whitter Stables customer Camille C. Akin (CX 10) is not dispositive as to the form of ownership of Whitter Stables in

---

[10]*See In re Richard L. Thornton*, 41 Agric. Dec. 870, 876 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992); *In re Joe Fleming,* 41 Agric. Dec. 38, 44 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1939-40 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

August and September 1998. Ms. Akin's affidavit does not reveal the time period covered by the alleged partnership status. Ms. Akin's business relationship with Jackie McConnell and Cynthia McConnell spanned 8 years prior to the time of her affidavit and covers the time during which Jackie McConnell Stables was in operation training Tennessee Walking Horses (into 1994) and also the period during which Jackie McConnell Stables was conducting a horse buying and selling business (in 1996 and after) at the same location as Whitter Stables (Tr. II at 728-29). James Odle agreed that he may have been the one to have inserted "(Cyndi and Jackie Mconnell [sic])" for clarity during his preparation of the affidavit for Ms. Akin to sign (Tr. I at 567).

Complainant offered CX 11 through James Odle to show that Jackie McConnell was more than just an employee and was, in fact, a manager of Whitter Stables. But Mr. Odle did not know who paid for the advertisement, directed the placement of the advertisement, or who approved the advertisement (Tr. I at 703-04, 707-08). Mr. Odle also did not know how the advertisement became available to the United States Department of Agriculture (Tr. I at 705).

Complainant's CX 28, which was published before the 1998 Tennessee Walking Horse National Celebration, tends to prove that Jackie McConnell was a trainer in 1997 (Tr. II at 652-57). That Jackie McConnell was a trainer in 1997 was not a contested issue, but it is not probative regarding whether he was a partner in Whitter Stables in August and September 1998.

A "News & Stories" article written in May of 2000 by Tanya Hopper (CX 29) is not dispositive as to whether Jackie McConnell owned any part of Whitter Stables in August and September 1998.

The 1989 warranty deed and the 1998 property tax receipt for the property on which Whitter Stables is located (CX 1) shows joint ownership by "JACKIE McCONNELL and wife, CYNDI McCONNELL." Complainant argues CX 1 tends to prove that Whitter Stables, which began in 1994, was a partnership, but I do not find that joint ownership of the real estate indicates joint ownership of Whitter Stables. Additionally, Cynthia McConnell testified credibly that, after Jackie McConnell's disqualification in the spring of 1994, he re-opened Jackie McConnell Stables in 1996 in the business of buying and selling

horses (Tr. II at 728-29). Regarding CX 1 at 7, the 1998 property tax receipt, there was no evidence of how the bank account was titled on which check number 5860 was drawn to pay the 1998 taxes, whether from an account belonging to Jackie McConnell or otherwise. The most definitive evidence regarding payment of the real property tax bill was Cynthia McConnell's testimony that she paid it. The record contains no evidence whether Fayette County, Tennessee, listed ownership or tax records in the name of the male first in a husband-wife relationship and whether that might account for the entry "Rcv of: MC CONNELL JACKIE." See CX 1 at 7. Jackie McConnell and Cynthia McConnell being husband and wife provides sufficient explanation for their joint ownership of the real property where the entity of Whitter Stables was situated. Relationships between them do not include a partnership in Whitter Stables, which has been proven to be merely a name under which Cynthia McConnell does business.

James Odle did not request or obtain, for Jackie McConnell or Cynthia McConnell, copies of income tax returns (Tr. I at 526). Mr. Odle stated that he knew how to gather information about business entities from different sources, either from the state or from the Secretary of State if it is a corporation, or the Internal Revenue Service (Tr. I at 525). Complainant did not present any such evidence to prove the existence of a partnership during August 1998 or September 1998 between Cynthia McConnell and Jackie McConnell.

*D. Cynthia McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)*

Regal By Generator was entered as entry number 685 in class 110 in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for competition in the horse show (CX 7). Cynthia McConnell stipulated she personally participated in completing the 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; CX 7).

"Entry" or "entering" is a process that includes a variety of actions, including, but not limited to, completing the entry forms, paying the

entry fee, preparing the horse for exhibition, and presenting the horse for pre-show inspection to designated qualified persons or to United States Department of Agriculture's representatives.[11]

The result of a horse being "sore" or "sored" includes circumstances in which a horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving."[12] The testimony and affidavits of the veterinary medical officers, Drs. Guedron and Kirsten, were persuasive that Regal By Generator was sore at the time of the pre-show inspection and that she would suffer pain if exhibited in the show (CX 9). Respondents offered no evidence to refute the testimony and affidavits of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

*E. Jackie McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)*

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

Jackie McConnell urges that the Secretary of Agriculture's policy and practice is that custodians of a horse, who are not shown to have been otherwise connected with the sored horse, have not been included as persons charged with "entering" a sored horse. Jackie McConnell has narrowed the issue by stating that he understands "the position of the USDA [is] that the mere fact of presenting the horse constitutes 'entry'

[11]See note 6.

[12]15 U.S.C. § 1821(3).

for the purposes of the HPA."[13]

A case in which the Complainant did not urge that the "custodian" be found in violation, and the Judicial Officer granted the custodian's motion to dismiss, is not persuasive here.[14]

If the remedial purpose of the Horse Protection Act is to be achieved, the Horse Protection Act must be construed liberally, so as to give effect to its provisions. "Entering," within the meaning of the Horse Protection Act, is a process that generally begins with the payment of an entry fee and includes presentation of a horse for pre-show examination by designated qualified persons or United States Department of Agriculture veterinarians. The entry of a horse within the meaning of the Horse Protection Act is also a status, such that once a person does any one or all of the steps in the process of entering a horse, it remains entered until it has finished showing or exhibiting.[15] "The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse 'sore.' Congress stated that its purpose was to 'make it impossible for persons to show sored horses in nearly all horse shows.' *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871." *In re John Allan Callaway*, 52 Agric Dec. 272, 293 (1993), citing *Elliott*. In a case contemporary to *Callaway*, the Judicial Officer found "For the same reasons, I held in *In re Callaway*, . . . that the custodian who presents a horse to the DQP for the pre-show inspection 'enters' the horse, within the meaning of the Act. Accordingly, Complainant proved that Respondent Roy E. Wagner also entered 'Sir Shaker,' as alleged in the Complaint." *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 316 (1993).

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

---

[13]See Jackie McConnell's proposed findings of fact and conclusions of law at 9.

[14]*See In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990).

[15]*In re William Dwaine Elliott*, 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

**Jackie McConnell's Appeal Petition**

Jackie McConnell raises two issues in his Petition for Appeal. First, Jackie McConnell contends the ALJ erroneously determined that he (Jackie McConnell) participated in "entering" a sore horse in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). In support of this contention, Jackie McConnell cites his proposed findings of fact and conclusions of law, portions of the transcript, RX 17, RX 18, RX 33, RX 35, and *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). (Pet. for Appeal at 1-2.)

I have carefully reviewed the portions of the record and the case cited by Jackie McConnell. I do not find the ALJ erred. Complainant established by a preponderance of the evidence that on September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[16]

Moreover, *Elliott*, cited by Jackie McConnell, does not support Jackie McConnell's position that his leading Regal By Generator to the pre-show inspection area does not constitute entering the horse in a horse show. To the contrary, the United States Court of Appeals for the Fourth Circuit expressly upheld the Secretary of Agriculture's position that "entering," as used in section 5(2)(B) of the Horse Protection Act

[16]See note 6.

(15 U.S.C. § 1824(2)(B)), is a process, which includes presenting a horse for pre-show inspection, as follows:

> Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a horse show would seem to encompass all the requirements–including inspection–and the time necessary to complete those requirements.
>
> Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. We think it stretches credulity to argue that Congress intended only to prohibit a horse being "sore" at registration or when being shown and between that time the horse is permitted to be "sore." The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse "sore." Congress stated that its purpose was to "make it impossible for persons to show sore horses in nearly all horse shows." *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Elliott's reading of the Act would defeat this purpose by effectively making meaningless pre-showing inspections which are not contemporaneous with the registration and payment of the entry fee. We conclude that the USDA's interpretation of "entering" is reasonable and not contrary to Congressional intent and thus we are not bound to give it effect.

*Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

I find Complainant proved by a preponderance of the evidence that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Second, Jackie McConnell contends the ALJ erroneously failed to find that Jackie McConnell was subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Jackie McConnell cites his proposed findings of fact, portions of the transcript, RX 20, "Fed. Reg. 11.7(d)," and *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991). (Pet. for Appeal at 2.)

I have carefully reviewed the portions of the record cited by Jackie McConnell. I do not find the cited portions of the record support Jackie McConnell's contention that ALJ erred by failing to find "selective prosecution" and "malicious prosecution."

Moreover, I am uncertain as to Jackie McConnell's reference to "Fed. Reg. 11.7(d)." Generally, "Fed. Reg." is an abbreviation used to reference the Federal Register, but a proper citation would include a volume number, page number, and date. Therefore, I am unable to locate the material in the Federal Register referenced by Jackie McConnell to determine what support, if any, the cited Federal Register material lends to Jackie McConnell's contention that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution."

Finally, *Anderson*, cited by Jackie McConnell, does not support Jackie McConnell's position that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution." The United States Court of Appeals for the Sixth Circuit expressly held that certain factors, not present in the instant proceeding, must be present to find "selective prosecution" or "vindictive prosecution," as follows:

> . . . A prosecutor selectively prosecutes someone when three

> things occur. First, he must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. . . . Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to. . . .
>
> A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted. . . . A person who claims he has been vindictively prosecuted must show that the prosecutor has some "stake" in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable.

*United States v. Anderson*, 923 F.2d 450, 453-54 (6th Cir. 1991) (citations omitted) (emphasis in original). Jackie McConnell has not established a prima facie case under either doctrine, and I find his contention that he was improperly prosecuted has no merit.

**Cynthia McConnell's and Whitter Stable's Appeal Petition**

Cynthia McConnell and Whitter Stables raise three issues in their Petition for Appeal.[17] First, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they "shipped " a sore horse, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)). In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and portions of the

[17]I do not address these issues as they relate to Whitter Stables because, as discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity which can be found to have violated the Horse Protection Act.

transcript. (Pet. for Appeal at 1.)

I have carefully reviewed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find erroneous the ALJ's conclusion that Cynthia McConnell shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4). Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Second, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they had not served an appropriate penalty for their violations of the Horse Protection Act and erroneously found there was no agreement between APHIS and the National Horse Show Commission. In support of these contentions, Cynthia McConnell and Whitter Stables cite portions of the transcript, the 1998 Strategic Plan, RX 17, RX 18, and RX 20. (Pet. for Appeal at 1-2.)

I agree with the ALJ's conclusion that Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding for a violation of the Horse Protection Act against a respondent who has previously been sanctioned

by a Horse Industry Organization for the same violation.

Third, Cynthia McConnell and Whitter Stables contend the ALJ erroneously failed to find that Cynthia McConnell and Whitter Stables were subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof," portions of the transcript, CX 9, CX 13, RX 17, RX 18, and RX 20. (Pet. for Appeal at 2.)

I have carefully reviewed Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find the ALJ erred by failing to find "selective prosecution" and "malicious prosecution" of Cynthia McConnell.

**Complainant's Appeal Petition**

Complainant raises two issues in "Complainant's Petition for Appeal of Decision and Order" [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously assessed Cynthia McConnell and Whitter Stables a $2,200 civil penalty and disqualified Cynthia McConnell and Whitter Stables for 1 year for their violations of the Horse Protection Act. Complainant contends Cynthia McConnell and Whitter Stables should each have been assessed a $4,400 civil penalty and should each have been disqualified for a 2-year period. (Complainant's Appeal Pet. at 2-19.)

As discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity against which a sanction may be imposed under the Horse Protection Act.

As for Cynthia McConnell, I agree with Complainant that the ALJ should have assessed Cynthia McConnell a $4,400 civil penalty and should have disqualified Cynthia McConnell for a 2-year period for her two violations of the Horse Protection Act.

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[18] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.[19]

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

---

[18] 7 C.F.R. § 3.91(b)(2)(vii).

[19] 15 U.S.C. § 1825(c).

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Cynthia McConnell a $4,400 civil penalty. The extent and gravity of Cynthia McConnell's prohibited

conduct are great. Two United States Department of Agriculture veterinary medical officers found Regal By Generator sore. Dr. Guedron found that digital palpation of Regal By Generator's left and right leg and foot elicited strong, consistent, and repeatable pain responses and noted several thick, firm abraded ridges of tissue on the posterior pastern of the left leg and several firm, raised, red "button" lesions on the posterior pastern of the right leg. Dr. Kirsten stated that Regal By Generator exhibited strong leg withdrawal in response to digital palpation of the left leg and mild leg withdrawal to digital palpation of the right leg and observed lesions on Regal By Generator's right pastern and raised and thickened ridges on Regal By Generator's left pastern. (CX 9 at 2-4.) Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16).

Despite Regal By Generator's condition, Cynthia McConnell contracted with an independent contractor to haul Regal By Generator to the 1998 Tennessee Walking Horse National Celebration and personally participated in completing Regal By Generator's 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; Tr. II at 124-25, 130, 180-81; CX 4, CX 7). Weighing all the circumstances, I find Cynthia McConnell is culpable for the violations of section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)).

Cynthia McConnell presented no argument that she is unable to pay a $4,400 civil penalty or that a $4,400 civil penalty would affect her ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[20] Based on the factors that are required to

[20]*See, e.g.*, *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Jack Stepp*, (continued...)

be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Cynthia McConnell a $4,400 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to

---

[20](...continued)
57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[21]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[22]

---

[21]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

[22]*In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994),

(continued...)

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Cynthia McConnell's first two violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Second, Complainant contends the ALJ erred in Finding of Fact 7 (Complainant's Appeal Pet. at 19).

As an initial matter, the ALJ's Initial Decision does not contain Finding of Fact 7; however, the ALJ's Initial Decision contains a paragraph identified as "7" in the discussion of the procedural history in which the ALJ states:

> [7] On September 17, 1999, Respondents filed a claim sounding in tort against the United States Department of Agriculture (USDA) and certain of its employees in Federal District Court for the Western District of Tennessee - Civil Action No. 00-2434. On or about June 22, 2000, the Federal Court granted Defendant's (USDA's) motion to dismiss.

Initial Decision at 3-4.

---

[22](...continued)
*reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Complainant asserts Cynthia McConnell and Whitter Stables were not plaintiffs in the case referenced by the ALJ; Jackie McConnell was the sole plaintiff. Complainant attaches to Complainant's Appeal Petition the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" filed September 17, 1999, and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed June 21, 2000, in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), in support of Complainant's assertion.

Based on my review of the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), I agree with Complainant's assertion that the ALJ's erroneously stated that Cynthia McConnell and Whitter Stables were plaintiffs in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000); however, I find the ALJ's error harmless.

## FINDINGS OF FACT

1. Regal By Generator was reasonably expected to suffer pain in the pastern areas of her front legs and feet if she were shown on September 3, 1998, as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration.

2. Regal By Generator exhibited abnormal sensitivity, lesions, and ridges on September 3, 1998, which were the response to chronic inflammation and irritation from chemicals and/or mechanical devices used on the pasterns of Regal By Generator's front legs and feet, according to two well-qualified, experienced APHIS veterinary medical officers who observed her in motion and examined her on September 3, 1998.

3. Regal By Generator's lesions and ridges would have occurred chronically over a long period of time, in response to chronic, repeated inflammation or irritation, according to one of the two well-qualified,

experienced APHIS veterinary medical officers.

4. Regal By Generator's abnormal sensitivity, lesions, and ridges would have taken weeks to develop, according to the other of those two well-qualified, experienced APHIS veterinary medical officers.

5. Regal By Generator was sore, within the meaning of the Horse Protection Act, during pre-show inspection on September 3, 1998.

6. Regal By Generator's sore condition was chronic and would have taken weeks to develop. Thus, Regal By Generator was sore on September 2, 1998, when the entry form was completed for her entry as number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration; and Regal By Generator was sore on August 23, 1998, when arrangements were made to transport and deliver her to the 1998 Tennessee Walking Horse National Celebration.

7. Jackie McConnell is an individual whose business mailing address is P.O. Box 490, Collierville, Tennessee 38027. At all times material to this proceeding, Jackie McConnell was a licensed horse trainer. On September 3, 1998, by presenting Regal By Generator for inspection at the pre-show inspection area, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

8. Cynthia McConnell is an individual whose business mailing address is P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Cynthia McConnell was a licensed horse trainer. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show with reason to believe that the horse may be shown or exhibited in a horse show, by personally contracting with an independent contractor to transport and deliver horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

9. Whitter Stables is a sole proprietorship which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Whitter Stables was wholly owned and controlled by Cynthia McConnell.

10. On September 2, 1998, by personally completing an entry form,

Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

11. This administrative proceeding is the first proceeding in which Cynthia McConnell has been found to have violated the Horse Protection Act.

12. Jackie McConnell has one prior violation, found in a hearing on the merits, of the Horse Protection Act.

13. Jackie McConnell has undergone three prior disqualification periods: two prior 6-month periods by consent with no culpability established; followed by a 2-year disqualification period that resulted from a prior violation of the Horse Protection Act.

## CONCLUSIONS OF LAW

1. On September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

2. Jackie McConnell has one prior Horse Protection Act violation.

3. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

4. On or about September 2, 1998, through September 3, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Jackie McConnell is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Jackie McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Jackie McConnell. Jackie McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

2. Jackie McConnell is disqualified for a period of 5 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Jackie McConnell shall become effective on the 60th day after service of this Order on Jackie McConnell.

3. Cynthia McConnell is assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Cynthia McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Cynthia McConnell. Cynthia McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

4. Cynthia McConnell is disqualified for a period of 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Cynthia McConnell shall become effective on the 60th day after service of this Order on Cynthia McConnell.

## RIGHT TO JUDICIAL REVIEW

Jackie McConnell and Cynthia McConnell have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jackie McConnell and Cynthia McConnell must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[23] The date of this Order is June 23, 2005.

---

[23] 15 U.S.C. § 1825(b)(2), (c).

## ORGANIC FOODS PRODUCTION ACT

## COURT DECISION

**ARTHUR HARVEY v. USDA.**
**No. 04-1379.**
**Filed January 26, 2005.**

**OFPA – Synthetic, not-organic additives – Dairy herd conversion to Organic – 80% organic feed for nine months rule – *Chevron* deference – Standing – Zone of interests – Injury in fact.**

Harvey (Producer, consumer, and accredited USDA organic food inspector) challenged certain final rules promulgated by USDA pursuant to Organic Food Production Act (OFPA) as being inconsistent with the Act. Appeal court granted *de-novo* review and agreed with Harvey in 2 of 7 counts that USDA rule "loopholes"; (a) (third count) allowing use of certain listed synthetic substances (the National List) as an "aid or adjunct" to processing of otherwise qualifying organic produce, and (b) (seventh count) the allowance of conversion of dairy herds to USDA accredited organic status in less than a year and with less than 100% organic feed were contrary to the Act.

**United States Court of Appeals,**
**First Circuit.**

**Background:** Producer and consumer of organic crops filed suit against the Secretary of Agriculture under the Administrative Procedure Act (APA), alleging that provisions of the National Organic Program Final Rule were inconsistent with the Organic Foods Production Act (OFPA) and diluted its organic standards. The United States District Court for the District of Maine, D. Brock Hornby, 297 F.Supp.2d 334, granted summary judgment in favor of defendant, and plaintiff appealed.

**Holdings:** The Court of Appeals, Schwarzer, Senior District Judge[1], sitting by designation, held that:

(1) regulation allowing use of private certifier's seal on products containing less than 95% organic ingredients, even though such products might not bear a USDA organic seal, was not contrary to purposes of

[1] Senior District Judge of the Northern District of California, sitting by designation.

OFPA;

(2) regulations providing that synthetic substances may be used in processed organic foods "as a processing aid or adjuvant" if they meet six criteria, and listing thirty-eight synthetic substances specifically allowed in or on processed products labeled as organic, are invalid; and

(3) regulation allowing dairy animals being converted to organic production to be fed 80% organic feed for the first nine months of the year prior to sale of their products as organic is invalid.

Affirmed in part; reversed in part and remanded.

Before BOUDIN, Chief Judge, SELYA, Circuit Judge, and SCHWARZER[2]

SCHWARZER, Senior District Judge.

Arthur Harvey appeals the District Court's grant of summary judgment to Secretary of Agriculture Ann Veneman on Harvey's claims alleging that multiple provisions of the National Organic Program Final Rule ("Final Rule" or "Rule"), 7 C.F.R. Pt. 205, are inconsistent with the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6523 ("OFPA" or "Act").

Harvey appeals on seven of the nine counts he originally brought. For the reasons set forth below, we affirm the judgment on the first, second, fifth, sixth, and eighth counts and reverse on the third and seventh counts, and we remand for entry of judgment in accordance with this opinion.

## FACTUAL AND PROCEDURAL HISTORY

### I. OVERVIEW OF OFPA AND IMPLEMENTING REGULATIONS

[2] Senior District Judge of the Northern District of California, sitting by designation.

Congress enacted OFPA in 1990 to "establish national standards governing the marketing" of organically produced agricultural products, to "assure consumers that organically produced products meet a consistent standard," and to "facilitate interstate commerce in" organically produced food. 7 U.S.C. § 6501. The Act furthers these purposes by establishing a national certification program for producers and handlers of organic products and by regulating the labeling of organic products. *Id.* §§ 6503(a), 6504, 6505(a)(1)(A). In order to be labeled or sold as organic, an agricultural product must be produced and handled without the use of synthetic substances, such as pesticides, and in accordance with an organic plan agreed to by an accredited certifying agent and the producer and handler of the product. *Id.* § 6504; *see also id.* § 6505 (listing OFPA requirements for certification). Products meeting these standards may be labeled as such and may bear the USDA seal. *Id.* § 6505(a)(2).

Exceptions to the Act's general prohibition on synthetic substances appear on a National List of approved substances for organic products. 7 U.S.C. § 6517. OFPA requires the Secretary to establish a National Organic Standards Board to develop the National List and to recommend exemptions for otherwise prohibited substances. *Id.* §§ 6518(a), (k); 6517(c)(1). The Act contains detailed guidelines for the inclusion of substances on the National List. *Id.* § 6517(c).

The Act also requires the Secretary to promulgate regulations "to carry out" OFPA. *Id.* § 6521. The Secretary published the Final Rule at issue in this case in December 2000 and it became effective on October 21, 2002. *See generally* 7 C.F.R. Pt. 205. Among other things, the Rule sets forth a four-tier labeling system for organic foods. *Id.* § 205.301. Under this system, the type of labeling permitted on a product varies according to the percentage of organic ingredients it contains. *Id.* The Rule also includes loopholes concerning nonorganic ingredients and synthetic substances, *id.* §§ 205.600(b), 205.605(b), 205.606; exemptions for wholesalers and distributors, *id.* § 205.101(b)(1), as well as livestock herds converting to organic dairy production, *id.* § 205.236(a)(2)(i); and restrictions on the activities of private certifiers,

*id.* §§ 205.303(a)(5), 205.303(b), 205.304(a)(3), 205.304(b)(2), 205.305(b)(2), 205.501(a)(11), 205.501(b). These are the provisions at issue in the present action and are outlined in more detail below.

## II. HISTORY OF THE PRESENT ACTION

Plaintiff-appellant Harvey is a producer and handler of organic blueberries and other crops, an organic inspector employed by USDA-accredited certifiers, and a consumer of organic foods. In October 2003 Harvey filed a complaint for declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 702, 706(1), and under OFPA, alleging that nine provisions of the Final Rule are inconsistent with the Act and dilute its organic standards.

On cross-motions for summary judgment, Magistrate Judge Margaret J. Kravchuk issued a recommended decision finding that Harvey lacked standing to bring his seventh claim, granting Harvey summary judgment on his ninth claim, and granting the Secretary summary judgment on the remaining claims. *Harvey v. Veneman,* No. 02-216-P-H, 2003 WL 22327171 (D.Me. Oct. 10, 2003). The District Court adopted the magistrate judge's recommended decision with respect to Harvey's first eight claims, but granted summary judgment to the Secretary, rather than Harvey, on his ninth claim. *Harvey v. Veneman,* 297 F.Supp.2d 334, 335 (D.Me.2004). Harvey timely appealed the District Court's judgment on the following seven of his nine original claims:

*Count 1:* Harvey contends that the Rule provides for the blanket exemption of nonorganic products "not commercially available in organic form" from the review and recommendation process OFPA requires for inclusion of substances on the National List, in contravention of the purposes of OFPA and the National List.

*Count 2:* Harvey contends that the Rule's provisions allowing use of a private certifier's seal on products containing less than 95% organic ingredients, even though such products may not, according to OFPA, bear a USDA organic seal, are contrary to the purposes of OFPA.

*Count 3:* Harvey contends that the Rule's provisions permitting the use of synthetic substances in processing contravene OFPA, which

prohibits the use of synthetic substances generally and specifically forbids the addition of synthetic ingredients in processing.

*Count 5:* Harvey contends that the Rule's exclusion of certain wholesalers and distributors from its coverage contravenes OFPA, which includes such entities among the "handlers" and "handling operations" to which it applies.

*Count 6:* Harvey contends that the Rule's prohibition on certifying agents' provision of uncompensated advice regarding certification standards contravenes OFPA, which prohibits only advice for compensation, and also violates the rights of such agents and their clients under the First Amendment to the United States Constitution.

*Count 7:* Harvey contends that the Rule's provisions allowing dairy animals being "converted" to organic production to be fed 80% organic feed for the first nine months of the year prior to sale of their products as organic contravenes OFPA, which requires dairy animals to be fed 100% organic feed for twelve full months prior to the sale of their products as organic.

*Count 8:* Harvey contends that the Rule's imposition of uniform standards on private certifiers contravenes the purposes of OFPA.

## DISCUSSION

### I. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *People to End Homelessness, Inc. v. Develco Singles Apts. Assocs.,* 339 F.3d 1, 8 (1st Cir.2003). In doing so, we draw all reasonable inferences from the facts in favor of the appellant. *Id.*

We also review de novo challenges to agency action under the APA (that is, we do not defer to a district court's conclusions). *Associated Fisheries v. Daley,* 127 F.3d 104, 109 (1st Cir.1997). Legal issues presented in such challenges are " 'for the courts to resolve, although even in considering such issues the courts are to give some deference to the agency's informed judgment' in applying statutory terms if the statute is silent or ambiguous on the issue." *Penobscot Air Servs., Ltd. v.*

*FAA,* 164 F.3d 713, 719 (1st Cir.1999) (quoting *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)). "That deference is described in the familiar two-step test" of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), according to which we first use traditional tools of statutory construction to determine congressional intent. *Penobscot Air Servs.,* 164 F.3d at 719. "[I]f the legislative intent is clear, we do not defer to the agency" and simply require that the regulations be consistent with the statute. *Id.* If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," the question "is whether the agency's answer is based on a permissible construction of the statute." *Id.* (citation and internal quotation marks omitted). We accord deference to the agency "as long as its interpretation is rational and consistent with the statute." *Id.* (citation omitted).

## II. HARVEY'S STANDING

A plaintiff bringing legal claims in federal court must "establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301, 2309, 159 L.Ed.2d 98 (2004). This is partly a constitutional requirement; to meet the requirements of Article III, a plaintiff must point to an "injury in fact" that a favorable judgment will redress. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is also a prudential requirement. To establish prudential standing, Harvey must show that his complaint "fall[s] within the zone of interests protected by the law invoked." *Newdow,* 542 U.S. at ----, 124 S.Ct. at 2309 (citation and internal quotation marks omitted).

Harvey alleges that he has suffered an injury in fact because the challenged regulations weaken the integrity of the organic program and the standards it sets forth. This weakening harms Harvey as a consumer of organic foods because it degrades the quality of organically labeled foods. The magistrate judge properly held that this claimed harm represents concrete, redressable injury sufficient to confer Article III

standing with respect to most of the counts in Harvey's complaint. It is well established that consumers injured by impermissible regulations satisfy Article III's standing requirements. *See GMC v. Tracy,* 519 U.S. 278, 286, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) ("Consumers who suffer [higher costs] from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III."); *Baur v. Veneman,* 352 F.3d 625, 628, 641-42 (2d Cir.2003) (finding cognizable injury in fact where consumer alleged that USDA regulations permitting use of downed livestock for human consumption caused him increased risk of contracting food-borne illness); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 793 F.2d 1322, 1324 (D.C.Cir.1986) (finding that consumers suffered sufficient injury in fact to challenge regulations reducing fuel economy standards "because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding").

The magistrate judge concluded that Harvey lacked Article III standing with respect to his seventh count because Harvey failed to allege specifically that he was a consumer of organic milk or inspector of organic dairy operations. Recommended Decision on Cross-Motion for Summary Judgment, Civ. No. 02-216-P-H (Oct. 10, 2003), at 33. But Harvey has continuously alleged, as the magistrate judge acknowledged, that he purchases and consumes organic products. Moreover, the record clearly contains Harvey's specific allegations that he has regular commercial dealings with organic dairy farmers and has purchased products containing dairy ingredients identified as organic. The magistrate judge erred in requiring more. Harvey has established that this particular regulation threatens sufficient injury to him as a consumer.

Harvey also clearly satisfies the requirements of prudential standing. The zone of interests test excludes only those whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). Congress enacted OFPA to establish

national standards governing the marketing of organic products, to assure consumers that organic products meet these standards, and to facilitate interstate commerce in organic products. *See* 7 U.S.C. § 6501. Harvey alleges that the Final Rule creates loopholes in the statutory standards, undermines consumer confidence, and fails to protect producers of true organic products. Harvey's alleged injuries fall precisely within the zone of interests that the statutes at issue were meant to protect.

## III. THE MERITS

### A. First Count: Alleged Exemption for Nonorganic Products Not Commercially Available

Harvey alleges that 7 C.F.R. § 205.606 permits the introduction of a wide variety of nonorganic ingredients into organic or made-with-organic products in contravention of OFPA's general prohibition of such ingredients. The portion of the Rule at issue provides:

> The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.
>
> *Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.*
>
> (a) Cornstarch (native)
>
> (b) Gums--water extracted only (arabic, guar, locust bean, carob bean)
>
> (c) Kelp--for use only as a thickener and dietary supplement
>
> (d) Lecithin--unbleached
>
> (e) Pectin (high-methoxy)

7 C.F.R. § 205.606 (emphasis added).

Harvey maintains that the emphasized portion of the Rule allows the introduction of any nonorganic ingredient into processed products whenever an individual certifier determines that the ingredient is not commercially available in organic form. Harvey correctly points out that §§ 6517 and 6518 of OFPA require all specific exemptions to the Act's ban on nonorganic substances to be placed on the National List following notice and comment and subject to periodic review. *See* 7 U.S.C. §§ 6517(a), (d), (e); 6518(k), (*l* ), (m). Harvey argues that the challenged provision allows ad hoc decisions regarding the use of synthetic substances, in contravention of these statutory procedural requirements.

In the District Court and before this court, the Secretary has taken the position that § 205.606 does not create a blanket exemption, as Harvey contends, but rather permits use only of the ingredients specifically listed in that section. In other words, the Secretary maintains that the list of five products in § 205.606 is a part of the National List and that the provision emphasized above and challenged by Harvey should be interpreted simply as a further limitation on the addition of new nonorganic ingredients to the National List.

We agree with the District Court that the interpretation advanced by the Secretary is a plausible interpretation of the language of § 205.606 that eliminates any conflict with OFPA's requirements. The District Court was correct to conclude that, under the Secretary's interpretation, § 205.606 is not in contravention of OFPA.

However, the District Court did not clarify that it is necessary to interpret the Rule in this manner in order to find this portion of the Rule valid. Under other interpretations, § 205.606 might exceed the Secretary's authority under OFPA. In particular, the interpretation suggested by Harvey, although it is at odds with OFPA's evident requirements, is not an implausible construction of the language of § 205.606 considered alone. Indeed, the Secretary herself appears to have espoused exactly this interpretation in the past. *See* 65 Fed.Reg. 80,616 ("In the regulation, a nonsynthetic and nonorganic agricultural product

... used as a processing aid does not have to appear on the National List. Such products are included in the provision in § 205.606 that nonorganically produced agricultural products may be used in accordance with any applicable restrictions when the substance is not commercially available in organic form.").

In light of this possibility, it is insufficient for this court simply to affirm the District Court's judgment that § 205.606 is, as it stands, consistent with OFPA. Instead, to clarify that this portion of the Rule may not be interpreted in a way that contravenes the National List requirements of OFPA, we remand to the District Court for entry of a declaratory judgment that § 205.606 does not establish a blanket exemption to the National List requirements for nonorganic agricultural products that are not commercially available.

B. Second Count: Use of Private Certifiers' Seals on Products Containing Less Than 95% Organic Ingredients

Harvey also challenges a part of the Final Rule permitting use of private certification notices and private certifiers' seals on products containing between 70 and 94% organic ingredients. 7 C.F.R. §§ 205.304(a)(3), (b)(2). Harvey acknowledges that the Act allows such products to be labeled as containing "organic" ingredients but contends that OFPA implicitly prohibits the certification of such ingredients or the use of non-USDA seals on these products. In his view, such certification runs afoul of § 6505(a)(1)(B) of the Act, which forbids labeling that "implies, directly or indirectly, that [a] product is produced and handled using organic methods" when it was not produced or handled in such a way. *Id.* We conclude that the Act does not prohibit, either implicitly or explicitly, the certification of organic ingredients or the use of private certifiers' seals and that the challenged portion of the Rule was a permissible exercise of the Secretary's discretion in this area.

The provision to which Harvey objects is one aspect of a comprehensive labeling and certification scheme set forth in the Rule. *See* 7 C.F.R. §§ 205.301-205.305. This scheme provides for four

different types of product labels and for two different types of certification, all depending on the percentage of organic ingredients in the labeled product. The labeling scheme distinguishes (1) products containing 100% organic ingredients, which may be labeled "100 percent organic," *see id.* § 205.301(a); (2) products containing 94 to 100% organic ingredients, which may be labeled "organic," *see id.* § 205.301(b); (3) products containing 70 to 94% organic ingredients, which may be labeled "made with organic (specified ingredients or food group(s))," *see id.* § 205.301(c), and (4) products containing less than 70% percent organic ingredients, which may identify each such ingredient on the label or ingredient statement with the word "organic," *see id.* §§ 205.301(d), 205.305(a)(1). Harvey does not contest these portions of the Rule, which are plainly consistent with the Act's requirements. *See* 7 U.S.C. §§ 6505(a)-(c), 6510 (forbidding labeling of products as organically produced unless produced in accordance with the Act and providing that no more than 5% nonorganic ingredients may be added to processed foods handled in accordance with the Act, but also permitting labeling of *ingredients* as organic in processed foods containing less than 94% organic ingredients).

Harvey's challenge is to a portion of the Rule's parallel certification scheme. This scheme allows (1) products in the first two labeling categories, containing 95% or more organic ingredients, to bear both a USDA seal and the seal of a private certifying agent, *see* 7 C.F.R. §§ 205.303(b)(4)-(5), 205.311(a); (2) products containing 70 to 94% organic ingredients to bear a notice of private certification and the seal of a private certifying agent, *see id.* 205.304(a)(3), (b)(2); and (3) products containing less than 70% organic ingredients to bear neither a USDA seal nor that of a private certifier, *see id.* § 205.305(b). Harvey specifically objects to the second of these categories. He maintains that "the Act's limited exemption for identifying organic ingredients does not authorize the certification of products which do not meet the requirements of the Act" and that allowing certification of such products misleads consumers, in contravention of 7 U.S.C. § 6505(a)(1)(B).

We note again that Harvey does not challenge the third tier of the

Rule's labeling scheme, which allows products containing 70 to 94% organic ingredients to be labeled "made with organic (specified ingredients or food group(s))." 7 C.F.R. § 205.301(c). Rather, Harvey's challenge is to the use of private certification notices and seals on such products. His argument that use of private certifiers' seals to designate the presence of organic ingredients in a product contravenes OFPA depends on two related premises: (1) that the Act allows for only one kind or level of certification, namely, USDA certification, which cannot be uncoupled from private certification, and (2) that the Act does not contemplate the certification of ingredients or the use of private, non-USDA seals to indicate their certification.

Neither premise is supported by the Act itself. First, the Act does expressly restrict use of the USDA seal, *see* 7 U.S.C. § 6505(a)(2), and contemplates an extensive role for private certifying agents in implementing the Act's requirements.[3] However, it is silent on the use of private certifiers' seals and on the standards for inclusion of private certification information on product packaging. Since the Act does not address private certification at all, it necessarily cannot address whether private certification may be uncoupled from USDA certification.

Second, the Act does provide for the identification of ingredients as organic when a product contains less than 95% organic ingredients, *id.* § 6505(c)(1)- (2), but it is silent on whether such identification may or may not include certification of such ingredients as organic and/or a private certifier's mark. In other words, with respect to products containing less than 95% organic ingredients, the Act speaks only to the

[3]*See, e.g.,* 7 U.S.C. §§ 6502(3)-(5) (defining "certifying agent," "certified organic farm," and "certified organic handling operation"), 6503(d) (providing for certification of farms or handling operations by agents), 6506(a)(4)-(6) (providing for periodic review of organic programs by certifying agents), 6513(a) (providing for submission of organic plans to certifying agents), 6514(a)-(c) (addressing accreditation of certifying agents), 6515(a)-(j) (setting forth "[r]equirements of certifying agents"), 6516(a)-(b) (addressing peer review of certifying agents), 6518(b)(7) (setting aside seat on the National Organic Standards Board for a certifying agent), 6519(d)-(e) (addressing violations reported and committed by certifying agents).

labeling portion of the tiered scheme described above. With respect to *certification* of products in this category, the Act is silent.

Since the Act is silent on these issues, we must conclude that Congress committed the questions to the Secretary's discretion and assess the challenged portions of the Rule for their reasonableness in light of OFPA's overall scheme. *Penobscot Air Servs.,* 164 F.3d at 719; *see also United States v. Haggar Apparel Co.,* 526 U.S. 380, 392, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999) ("If ... the agency's statutory interpretation fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give that judgment controlling weight." (citations and internal quotation marks omitted)).

The challenged regulations are reasonable in light of OFPA's overall scheme. The Act clearly authorizes the use of the word "organic" on the packaging of products made with 70 to 94% organic ingredients. 7 U.S.C. § 6505(c)(1). Under the Act, certifying agents play a crucial role in determining whether an ingredient derives from an organic operation. *Id.* § 6503(d). Given these statutory directives, the Secretary's requirement that labels on third-tier products (containing 70 to 94% organic ingredients) identify the agent responsible for certifying such ingredients is not unreasonable. This information allows the Secretary to identify and track certifiers on a product-by-product basis, creates consumer confidence that the specified ingredients are indeed organic, and provides the name of the certifier, which may be useful to some consumers. Far from contravening the Act, the certification requirement furthers its purpose of assuring consistency. *See id.* § 6501 (stating purposes of OFPA).

Nor is it unreasonable for the Secretary to permit inclusion of private certifiers' seals on such products. Such seals will tend to increase consumer confidence and to facilitate interstate commerce in organic products, furthering two of OFPA's three goals. *See id.* Harvey and the amici argue that the presence of a non-USDA seal on some products will confuse consumers. Consumers might be confused by the presence of *USDA* seals on products containing 70 to 94% organic ingredients. *See*

*id.* §§ 6505(a)(1)(B), 6505(a)(2), 6510(a)(4). But it is difficult to see how a *non-USDA* seal applied in compliance with the challenged provisions could create similar confusion, particularly since the seal will be accompanied by labeling stating not that the product is "100% organic" or "organic" but merely that it is "made with organic (ingredients)." Under these circumstances, a private certifier's seal appearing alone on a label serves simply to reiterate the identification of the agent certifying the ingredient. Harvey points to no support, statutory or otherwise, for his contention that the identification of an ingredient as "organic" is somehow less confusing to consumers than identification of a private certifier or use of such a certifier's seal, yet such a distinction is crucial to his argument. Because we can see no basis for the distinction, we reject the inference.

We conclude that the District Court did not err in upholding the challenged portions of the Final Rule as permissible exercises of the Secretary's authority. We therefore affirm the District Court's judgment on this count of Harvey's complaint.

C. Third Count: Use of Synthetic Substances in Processing

Harvey next challenges two parts of the Rule permitting synthetic substances to be used in processed organic foods. 7 C.F.R. §§ 205.600(b), 205.605(b). Section 205.600(b) provides that synthetic substances may be used "as a processing aid or adjuvant" if they meet six criteria; § 205.605(b) lists thirty-eight synthetic substances specifically allowed in or on processed products labeled as organic. These provisions, Harvey contends, contravene the plain language of OFPA, which provides that certified handling operations "shall not, with respect to any agricultural product covered by this title ... add any synthetic ingredient during the processing or any postharvest handling of this product." 7 U.S.C. § 6510(a)(1). [4] Harvey is correct; the challenged

[4]The ban on the addition of synthetic substances in handling applies only to those products labeled 'organic' or '100% organic.' The statute does not prohibit the addition of synthetic substances to foods labeled 'made with organic [ingredients],' provided the (continued...)

regulations lie outside of the scope of authority granted the Secretary by OFPA.

The Secretary conceded before the District Court that § 6510(a)(1) constitutes a "general prohibition" against adding synthetic ingredients in handling operations. The Secretary argues, however, that § 6517 of the Act, which directs the establishment of the National List and governs the creation of exemptions from the Act's general prohibitions, allows the listing of synthetics for use in the handling of products labeled organic. We reject this argument. This section provides that

> The National List may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this title *only if* ...
> (B) the substance--
> (i) is used in *production* and contains an active *synthetic* ingredient in the following categories ...
> (ii) is used in *production* and contains *synthetic* inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
> (iii)is used in *handling* and i[s] *non-synthetic* but is not organically produced....

7 U.S.C. § 6517 (emphases added). This section contemplates use of certain synthetic substances during the production, or growing, of organic products, but not during the handling or processing stages.[5] Section 6517(c)(1)(B)(iii) simply does not say what the Secretary needs it to say.

The Secretary notes that some subsections of § 6517 refer to "farming or handling" activities together, and the Secretary claims that this language renders the Act ambiguous or inconsistent, permitting the

---

[4](...continued)
other requirements of the Act are met. *See* 7 U.S.C. § 6505(c).

[5]*See* 7 U.S.C. § 6502(8) (defining "handle" as "to sell, process, or package agricultural products"), (18) (defining "producer" as "a person who engages in the business of growing or producing food or feed").

Secretary to draft a reasonable reconciliation. We reject this characterization of the Act. Section 6517(c) clearly establishes a three-prong test for exemption of otherwise prohibited substances and their inclusion on the National List. Prong (A), not quoted above, sets forth requirements that any otherwise prohibited substance, whether used in production or handling, must meet to be exempted.[6] Prong (B), quoted above, specifically requires that the otherwise prohibited substances exempted for use in handling be nonsynthetic. Prong (B) is not inconsistent with prong (A); it merely sets forth more specific requirements with regard to the types of substances that may be exempted for use in production and handling, respectively.

The challenged regulations are contrary to the plain language of OFPA and therefore exceed the Secretary's statutory authority. *See Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter...."). We therefore reverse the District Court's grant of summary judgment to the Secretary on this count.[7]

D. Fifth Count: Exemption of Wholesalers and Distributors from Certification Requirements

Harvey next challenges 7 C.F.R. § 205.101(b)(1), a portion of the Final Rule that excludes from the Act's coverage and requirements "handling operations" selling products that are "packaged or otherwise enclosed in a container prior to being received or acquired by the

[6]This subsection requires such substances to be "not ... harmful to human health or the environment"; necessary to production or handling of an agricultural product "because of the unavailability of wholly natural substitute products"; and "consistent with organic farming and handling." 7 U.S.C. § 6517(c)(1)(A)(i)-(iii).

[7]We note that in his brief, Harvey admits that he has withdrawn his challenge as to some of the thirty-eight substances listed in 7 C.F.R. § 205.605(b) because use of the substances is required by other statutes. Our reversal of the District Court's judgment is without prejudice to any such concessions made by Harvey or to the general principle of 7 U.S.C. § 6519(f), which provides that OFPA is not to be interpreted to alter the Secretary's authority under other statutes.

operation" and that "[r]emain in the same package or container and are not otherwise processed while in the control of the handling operation." *Id.* § 205.101(b)(1)(i)- (ii). According to Harvey, this provision impermissibly excludes wholesalers and distributors, a subset of those engaged in "handling operations," from certification and other OFPA requirements. But, Harvey argues, OFPA expressly exempts from its certification requirements only one subset of those engaged in "handling operations," namely, retailers who do not process the foods they sell. 7 U.S.C. §§ 6502(9), (10). According to Harvey, the Act cannot be read to permit the additional blanket exemption of wholesalers and distributors.

OFPA's exclusion of final retailers from its coverage shows that Congress knew how to exclude operations otherwise subject to the Act and must be presumed to have acted deliberately when it did not specifically exclude those that handle only packaged products. *See id.* That, however, is not the end of the story. Section 6510 of the Act specifies the requirements for certification of handling operations. *Id.* § 6510. Each of the seven subsections of § 6510 prohibits either the addition of contaminants or exposure to contaminating materials. *Id.* § 6510(a)(1)-(7). The evident purpose of this section is to ensure that operations handling organic products will not contaminate or expose to contamination those products. But operations handling only packaged products (as defined in the regulation) do not present the contamination hazards at which this section--and hence the certification process--is aimed. Thus, certification is irrelevant to those operations that handle only packaged products.

The statutory definition of handling operations in § 6502(10), on its face, appears to include operations handling only sealed packaged products. But the requirements for certification of handling operations in § 6510 appear to have no application to operations handling only sealed packaged products, which by their nature could not engage in any of the proscribed activities. This portion of the statute therefore lacks coherence and consistency, creating ambiguity concerning Congress' intent. *See, e.g., Barnhart v. Sigmon Coal Co.,* Inc., 534 U.S. 438, 450,

122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (holding that inquiry as to statutory ambiguity ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent") (internal quotation marks and citation omitted); *Salinas v. United States,* 522 U.S. 52, 60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (noting that in order for a statute to be considered unambiguous, "[i]t need only be plain to anyone reading the Act that the statute encompasses the conduct at issue") (internal quotation marks and citations omitted); *Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.") (citation omitted). Because "the statute is silent or ambiguous with respect to the specific issue," the court must defer to the Secretary's reasonable interpretation of the statute. *Chevron,* 467 U.S. at 843-44, 104 S.Ct. 2778. We therefore affirm the District Court's grant of summary judgment to the Secretary on this count.

E. Sixth Count: Prohibition on Uncompensated Advice from Private Certifiers

Harvey also challenges 7 C.F.R. § 205.501(a)(11)(IV), which prohibits certifying agents from "giving advice or providing consultancy services, to certification applicants or certified operations, for overcoming identified barriers to certification." Harvey contends, first, that this regulation clearly conflicts with 7 U.S.C. § 6515(h), which bars certifying agents only from mixing advice with financial interest:

> Any certifying agent shall not--
>
> (1) carry out any inspections of any operation in which such certifying agent ... has, or has had, a commercial interest, including the provision of consultancy services;
>
> (2) accept payment, gifts, or favors of any kind from the business inspected other than prescribed fees; or
>
> (3) provide advice concerning organic practices or techniques for a fee, other than fees established under such program.

*Id.*

Harvey argues further that even if the relevant portion of OFPA is ambiguous, deference to the Secretary's interpretation as embodied in

the portion of the Rule at issue is not warranted, because this regulation raises serious constitutional questions in that it conditions receipt of a public benefit--USDA accreditation--on the relinquishment of free speech rights. *See Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 544, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

In connection with the first of these arguments, Harvey specifically contends that § 6515(h), titled "Conflicts of interest," constitutes the complete list of certifier activities banned by Congress and may not be interpreted to bar activities not involving financial benefit to the advice giver. But as the Secretary points out, the statute is not quite so narrowly focused; it also bars inspections when the certifier "has had" a commercial interest in an operation and prohibits inspectors from accepting "favors of any kind." 7 U.S.C. § 6515(h)(1), (2). As its title suggests, the subsection regulates conflicts of interest and certifier integrity generally. It neither addresses nor excludes the question of whether the provision of free advice may risk a conflict of interest.

Since the statute is ambiguous on this point, we reach step two of *Chevron* and must defer to the Secretary's interpretation if it is reasonable. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We conclude that this interpretation is reasonable. It is easy to imagine situations in which providing free advice might create a conflict of interest for a certifier; the Secretary outlines a scenario in which a certifier provides well-meaning but erroneous advice on compliance with the Act to a producer, then later is faced with a choice between reporting the producer's violation and recanting the erroneous advice, a step that could injure the certifier's own reputation and credibility. Section 6515(h) is concerned with ensuring certifiers' integrity and avoiding conflicts of interest. It does not preclude the Secretary from imposing additional requirements tending to achieve these ends. The challenged regulation is therefore neither inconsistent with the Act nor an unreasonable interpretation of the Secretary's authority.

Harvey argues that if we find the statute ambiguous on this point, any *Chevron* deference due the Secretary's interpretation is offset by the

requirement that we construe statutes, where possible, to avoid conflict with the Constitution. *See Rust v. Sullivan,* 500 U.S. 173, 190-91, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *see also U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1231 (10th Cir.1999) ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."). According to Harvey, the challenged regulation raises a substantial constitutional question, since it conditions receipt of a government benefit on speech restrictions.

In making this argument, Harvey relies primarily on *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).[8] In *Legal Services Corp.,* the Supreme Court invalidated restrictions on the speech of attorneys representing welfare claimants in a government-funded legal services program. The Court noted that the challenged program "was designed to facilitate private speech, not to promote a governmental message," and contrasted it in this regard with the program in *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, in which the government "used private speakers to transmit information pertaining to its own program," a program of federal funding for family planning clinics. *Legal Servs. Corp.,* 531 U.S. at 541-42 (citation and quotation omitted). The Court in *Legal Services Corp.* emphasized that "when the government disburses public funds to private entities to convey a governmental message[, as in *Rust* ], it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 541, 121 S.Ct. 1043 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)).

---

[8]The Secretary argues that the constitutionality of the regulation should instead be analyzed under *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), because certifiers are government employees. *Pickering* is not appropriate to analysis of this regulation, since certifiers are not by definition government employees or recipients of government funds. *See* 7 U.S.C. § 6514 (setting forth requirements for accreditation as applicable to both State officials and "private person[s]").

The present case is clearly more nearly analogous to *Rust,* in which the Court found that speech restrictions did not create a constitutional problem, than to *Legal Services Corp.,* in which the Court found that they did. In OFPA, the government has not created a program to facilitate private speech, as in *Legal Services Corp.* Instead it has created a scheme that uses private certifiers to transmit information regarding the national certification program, a clear example of a "governmental message." *Legal Servs. Corp.,* 531 U.S. at 541, 121 S.Ct. 1043; *see also Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510 ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message").

The limitation at issue, as discussed above, is a reasonable addition to OFPA's provisions for minimizing certifier conflicts of interest. We conclude that it is also an appropriate restriction on speech within OFPA's scheme and raises no serious constitutional difficulties. We therefore affirm the District Court's grant of summary judgment to the Secretary on this count.

F. Seventh Count: Conversion of Dairy Herds to Organic Production

Harvey also challenges a portion of the Rule creating an exception to the Act's requirements for dairy herds being converted to organic production. 7 C.F.R. § 205.236(a)(2)(i). OFPA provides that "[a] dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this title for not less than the 12-month period immediately prior to the sale of such milk and milk products." 7 U.S.C. § 6509(e)(2). The challenged rule, in contrast, provides that

> when an entire, distinct herd is converted to organic production, the producer may:
>
> (i)For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and

(ii)Provide feed in compliance with § 205.237 for the final 3 months.

7 C.F.R. § 205.236(a).

Section 205.237, referred to in the quoted portion of the Rule, provides that "[t]he producer of an organic livestock operation must provide livestock with a *total feed ration* composed of agricultural products, including pasture and forage, that are organically produced and, if applicable, organically handled." *Id.* § 205.237 (emphasis added). The reference to a "total feed ration" of organically produced feed products indicates that livestock must ordinarily be fed 100% organic feed to qualify as part of an "organic livestock operation." *Id.*[9] Under the challenged regulation, a converting dairy herd must be fed this way for only three months. In contrast, under § 6509(e)(2) of OFPA, dairy animals must be "handled organically" for a full twelve months before their products may be labeled organic. In other words, OFPA clearly requires a single type of organic handling for twelve months before sale of dairy products as organic, 7 U.S.C. § 6509(e)(2), whereas the Final Rule requires two different levels of organic feed during that twelve-month period, 7 C.F.R. § 205.236(a). The statutory and regulatory directives directly conflict on this point.

The Secretary admits that OFPA requires dairy livestock to be fed organically produced feed for the twelve months before their milk is sold as organic. *See* 7 U.S.C. § 6509(e)(2). The Secretary characterizes the challenged regulation, which provides for a phased conversion process, as an "exception" to this requirement. The Secretary justifies this exception through a twofold argument for the validity of § 205.236(a): (1) OFPA is silent on the question of dairy herd conversion, so the Secretary has freedom to promulgate reasonable regulations on this subject; and (2) even if § 6509(e)(2) of the Act is construed to govern the conversion of dairy herds, the Act does not specify the meaning of

[9]This interpretation of "total feed ration" is consistent with the legislative history of OFPA. *See* S.Rep. No. 101-357, 1990 U.S.C.C.A.N. 4656, 5222 ("Livestock must be fed 100 percent organically grown feed.... [Dairy] livestock [must] be raised according to all of the above standards for ... not less than one year.").

the term "handled organically," so the Secretary may fill this gap with a reasonable interpretation, such as that contained in § 205.236(a) of the Rule. We reject both arguments.

First, the twelve-month requirement of § 6509(e)(2) has little meaning if it does not govern situations in which a dairy animal is being "converted" to organic production, and nothing in the Act indicates that the standards for organic production are different for entire herds than for single animals. Reasonably construed, OFPA sets forth clear requirements for dairy herd conversion in § 6509(e)(2), and the Secretary may not promulgate a regulation directly at odds with those statutory requirements.

Second, while the Act itself does not define "handled organically," the Secretary appears to have filled that gap with respect to the feed provided dairy animals in § 205.237(a), which, fairly construed, requires 100% organic feed. This interpretation is consistent with Congress' intent as expressed in the legislative history of OFPA. *See* S.Rep. No. 101-357, 1990 U.S.C.C.A.N. 4656, 5222. Even if the meaning of "handled organically" remained unclear, it would be impossible to reconcile the phased conversion process set forth in the challenged rule with the one-step process that § 6509(e) of the Act sets forth. Nothing in the Act's plain language permits creation of an "exception" permitting a more lenient phased conversion process for entire dairy herds.

The Secretary's creation of such an exception in the challenged provision of the Rule is contrary to the plain language of the Act. *See Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778. The District Court was in error in concluding otherwise, and we therefore reverse its judgment on this count of Harvey's complaint.

G. Eighth Count: Prohibition on Distinct Private Certification Standards

Harvey's final challenge is to a provision of the Final Rule that prohibits a certifying agent from

> requir[ing] compliance with any ... practices other than those provided for in the Act and the regulations ... as a condition of use of [the agent's] identifying mark: Provided, That, certifying agents certifying production or handling operations within a State with more restrictive requirements, approved by the Secretary, shall require compliance with such requirements as a condition of use of their identifying mark....

7 C.F.R. § 205.501(b)(2).

Harvey argues not that this regulation contravenes any specific provision of the Act, but that its limitation on more stringent private standards is counter to the purposes of OFPA. Specifically, Harvey maintains that the limitation will suppress competition among users of organic production and handling methods, create consumer confusion, and limit consumer choice. Harvey also argues for the first time on appeal that the regulation impermissibly regulates commercial speech and is therefore unconstitutional.

In fact, the challenged regulation does not frustrate the purposes of the Act; it furthers them. Congress clearly set forth OFPA's purposes in the Act itself. The aim of the system established by the Act is, in part, to help "establish national standards governing the marketing" of organic products and to "assure consumers that organically produced products meet a consistent standard." 7 U.S.C. § 6501. The Act accordingly calls for the establishment of a national organic production program and national standards for organic production, *id.* §§ 6503, 6504, and provides that products may be labeled "organically produced only if such product is produced and handled in accordance with this title," *id.* § 6505(a)(1)(A). OFPA further provides that State certification programs may be more restrictive than the federal program. *Id.* § 6507(b)(1). This provision, incidentally, allows for the type of competition developing more stringent organic standards sought by Harvey.

The Act is silent, however, on the issue of more stringent private standards or certification requirements, just as it is silent on the use of private certifiers' seals. Since this is a matter on which Congress did not

speak, *Chevron* requires us to assess whether the challenged regulation is a reasonable interpretation of the Act. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We conclude that it is. As noted above, the Act's provision for more stringent State standards allows for the kind of competitive advancement of standards Harvey desires. Additionally, as the Secretary points out, nothing in the challenged regulation prevents private certifiers from making truthful claims about the products they certify; it only bars such certifiers from applying more stringent requirements as a condition of use of their USDA-accredited certifying mark. This ban is a reasonable means of furthering the Act's concern with consistency.

We decline to consider Harvey's constitutional argument. Harvey concedes that he did not raise the issue before the District Court but argues that our consideration of it is warranted under *National Ass'n of Social Workers v. Harwood,* 69 F.3d 622, 627-29 (1st Cir.1995). In *Harwood,* we noted that we countenance consideration of arguments not raised below when six factors "heavily preponderate in favor of" considering them. *Id.* at 628. It may be appropriate to consider an omitted argument when it (1) is "purely legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts," (2) "raises an issue of constitutional magnitude," (3) "is highly persuasive" or threatens a "miscarriage of justice" if not addressed, (4) does not threaten prejudice or inequity to the adverse party if addressed, (5) was omitted inadvertently, and (6) "implicates matters of great public moment." *Id.* The issue here is purely legal and constitutional, satisfying the first and second *Harwood* factors, and it may have been omitted inadvertently, satisfying the fourth, but Harvey does not argue convincingly that failing to reach the claim will threaten a miscarriage of justice or that the issue is one of great public moment. *See id.* (noting that the "great public moment" factor is "perhaps most salient"). On balance, the factors do not preponderate heavily in favor of considering the question.

The provision at issue is a reasonable interpretation of a matter on which the Act is silent, so it was a valid exercise of the authority delegated to the Secretary by the Act. We therefore affirm the District

Court's grant of summary judgment to the Secretary on this count.

## CONCLUSION

We **REMAND** the first count of Harvey's complaint to the District Court for entry of declaratory judgment clarifying the permissible interpretation of the regulation at issue in accordance with this opinion.

On the second, fifth, sixth, and eighth of Harvey's counts, we **AFFIRM** the District Court's grant of summary judgment to the Secretary.

On the third and seventh of Harvey's counts, we **REVERSE** the District Court's grant of summary judgment to the Secretary and **REMAND** the counts to the District Court for entry of summary judgment in Harvey's favor.

The parties shall each bear their own costs.

## PLANT QUARANTINE ACT

## COURT DECISION

**THE CALIFORNIA AVOCADO COMMISSION, ET AL. v. USDA.[1]**
**No. CVF016578RECSMS.**
**Decision and Order**
**Filed May 18, 2005.**

**(Cite as: 2005 WL 1344203 (E.D.Cal.))**

**P.Q. – N.E.P.A. – P.P.A. – Rule making – Avocados, Mexican Hass.**

Avocado growers in California challenged a final rule which would have amended a long standing ban on importation of Mexican Hass Avocados into specified regions of the U.S. After the challenge to the original final rule, the USDA amended the rule based upon statistical findings (no pests found in 5 years & 10 million avocados inspected). The court found the growers's challenge to the original final rule moot.

**United States District Court,**
**E.D. California.**

ORDER DISMISSING CASE AS MOOT.

COYLE, J.

Plaintiffs, four California avocado growers and an agency created by the state of California that purports to represent the interests of California's approximately 6,000 commercial avocado growers and their 21,000 employees, challenge the promulgation of two final rules--the Original Avocado Rule and the Avocado Expansion Rule--by the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA"). The challenged APHIS rules permitted the regulated importation of Hass avocados from the Mexican state of Michoacan into specified regions of the United States.

---

[1]Mike Johanns has been substituted for his predecessor Ann Veneman pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

On November 18, 2002, the Court heard the parties' cross motions for summary judgment or summary adjudication of Plaintiffs' claims. On January 14, 2004, the Court issued an order dismissing as moot Plaintiffs' challenge to the Original Avocado Rule. Upon further consideration, the Court dismisses as moot Plaintiffs' challenge to the Avocado Expansion Rule.

**I. Undisputed Factual Background**

The Mexican Hass avocado was subject to a ban on import to the contiguous United States from 1914 to 1997 under federal plant quarantine laws and regulations. On November 15, 1994, APHIS published an advance notice of a proposed rule-making in the Federal Register, announcing that it had received a request from the Government of Mexico to allow importation of Hass avocados from the Mexican state of Michoacan.

The Original Avocado Rule was promulgated under the authority of the Plant Quarantine Act of 1912. Following the solicitation of comments on the advanced notice, a proposed rule was published and APHIS prepared risk analysis documents and an Environmental Assessment. APHIS concluded that the likelihood of pest introduction into the United States would be reduced to a negligible level if the mitigation measures set forth in the Original Avocado Rule were applied. After a 180-day period for public comment, the submission of written comments, and public hearings, APHIS published a final rule on February 5, 1997 (the "Original Avocado Rule"). The Original Avocado Rule allowed, subject to certain conditions, the importation of Hass avocados from November through February into 19 central and northern states and the District of Columbia.

APHIS received another request from the Government of Mexico to expand the scope of avocado importation. A new authorizing statute, the Plant Protection Act, was in effect when the request was received and remains in effect today. APHIS, via the notice and comment rule-making procedures, amended the Original Avocado Rule on November 1, 2001. The amended regulation, the "Avocado Expansion

Rule," was published at 7 C.F.R. § 319.56-2ff. It expanded the area of distribution to include 12 more states and it lengthened the shipping season to October 15 through April 15.

**II. Procedural Background**

Plaintiffs' complaint challenges the legality of both the Original Avocado Rule and the Avocado Expansion Rule, arguing that both rules were promulgated in excess of the USDA's statutory authority, were arbitrary and capricious based on the administrative record and were contrary to the USDA's general quarantine. Plaintiffs also argue that the USDA violated the National Environmental Policy Act because it failed to prepare an environmental impact statement for either rule.

As mentioned, on January 14, 2004, the Court dismissed as moot Plaintiffs' challenge to the Original Avocado Rule. The Court found that the Avocado Expansion Rule superseded the Original Avocado Rule and that, accordingly, the Original Avocado Rule was incapable of harming Plaintiffs.

**III. Recent Developments**

On May 24, 2004, APHIS published an advance notice of a proposed rule-making in the Federal Register. 69 Fed.Reg. 69749, 69749 (Nov. 30, 2004). The proposal was to amend the regulations governing the importation of Hass avocados from Michoacan, Mexico to, *inter alia,* expand the number of states into which the avocados could be imported and to allow distribution all months of the year. *Id.* The action was proposed both in response to a request by the Government of Mexico and based on APHIS' determination that the phytosanitary measures provided by the rule would reduce the risk of introduction of plant pests associated with Mexican Hass avocados in the United States.

APHIS solicited comments for a 60 day period that ended on July 23, 2004, and the risk assessment was updated based on the comments received. *Id.* Ultimately, APHIS estimated with 95 percent confidence that fewer that 387 infested avocados would enter the United States

under the new rule. However, APHIS also noted that no pests have been discovered in 6 years of inspections that included the examination of over 10 million avocados. *Id.* Based in part on this data as well as on statistical models, APHIS concluded that "it is slightly more likely that zero infested avocados will enter the United States than one infested avocado." *Id.*

The final rule went into effect on January 31, 2005. As amended, it provides that fresh Hass avocados may be imported pursuant to restrictions from Michoacan, Mexico into all states except California, Florida and Hawaii. 7 C.F.R. § 319.56-2ff (2005). The regulation further provides that after January 31, 2007, fresh Hass avocados may be imported into all states. *Id.*

**IV. Mootness**

Under Article III of the Constitution, federal courts have jurisdiction only over cases and controversies. *Public Util. Comm'n v. F.E.R.C.,* 100 F.3d 1451, 1458 (9th Cir.1996). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quoting *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)). A key inquiry is whether a court is "able to grant effective relief." *Id.* (citing *GTE California, Inc. v. FCC,* 39 F.3d 940, 945 (9th Cir.1994)); *McBride Cotton & Cattle Corp. v. Veneman,* 290 F.3d 973, 982 (9th Cir.2002).

Here, APHIS followed the notice and comment procedures for rule-making required by the Administrative Procedures Act. 5 U.S.C. §§ 551(5), 553. Under those procedures, an amended rule as promulgated is final and supersedes the earlier rule. Accordingly, the Avocado Expansion Rule ceased having legal effect on January 31, 2005, when the New Avocado Rule became effective. As was the case with respect to the Original Avocado Rule, the Court cannot grant relief from an inoperative rule. *See* Doc. 89 at 7. Consequently, Plaintiffs' challenge to the Avocado Expansion Rule is moot and the Court dismisses the remainder of the complaint on the grounds that the Court lacks subject matter jurisdiction. *See Sannon v. United States,* 631 F.2d 1247, 1250-51

(5th Cir.1980) (stating "[t]hat newly promulgated regulations immediately applicable to litigants in a given case can have the effect of mooting what once was a viable case is without doubt").

ACCORDINGLY, the remainder of Plaintiffs' complaint is DISMISSED AS MOOT.

IT IS SO ORDERED.

## PLANT QUARANTINE ACT

## DEPARTMENTAL DECISIONS

**In re: MIGUEL A. HIDALGO.**
**P.Q. Docket No. 03-0008.**
**Decision and Order.**
**Filed January 24, 2005.**

**PQ – Plant quarantine – Default – Failure to file timely answer – Mangoes – Service.**

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Jill S. Clifton concluding Respondent imported six mangoes into the United States from Peru in violation of the Plant Protection Act (7 U.S.C. §§ 7701-7772) and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq*.) and assessing Respondent a $500 civil penalty. The Judicial Officer rejected Respondent's contention that he was not served with the complaint. The Judicial Officer stated the Hearing Clerk properly served Respondent with the complaint on November 12, 2002, in accordance with 7 C.F.R. § 1.147(c)(1), by mailing the complaint by certified mail to Respondent's last known residence where someone signed for the complaint. The Judicial Officer stated the Rules of Practice are reasonably calculated to apprise parties of the pendency of an action and afford them an opportunity to be heard. Therefore, the Rules of Practice, which were followed in the proceeding, meets the requirements of due process.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on November 7, 2002. Complainant instituted this proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772); regulations issued under the Plant Protection Act (7 C.F.R. §§

319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that, on or about March 4, 2001, Miguel A. Hidalgo [hereinafter Respondent] imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e), and .56-2i (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 12, 2002.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on March 11, 2004.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas; (2) concluding that Respondent violated the Plant Protection Act and 7 C.F.R. § 319.56 *et seq.*; and (3) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2).

On May 4, 2004, Respondent appealed to the Judicial Officer. Complainant did not file a response to Respondent's appeal petition, and on January 11, 2005, the Hearing Clerk transmitted the record to the

[1]Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912.

[2]Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771.

Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with minor modifications. Additional conclusions by the Judicial Officer follow the ALJ's conclusions, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 104—PLANT PROTECTION

. . . .

SUBCHAPTER II—INSPECTION AND ENFORCEMENT

. . . .

**§ 7734. Penalties for violation**

. . . .

**(b) Civil penalties**

**(1) In general**

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and

opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) $50,000 in the case of any individual (except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

**(2) Factors in determining civil penalty**

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider with respect to the violator—

(A) ability to pay;

(B) effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) any other factors the Secretary considers appropriate.

7 U.S.C. § 7734(b)(1)-(2).

7 C.F.R.:

## TITLE 7—AGRICULTURE

. . . .

## SUBTITLE B—REGULATIONS OF THE DEPARTMENT

## OF AGRICULTURE

. . . .

## CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

## PART 319—FOREIGN QUARANTINE NOTICES

. . . .

### SUBPART—FRUITS AND VEGETABLES

QUARANTINE

**§ 319.56 Notice of quarantine.**

. . . .

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam,

upon request in specific cases, authorize such importation under conditions, specified in the permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

**§ 319.56-2 Restrictions on entry of fruits and vegetables.**

. . . .

(e) Any other fruit or vegetable, except those restricted to certain countries and districts by special quarantine [footnote omitted] and other orders now in force and by any restrictive order as may hereafter be promulgated, may be imported from any country under a permit issued in accordance with this subpart and upon compliance with the regulations in this subpart, at the ports as shall be authorized in the permit, if the U.S. Department of Agriculture, after reviewing evidence presented to it, is satisfied that the fruit or vegetable either:

(1) Is not attacked in the country of origin by injurious insects, including fruit and melon flies (Tephritidae);

(2) Has been treated or is to be treated for all injurious insects that attack it in the country of origin, in accordance with conditions and procedures that may be prescribed by the Administrator;

(3) Is imported from a definite area or district in the country of origin that is free from all injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and its importation is in compliance with the criteria of paragraph (f) of this section; or

(4) Is imported from a definite area or district of the country of origin that is free from certain injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and the criteria of paragraph (f) of this section are met with regard to those certain insects, provided that all other injurious insects that attack the fruit or vegetable in the area or district of the country of origin have been eliminated from the fruit or vegetable by treatment or any other procedures that may be prescribed by the Administrator.

**§ 319.56-2i Administrative instructions prescribing treatments for mangoes from Central America, South America, and the West Indies.**

(a) *Authorized treatments*. Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56-2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference."

(b) *Department not responsible for damage*. The treatments for mangoes prescribed in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

7 C.F.R. §§ 319.56(c), .56-2(e), .56-2i (2001).

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. Respondent is an individual with a mailing address of 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711.

2. On or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e), and .56-2i because importation of such mangoes from Peru into the United States is prohibited, except under specific conditions.

### Conclusions

1. By reason of the Findings of Fact, Respondent has violated the Plant Protection Act and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq*.).

2. The $500 civil penalty assessed against Respondent in the Order is a reasonable, adequate, and appropriate civil penalty for Respondent's violations.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in his appeal petition that he moved from 9608 Nonquitt Drive, Fairfax, Virginia 22031, 5 years ago or more and that he did not receive any of the Hearing Clerk's "previous letters." I infer Respondent asserts the first filing Respondent received in this proceeding is the ALJ's Initial Decision and Order.

Section 1.147(c)(1) of the Rules of Practice provides that a complaint is deemed to be received by a party on the date of delivery by certified mail to the last known residence of the party, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or

> other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

On November 7, 2002, the Hearing Clerk sent the Complaint, the Rules of Practice, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. Someone signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 attached to the envelope containing the Complaint, Rules of Practice, and service letter,[3] and the United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 with the date of delivery, November 12, 2002.[4]

The Hearing Clerk properly serves a document in accordance with the Rules of Practice when a party to a proceeding, other than the Secretary, is served with a certified mailing at the party's last known

[3]The recipient of the Complaint, the Rules of Practice, and the service letter did not print his or her name in the space provided on the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912; however, the recipient signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 "Shog."

[4]See note 1.

residence and someone signs for the document.[5] Therefore, the Hearing Clerk properly served Respondent with the Complaint in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on November 12, 2002.

Sections 1.136(c) and 1.139 of the Rules of Practice state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

---

[5]*In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83, 95 2003), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003); *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573, 1576 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Joseph Buzun*, 43 Agric. Dec. 751, 754-56 (1984).

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

> The respondent shall have twenty (20) days after service of this Complaint in which to file an Answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this Complaint shall constitute an admission of the allegation. Failure to file an Answer within the prescribed time shall constitute an admission of the allegations in this Complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that a timely answer must be filed, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> November 7, 2002
>
> Mr. Miguel A. Hidalgo
> 9608 Nonquitt Drive
> Fairfax, Virginia 22031-1711
>
> Dear Mr. Hidalgo:
>
> Subject: In re: Miguel A. Hidalgo, Respondent -
> P.Q. Docket No. 03-0008
>
> Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and

telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated November 7, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Respondent's answer was due no later than December 2, 2002. Respondent's first filing in this proceeding is dated April 30, 2004, and was filed May 4, 2004, 1 year 5 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint.

On December 13, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time prescribed in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Respondent failed to respond to the Hearing Clerk's December 13, 2002, letter.

On March 8, 2004, Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order, and the Hearing Clerk sent Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. "Ruth Nancy Hidalgo" signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 attached to the envelope containing Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the service letter. The United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 with the date of delivery, March 11, 2004. Therefore,

the Hearing Clerk properly served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on March 11, 2004.

Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2004, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,[6] generally there is no

---

[6]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final*

(continued...)

basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[7] The Rules of Practice provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 1 year 5 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order.

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[8] The Rules of Practice, which provides for service by certified

---

[6](...continued)
*decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[7]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56 alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56(c) alleged in the complaint).

[8]*See also Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); *DePiero v. City of Macedonia*, 180 F.3d 770, 788-89 (6th Cir. 1999) (holding service of a summons at the plaintiff's
(continued...)

mail to a respondent's last known principal place of business or last known residence, which procedure was followed in this proceeding, meets the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (1982), the court held:

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically

---

[8](...continued)
last known address is sufficient where the plaintiff is not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect the plaintiff would not actually receive the notice mailed to his last know address), *cert. denied*, 528 U.S. 1105 (2000); *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

> authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[9]

For the foregoing reasons, the following Order should be issued.

## ORDER

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Payment of the civil penalty shall be sent to, and received by, the

---

[9] *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0008.

## RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[10] Respondent must seek judicial review within 60 days after entry of the Order.[11] The date of entry of the Order is January 24, 2005.

---

[10] 7 U.S.C. § 7734(b)(4).

[11] 28 U.S.C. § 2344.

## SUGAR MARKETING ALLOTMENT

## DEPARTMENTAL DECISIONS

**In re: AMALGAMATED SUGAR COMPANY, L.L.C.**
**SMA Docket No. 04-0003.**
**Decision and Order.**
**Filed February 7, 2005.**

**SMA – "Permanent Termination" of operations – "Sale of all assets" – Sugar Marketing allocation, transfer of – Pro-rata distribution of sugar marketing allocation – Processing capacity, lack of critical equipment for.**

David Bunde, Kevin Brosch, Michael Greear, David Bieging, Steven Z. Kaplan, Steven Adducci, Ralph Linden for Complainant and Intervenors.
Jeffrey Kahn, for Respondent.
*Decision and Order issued by Administrative Law Judge Victor W. Palmer*

## DECISION

Petitioner, Amalgamated Sugar Company ("Amalgamated"), is a sugar beet processor appealing a decision by the Commodity Credit Corporation ("CCC") that allowed a competitor, American Crystal Sugar Company ("American Crystal") to acquire all of the sugar beet marketing allocation formerly held by a different processor, Pacific Northwest Sugar Company ("Pacific Northwest", "PNW" or "PNSC"). Allocations for the marketing of beet sugar among beet sugar processors are applicable each crop year that allotments are in effect under the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002 (7 U.S.C.§§1359 aa-kk) ("Act" for the Act as amended and "2002 Farm Bill" for the 2002 amendatory provisions). The initial decision granting the transfer was made by CCC on September 16, 2003. In response to Petitioner's request for reconsideration, the CCC's Executive Vice President on November 14, 2003, issued a Reconsidered Determination denying the requested overturn of the decision. Petitioner's appeal from the Reconsidered Determination was filed pursuant to 7U.S.C.§1359 ii and the Rules of

Practice issued under 7 C.F.R.§1435.320 (b)[1]. The Act and the Rules of Practice provide for a hearing on the appeal by an Administrative Law Judge in accordance with 5 U.S.C.§§554 and 556 ("the Administrative Procedure Act", or "the APA"), and for intervention in the proceeding by affected persons. My decision as the assigned Administrative Law Judge, is based on the certified copy of the Administrative Record ("A.R.") upon which the Executive Vice President based his Reconsidered Determination, matters that have been officially noted, the transcribed testimony and exhibits received at the hearing and proposed findings of fact, conclusions, orders and briefs by the parties.[2] All proposed findings and conclusions were considered and are incorporated as part of this decision or, if not incorporated, rejected as not in accord with the material issues of fact, law or discretion presented on the record. This decision upon becoming effective, reverses the Reconsidered Determination by the Executive Vice President for the reasons set forth in the following findings, conclusions and discussion, and directs that the marketing allocation be distributed in future crop years to all beet sugar processors on a pro rata basis.

## The Parties and the Issues

Petitioner, Amalgamated, has been joined in this appeal by two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. ("SMBSC") and Wyoming Sugar Company ("Wyoming"). American Crystal has intervened in support of CCC. The Executive Vice President stated in his Reconsidered Determination that is the subject of this appeal, "...after careful reconsideration, I cannot find justification to overturn CCC's decision". (A.R. at 3). He based the decision on his interpretation of subparagraphs (E) and (F) of section 359d(b)(2) of the Act (7U.S.C.§1359dd(b)(2)(E) and(F) that read:

(E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR– If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently

[1] The Rules of Practice are attached as Addendum I. [Not included - Editor]

[2] *See* the Rules of Practice, Addendum I, particularly, Rule 1(b), Rule 2(a)(b)(c)(d)(e) and (g), Rule 5(a), Rule 6, Rule 9 and Rule 10.

terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall –

(i) eliminate the allocation of the processor provided under this section; and

(ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

The Reconsidered Determination stated (A.R. at 3):

CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated <u>in conjunction</u> with the sale of its assets. The act of permanent termination was simultaneous with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons <u>other than in conjunction</u> with the sale of its assets, paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Iintervenors seek the overturn of the CCC decision as beet sugar processors who shall share in the distribution of the marketing allocation under subparagraph E that controls when subparagraph F does not.

**The Appeal Proceedings**

Amalgamated filed its Petition on December 4, 2003. CCC filed an Answer, a Motion to Dismiss, and a Certified Copy of the Administrative Record on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2204. Amalgamated filed a brief opposing the Motions to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004. This proceeding was reassigned to me, and on June 23, 2004, I issued an Order denying the Motions to Dismiss and the Motion for Summary Judgment.[3] On August 10, 2004, I conducted a teleconference with the parties scheduling dates for identifying witnesses and exhibits, holding an oral hearing and the filing of pre-hearing briefs.

Pre-hearing briefs were filed and the oral hearing was held on September 21-23 and on October 4 and 5, 2004 in Washington, DC. An amended certified copy of the Administrative Record respecting the Executive Vice President's Reconsidered Determination was filed and made part of the record at the outset of the hearing. Post-hearing briefing was completed on November 24, 2004. References to the transcript of the oral hearing are shown as "Tr." plus the day of the hearing and the page of that day's transcript, e.g., "Tr. Sept. 21 at 25". Exhibits of Amalgamated and SMBSC are cited as "AMAL–SM - _____)". American Crystal's Exhibits are cited as "ASCS - ___". CCC's Administrative Record is cited as "A.R. _____." and CCC's amended Administrative Record is cited as A.R. add ____."

## Findings of Fact

[3] Copy of my Order is attached as Addendum 2 [See Miscellaneous Orders this volume –Editor.].

1. The Columbia River Sugar Company (CRSC) was formed as a cooperative in 1991, to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the processing plant located these had gone out of business and was inoperable.
2. CRSC formed the Pacific Northwest Sugar Company in partnership with the Holly Sugar Company (Holly Sugar) to construct the factory, which took place in 1996 through the summer of 1998. (AMAL-SM 58 at 8).
3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar whose personnel had experience gained from operating other factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the beets it processed of only 25% and two-thirds of the sugar beets delivered to the plant were not processed but instead rotted (AMAL-SM 58 at 8).
4. In 1999, Holly Sugar pulled out of the partnership conveying its interest in Pacific Northwest to CRSC. That year, Pacific Northwest operating the factory without assistance from Holly Sugar, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars.

The sugar recovery rate for the 1999 - 2000 processing season, increased from 25% to 65%. However, to be profitable, a sugar processing plant requires a recovery rate in excess of 80% with 90% being the optimum target (Tr. Sept. 22 at 52- 67; Tr. Oct 5 at 6-10).
5. In the 2000-2001 processing season Pacific Northwest made additional improvements to its plant's operations and claimed to have again increased its sugar recovery to 82%. However, to reach 82%, the plant's chief operating officer had directed that residual molasses be recycled through its equipment; a practice that cost more in energy costs than the value of the additional sugar obtained (Tr. Oct. 5 at 10-11).
6. Operating a sugar beet processing plant is very expensive requiring large sums of capital. In 1999, Pacific Northwest owed $159-160

million to its principal lender and various creditors (AMAL-SM-58 at 8). In August of 1999, with strong congressional support, Pacific Northwest obtained a loan guarantee from the U.S. Department of Agriculture's Rural Development Business Guarantee loan project that enable it to borrow $20 million to upgrade equipment, pay vendors and provide working capital. In December 2002, the U.S. Department of Agriculture, Office of the Inspector General Western Region, issued an audit report that reviewed the circumstances of the loan guarantee (AMAL-SM-58). The Department had guaranteed 70 percent or $14 million of the loan. In the spring of 2000, Pacific Northwest defaulted on the loan and the Rural Development was left with an unpaid balance of $12.1 million after the proceeds from liquidation were applied to the loan. When the $20 million guaranteed loan was made, Pacific Northwest pledged as collateral the land, plant and equipment of the company that was initially valued at $162 million. The lender discounted the appraised value to a range of $40 million to $70 million in recognition of the limited opportunities to dispose of company assets and the lack of a production history (AMAL-SM-58 at 9). The lender also obtained a liquidation appraisal that disclosed that the collateral pledged by Pacific Northwest had a scrap value of $2 million and a forced liquidation value of $10 million. The Inspector General's Audit Report concluded:

> "By the spring of 2000, the Company's second attempt to establish the viability of the processing plant had failed. The failure was attributable to the borrower's poor financial condition and its inability to maintain sufficient resources to survive equipment failure and added production costs. The plant closed and the lender was force to liquidate the company's assets. In May 2001, the collateral was sold for $2.1 million. After the company paid liquidation costs, $1.9 million was applied against the guaranteed loan amount, leaving Rural Development obligated to pay the lender $12.1 million.["] (AMAL-SM-58 at 9).

7. In August/September 2000, at the suggestion of Cobank which was Pacific Northwest's principal lender, Pacific Northwest retained Emmer Associates, Inc., an agricultural financing and debt restructuring firm to work on its debt problems (Tr. Sept. 22 at 46-47). The Chief Executive

Officer of Emmer Associates, Allan Lambrecht, personally worked on finding solutions for Pacific Northwest. In his opinion, Pacific Northwest had three principal needs: (1) the restructuring of its onerous debt; (2) a viable plant; and (3) a favorable price for the sugar the plant would produce (Tr. Sept. 22 at 61-62). At that time, the autumn of 2000, Pacific Northwest owed $159-160 million to four lenders with Cobank being the principal lender (Tr. Sept. 22 at 65-66). Efforts to restructure the debt did not go fast enough to maintain sugar beet planting commitments with growers and in March of 2001, Pacific Northwest released its growers from planting commitments. This decision was also based on the fact that the California energy crisis of 2000 – 2001 affected the Pacific Northwest and power companies paid both growers and the plant not to use power (Tr. Sept. 22 at 73). There was also a drought that year and since most of the sugar beets would have been grown on irrigated land, payments for water were avoided by not planting a sugar beet crop (Tr. Sept. 22 at 74-75). In June of 2001, a restructuring arrangement was completed under which the plant was sold to a third party, Central Leasing, for $2.1 million. Pacific Northwest then leased the plant for the 2001-2002 processing season with a purchase option to buy back the plant in the 12-month period following June 2001 for the $2.1 million (Tr. Sept. 22 at 75-76). The lease payment was set at the rate of interest Central Leasing was paying for having borrowed the $2.1 million it paid for the plant. (Tr. Sept. 22 at 80). Under the arrangement, the lenders allowed the plant to be sold free and clear of debts and liens by releasing their security so that title was transferred unencumbered to Central Leasing (Tr. Sept. 22 at 78). The $2.1 million was paid to Cobank and the lenders who were owed some $159-160 million (Tr. Sept 22 at 79). By these means the old debt no longer needed to be serviced but new capital was needed for the plant to operate (Tr. Sept. 22 at 85-86). Everyone understood, in June 2001, that the old debt of $159-160 million less the $2.1 million paid against it would not be paid (Tr. Sept.22 at 87). The debt would be carried on Pacific Northwest's balance sheet as unsecured debt but no payments on it would be made (Tr. Sept. 22 at 87). A principal problem in securing new capital for the plant to operate after June 2001, was that two very substantial agricultural lenders had been taken down, dramatically, wherein they released their collateral and lost $160 million that they

agreed they would not be able to recover. Normal commercial agricultural channels for borrowing money were therefore no longer available (Tr. Sept. 22 at 88).

8. On behalf of Pacific Northwest, Mr. Lambrecht attempted to secure capital for it to continue as a sugar beet processor from a variety of sources subsequent to the June 2001 arrangement with creditors and the sale and leaseback of the plant. Pacific Northwest and Mr. Lambrecht met or communicated with Global Ventures, General Mills, Cargill, American Federal Securities, Aegon Insurance Company, Oxbow Financial, Selby Financial, British Sugar, American Crystal, Michigan Sugar, Minn Daks, Southern Minnesota, and Amalgamated Sugar in an effort to find funding and, if possible, a partner to operate the Moses Lake plant (Tr. Sept. 22 at 90-106). None of these potential sources of capital resulted in necessary capital being obtained prior to the March 2002 deadline for obtaining sugar beet growing commitments for the 2002-2003 processing season (Tr. Sept. 22 at 108-109).

9. Sugar beet processing operations at the Moses Lake plant ceased in February 2001 and never resumed (Tr. Oct 5 at 11). No sugar beet crop was planted by CRSC growers in 2002 or 2003 (Tr. Sept. 21 at 188).

10. On July 23, 2001, Pacific Northwest was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application as required by Washington State law (ASCS-70). Pacific Northwest was not reinstated until September 8, 2003 when it filed necessary documents (ASCS-71).

11. After Pacific Northwest announced it would not have beets planted for the 2001 crop year, it laid off employees at the Moses Lake plant and reduced its workforce to less than 40 people (Tr. Oct. 5 at 12). The plant when fully operational on October 19, 2000, had employed 290 people (AMAL-SM-22 at 3).

12. In December 2001, Pacific Northwest forfeited 91 million pounds of sugar to the CCC and the sugar was then sold on the market to Amalgamated and another bidder. When Amalgamated finally obtained access to the plant site in April 2002 to take the sugar, there were no people working there. Indemnity agreements and arrangements for cutting open the expensive tanks where the sugar was stored were made exclusively with Central Leasing with no participation by Pacific Northwest (Tr. Oct. 5 at 42-58). Central Leasing accepted a monetary

payment in lieu of actual repairs to the tanks and the tanks were not repaired (Tr. Oct. 5 at 59-60).

13. At the end of March 2002, Pacific Northwest's lease arrangement for the Moses Lake plant ended after having failed to pay the agreed rent, and the lease was not renewed (Tr. Sept. 22 at 115).

14. In May of 2002, the 2002 Farm Bill was signed and Pacific Northwest subsequently received a sugar beet marketing allocation of 2.7% of the future allotments under the Act, on the basis of its production record for 1998, 1999 and 2000.

15. In July of 2002, a daylong meeting was held in Spokane, Washington at the law offices of Pacific Northwest's attorneys that included Mr. Lambrecht, representatives of Central Leasing, all five of Pacific Northwest's Board of Directors, a Cargill representative who attended by telephone and a representative for Oxbow Capital and Selby Financial (Tr. Sept.22 at 119-121). Pacific Northwest's Board of Directors made it clear "they were really done spending money, and would pay no further bills from financial consultants or attorneys (Tr. Sept. 22 at 123). In fact, Mr. Lambrecht had not been paid by Pacific Northwest since January 2002 (Tr. Sept 20 at 123).

16. It was decided at the July 2002 meeting that a new entity, Washington Sugar Company, LLC ("Washington Sugar") would replace Pacific Northwest so that Pacific Northwest would not incur any more debts or obligations in respect to any activity to revive sugar beet processing operations at the Moses Lake plant (Tr. Sept. 22 at 125). Washington Sugar was a different company in terms of its ownership base from Pacific Northwest. The only owner of Washington Sugar was Scott Lybbert who was but one of the five directors of Pacific Northwest that was a wholly owned subsidiary of CRSC (Tr. Sept. 22 at 129). CRSC had no interest in Washington Sugar (Tr. Sept. 22 at 130).

17. A year after its June 2001 purchase of the Moses Lake plant, Central Leasing's leaseback/purchase option agreement with Pacific Northwest ended, and Central Leasing started to dispose of the plant's equipment and sought other ways to recover its investment. In July 2002, it leased two beet pilers to Amalgamated and in December 2002, Amalgamated brought the pilers from Central Leasing for $215,000 (Tr. Oct. 5 at 63; AMAL-SM-57). On June 10, 2003, Central Leasing sold the three remaining pilers of the Moses Lake plant to Amalgamated for

$700,000 (Tr. Oct. 5 at 63; AMAL-SM-59). To avoid frost damage to beets during the short harvest opportunity window in Moses Lake, beet pilers are required for beets to be received, cleaned and piled for long-term storage so the factory can operate for a longer period of time (Tr. Oct. 5 at 64-65). On April 16, 2004, Central Leasing sold to Crab Creek Sugar Company centrifuges, conveyors, filters, pumps and other sugar beet processing equipment identified in a Bill of Sale of that date (ASCS-94). By early 2002, the computer system that allowed the Moses Lake plant to be operated as an automated factory was no longer available. (Tr. Oct. 5 at 14-16).

18. In July 2002, Pacific Northwest lost its short-term lease on the Moses Lake facility for failure to pay rent and no longer had a purchase option for the plant in place (Tr. Sept. 23 at 6). Pacific Northwest owned no sugar beet processing equipment and had been unable to attract any new financing. At that point, the Board of Directors of Pacific Northwest informed their lawyers and consultants that they "were really done spending money" and that "they were not ready to stand on the line and incur any more debt or obligations for the people pursuing" further efforts to revive the Moses Lake plant (Tr. Sept. 22 at 122 and 125).

19. The former vice-president of Pacific Northwest and a CRSC member, Scott Lybbert, formed a new company, Washington Sugar, to pursue the revival of sugar beet processing at the Moses Lake plant. On December 3, 2002, the CRSC Board passed a resolution to transfer its marketing allocation to Washington Sugar and in support of Washington Sugar's efforts to reopen the Moses Lake plant (ASCS - 66 at 2). The resolution made it clear that Pacific Northwest had permanently terminated its operations at the Moses Lake plant:

> CRSC is the sole member of Pacific Northwest Sugar Company, LLC ("PNSC"); and…CRSC has no desire, interest or ability to move forward and operate PNSC processing facility (A.R. add at 95)

20. On September 24, 2002, Scott Lybbert, as President of Washington Sugar Company, wrote to CCC asking that Pacific Northwest's beet sugar marketing allocation be transferred to Washington Sugar (A.R. add at 2). On October 3, 2002, he wrote a

second letter making the same request (A.R. add at 3).

21. On October 11, 2002, CCC advised Mr. Lybert, pursuant to 7C.F.R.§1435.308(d) that covers purchasing processors who are new entrants, CCC would transfer Pacific Northwest's allocation to Washington Sugar Company "upon receipt of a copy of the bill of sale showing that virtually all of the assets or Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company (A.R. add at 4).

22. At approximately the same time, Amalgamated, by its President, Ralph Burton, also asked CCC about acquiring Pacific Northwest's allocation. Amalgamated was told that it would be entitled to the allocation "(i)f Amalgamated purchased virtually all of the assets of Pacific Northwest Washington, including the factory" (A.R. add at 6, Tr. Oct. 4 at 134-137).

23. CCC redistributed virtually all of Pacific Norwest's marketing allocation to other processors in crop year 2002. Although CCC provided Pacific Northwest with an initial marketing allocation for crop year 2002, CCC was legally empowered to redistribute any allocation that wasn't being used. On October 1, 2002, when CCC announced initial allocations under the provisions of the 2002 Farm Bill, it immediately and simultaneously redistributed 87% (97,639 of 112,639 short tons) of Pacific Northwest's allocation to other processors (AMAL-SM-78). During the remainder of that same crop year, CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest's initial allocation, as well as any additional allocation that Pacific Northwest might have received because of increases in the beet sugar total allotment – to other sugar beet processors. As of September 25, 2003, Pacific Northwest's remaining balance was only 381 short tons or .008% of the overall beet sugar allotment (Tr. Oct 4 at 149-154; AMAL-SM-78).

24. Even though Pacific Northwest never used any of its sugar beet marketing allocation, it sought to have the allocation increased for crop year 2003. A hearing on the application was held on June 16, 2003, at which CCC's Executive Vice President presided. CCC was informed at the hearing through the testimony of various witnesses that Pacific Northwest had apparently terminated operations and was unlikely to operate in the future. Ralph Burton, President and CEO of

Amalgamated, testified (AMAL-SM-61 at 2; Tri. Oct. 4 at 146-147):

> "…a crop has not been grown and the factory has not processed sugar beets for at least two years…."

Perry Meuleman, President of the Idaho Sugarbeet Growers Association, testified (AMAL-SM-61 at 3):

> It is my understanding that Pacific Northwest has not planted sugar beets for at least two years – and 2004 is suspect. They do not control the factory assets. In fact, the owner of the factory assets has recently agreed to sell three of their beet pilers to the Amalgamated Sugar Company. Pilers are a critical component of a successful beet operation...

James Horvath, President and CEO of American Crystal testified (AMAL-SM-61 at 5):

> Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugar beets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue in operation in 2003…

The Sugarbeet Processors group, which included virtually every sugar beet processor other than Pacific Northwest, submitted virtually identical testimony (AMAL-SM-61 at 7). Finally, the Sugar Beet Growers group informed the CCC that based on Pacific Northwest's unsuccessful history, that fact that it was saddled with old mismatched equipment, its failure to process sugar beets during the 2001 and 2002 crop years, and that all but a minimal amount of PNSC's allocation had to be reallocated to other processors (AMAL-SM-61-at 23-24).

> …there has to be a real question in any reasonable person's mind as to whether this company can ever rise from the ashes to become an operational processor again….

25. The all day meeting held in Spokane, Washington in July 2002 marked the end of any meaningful involvement by Pacific Northwest with the sugar beet processing plant it had sold to Central Leasing.

From that point on, all arrangements, deals and overtures respecting the beet sugar marketing allocation CCC had conferred upon Pacific Northwest were undertaken by Scott Lybbert for his company Washington Sugar, with some assistance from Central Leasing. Neither entity had ever been recognized by CCC as having any independent right or entitlement to the allocation. Although various industry members were interested in acquiring the allocation, they appear to have been either misled or kept in the dark about the status of those who would sell it. There were also different objectives being pursued by Lybbert/Washington Sugar and Central Leasing. When Joseph Talley, Vice-President of Finance and Chief Financial Officer of American Crystal met with Scott Lybert, and Allan Lambrecht on January 30, 2003, Mr. Talley prepared notes on their conversation (Tr. Sept. 21 at 170; ASCS-26). Mr. Talley's notes and his confirming testimony show that he was advised that Washington Sugar was 100 per cent owned by Scott Lybbert and that others was an agreement with USDA that Washington Sugar had the rights to whatever marketing allocation Pacific Northwest had (Tr. Sept. 21 at 219-220, ASCS-26 at 4). There were stumbling blocks to reviving operations at the Moses Lake plant that Mr. Talley duly noted. Growers were still owed $8 million and their lawsuit against USDA (CCC Sugar) and Pacific Northwest was on appeal. USDA had hinted that if no crop was planted by May, the 15,000 tons of 2003 allocation would go away, and for the future it seemed like Pacific Northwest's allocation would go away permanently (Tr. Sept 32 at 220, ASCS-26 at 4). As for participation by Central Leasing:

> "Pacific Rim Ethanol is working with Central Leasing to convert the plant to an ethanol facility. Central Leasing would contribute the plant assets as equity to the ethanol company. Project would process barley and wheat into ethanol, and also to vital wheat gluten.
>
> ... Central Leasing does not appear to be willing to part with the plant today. Scott L. doesn't know how long this idea will live on.
>
> … Does Central Leasing understand that if the marketing allocation goes away the plant has no value as a sugar processing plant?["] (ASCS-26 at 4-5).

Mr. Talley's notes and testimony also disclosed that Central Leasing offered to lease the plant to Washington Sugar but it would not include the assets that Pacific Rim might want (boilers, gas system, etc…value of $10 million) (Tr. Sept. 21 at 220-2, ASCS-26 at 5).

26. Central Leasing brought Pacific Northwest's plant and equipment but never sought to acquire the allocation and was unwilling to directly use the plant for sugar processing. Scott Lybbert was a former director of Pacific Northwest who was interested in reviving the plant's operations through his company, Washington Sugar, but CCC so conditioned the transfer of the allocation to Washington Sugar that he was unable to go forward. There then came a time when Mr. Lybbert and Central Leasing decided to recoup financial losses. Both would share in the payment American Crystal was offering for a successful transfer of the allocation to cover American Crystal's processing operations at plants located outside the State of Washington and not at Moses Lake.

27. American Crystal's proposal was described in a July 3, 2003, fax by Joseph Talley of American Crystal to Barbara Fesco, a CCC sugar program official (A.R.add at 89-90):

> "First, our understanding is that Pacific Northwest Sugar Company (PSNC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only through the current fiscal year).["]
>
> American Crystal Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). <u>Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other</u>

> generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction (emphasis added).

28. On July 30, 2003, American Crystal's President James J. Horvath, and Scott Lybbert for Washington Sugar; sent CCC a fax that formally notified CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and marketing allocations) associated with the Moses Lake Washington sugar beet process factory." They requested, "USDA's preliminary approval of these transactions as they related to the transfer of marketing allocation currently held by the Pacific Northwest Sugar Company, LLC to ACSC." CCC was again told that American Crystal had no intention of ever operating the Moses Lake facility (A.R. add at 92-93)

29. CCC replied on August 28, 2003 (A.R. add at 234-235):

We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar marking equipment used by Pacific Northwest (Emphasis added).

In contrast to previous responses to Washington Sugar and Amalgamated that CCC would require the purchase of virtually all of Pacific Northwest's assets, including the factory, American Crystal was advised that the transfer of Pacific Northwest's allocations would be effectuated upon receipt of documentation showing "that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest used to make sugar" (emphasis added). (AMAL-SM-67; A.R. add at 234-235).

30. The letter from CCC of August 28, 2003 (A.R. add at 234-235), advised Mr. Lybbert of Washington Sugar and Mr. Horvath of American Crystal, that CCC would transfer Pacific Northwest's marketing allocation to American Crystal if provided with

documentation showing:

> *…all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
>
> * Certification from Pacific Northwest that it has not marketed any sugar under its 2002 – crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002 – croup allocation to American Crystal.
>
> * American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.
>
> * American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

31. On September 8, 2003, American Crystal advised CCC that through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired that day, "…ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory…" (AMAL-SM-70 at 1). The letter went on to positively address the requirements for the transfer CCC specified in its August 28th letter"(A.R. add at 243-244). A bill of Sale was attached (A.R. add at 245-247). However, an "Appendix A" referred to in the Bill of Sale from Central Leasing was not part of the materials produced in evidence and there is nothing indicating that the diffuser and molasses desugaring equipment was actually acquired by American Crystal (A.R. add at 248-249, ASCS 67 at 64-65).

32. On September 16, 2003, CCC, wrote to Scott Lybbert as Vice-President Finance and Marketing, Pacific Northwest Sugar Company, to inform that effective immediately, it was transferring Pacific Northwest's marketing allocation to American Crystal (A.R. add at 250).

33. American paid $6.8 million to acquire Pacific Northwest's marketing allocation. The following payments were made from an escrow account (ASCS 67 at 31-36, Tr. Sept. 21 at 137-139):

| | |
|---|---|
| Central Leasing | $2,125,000.00 |
| Scott Lybbert | $ 300,000.00 |
| Pacific Northwest | $3,025,000.00 |

The $300,000.00 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million total going to him (Tr. Sept. 21 at 138-139).

34. After acquiring the allocation, American Crystal realized it could not fully use all of it (Tr. Sept. 21 at 155-156). American Crystal contacted other beet sugar processors and leased them portions of American Crystal's allocation for undisclosed sums (Tr. Sept. 21 at 159-166; ASCS 85-94). The other processors who leased portions of American Crystal's marketing allocation were Michigan Sugar and Minn-Dak and because of confidentiality agreements American Crystal has with each of them, I did not compel American Crystal to reveal the amounts it has received under the lease arrangements (Tr. Oct. 5 at 121-124).

35. On July 1, 2004, CCC added a regulatory provision dealing with permanently terminated sugar processors operations (7C.F.R.§1435.308(b)):

> ...CCC will permanently eliminate the processor's remaining allocation and distribute it to all the other processors on a pro-rata basis when the processor:
>
> (1) Has been dissolved,
> (2) Has been liquidated in a bankruptcy proceeding, or
> (3) Has permanently terminated operations by:

(i) Not processing sugarcane or sugar beets for 2 consecutive years, or
(ii) Notifying CCC that processor has permanently terminated operations.

**Conclusions of Law**

The Act has conferred subject matter jurisdiction upon Administrative Law Judges to hear and decide appeals of this kind.

Petitioner has stated a legally cognizable claim.

The doctrine of judicial estoppel is unwarranted and inappropriate in this case.

The Reconsidered Determination by the Executive Vice President of the Commodity Credit Corporation that implemented the permanent transfer of Pacific Northwest's marketing allocation exclusively to American Crystal instead of distributing it pro-
rata to all beet sugar processors, is unsupported by the evidence of record and is inconsistent with the Act's requirements.

**Discussion**

The first three conclusions deal with procedural issues that are discussed in the Order of June 23, 2004, attached as Addendum 2. The discussion that follows is concerned with the merits of the appeal that is the subject of the fourth conclusion.
Chief Judge Marc R. Hillson recently reviewed the history underlying the 2002 Farm Bill:

The federal government regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Marketing Transition Act, P.L. 104-127, also known as the "Freedom to Farm Act"; which removed the previous sugar marketing allotments that had limited the sale of beet sugar, and other commodities. Then, in 2002, Congress largely reversed

itself by passing the Farm Security and Rural Investment Act, 7U.S.C.§ 1359 *et seq.* This Act required the Secretary to once again establish allotments for the processing of beet sugar, based on the average weighted quantity of beet sugar produced by a given processor during 1998 to 2000 crop years …. *In re: Southern Minnesota Beet Sugar Cooperative*, SMA Docket No. 03-0001, slip opinion, July 21, 2004, at 3.

The Act as amended in 2002, requires the Secretary of Agriculture to estimate the amount of sugar to be consumed in the United States each crop year from 2002 through 2007, and after estimating the amount of permissible imports and desirable carryover stocks of sugar, to establish allotments for the crop year that divides the marketable balance between domestic processors of sugar beets and sugarcane (7U.S.C.§1359bb). Sugar beet processors receive allocations of their crop year allotment based on their production histories during the 1998 to 2000 crop years (7U.S.C.§1359(dd (b)(2)). Any increase in a given processor's allocation requires an offsetting decrease in the allocations of other processors so that the overall allotment remains unchanged for what industry members call "a zero sum game."

The pertinent legislative history of the 2002 amendatory provisions that restored beet sugar allotments, consists of short, introductory remarks by their cosponsor, Senator Conrad of North Dakota (AMAL-SM-83; Vol.148, No. 10 of the Congressional Record, Feb. 8, 2002 at S 513-S 514). Senator Conrad stated that the provisions reflected producers' efforts to forge a consensus on a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. After reviewing the methodology for establishing future allotments, Senator Conrad stated that:

> ...the formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of a new processor, and so on.
>
> Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.

These stated intentions that reallocations be event driven and that actions by the Secretary should be predictable, fair and transparent were not adequately met by CCC's actions in this case. Moreover, CCC's actions conflict with the plain and straightforward language of the Act. CCC, acting for the Secretary, is to transfer the allocation of allotment held by a sugar beet processor to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor."

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC and an equivalent allocation is to be made to the other beet sugar processors on pro rata basis *See* 7 U.S.C.§1359dd (b)(2)(E) and (F).

When a processor requests the transfer of another processor's allocation of allotments, CCC is required to make three determinations before granting the transfer request.

**1. Both parties to the transfer must be processors.**

Unquestionably, American Crystal is a sugar beet processor. But Pacific Northwest did not fit the regulatory definition at the time of the transfer request. The following definition was published on August 26, 2002 (67 FR 54928; 7 C.F.R.§1435.2):

> *Sugar beet processor* means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

Earlier, 7C.F.R.§1435.2 states:

> The definitions, set forth in this section are applicable for all purposes of program administration.

Despite this admonition of the regulation, a failing processor needs time to wind down operations before selling its company or all of its assets. Strict application of the definition in those circumstances would thwart the Act's objective that CCC is to transfer the marketing

allocation of a processor that may be failing but has not as yet been dissolved, liquidated in bankruptcy, or has not otherwise permanently terminated its operations. This conflict between an objective of the Act and an implementing regulation requires an exception to the regulation to allow the transfer of a marketing allocation held by a failing but not totally failed, processor as the Act intends. Therefore, even though Pacific Northwest no longer had either a viable processing facility or a supply of current beets, it still was entitled to be treated as a "processor" for the purposes of administering subparagraph (F) of section 359d(b)(2) of the Act.

2. **The seller of the allocation has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor).**

CCC and American Crystal both argue that Pacific Northwest had not permanently terminated operations before selling its allocation to American Crystal.

American Crystal urges that even though Pacific Northwest previously sold its plant and equipment to Central Leasing, had lost the lease and its option to buy back the plant for failure to pay rent, and had not contracted for a supply of sugar beets for three years, it still had not permanently terminated operations at the time of sale. American Crystal asserts three bases for its argument. First, it argues that the attempts by other industry members to acquire the allocation indicates the industry did not believe a transfer was foreclosed because Pacific Northwest 's operation had permanently terminated. Second, a temporary shut-down of operations is not the same thing as a permanent termination and nothing about Pacific Northwest's conduct was consistent with a company that had given up (American Crystal's brief, at 23). Third, it joins with CCC in arguing that a determination of whether a permanent termination of operations has taken place is a wholly discretionary matter left to CCC's judgment.

The fact that others sought the transfer of Pacific Northwest's marketing allocation is of no legal consequence. They made incorrect assumptions based on misleading and incomplete information (*See*

Finding of Fact 24).

The argument that the plant's shut-down was only temporary and Pacific Northwest had not given up hope is completely refuted by the evidence of record. Hope was definitely gone. American Crystal's own witness, Allan Lambrecht, testified that Pacific Northwest's Board of Directors in a July 2 "summit meeting," instructed all in attendance that "they were really done spending money" and would incur no financial obligations to revive sugar beet processing at the Moses Lake plant (*See* Findings of Fact 15 and 16).

The record evidence makes it abundantly clear that at the time American Crystal undertook to buy the marketing allocation, Pacific Northwest had long ceased to have the ability to process sugar beets. Its factory and equipment had been sold more than two years earlier to Central Leasing. Although when it sold the plant and equipment, it obtained a lease with a purchase option, Pacific Northwest failed to pay the agreed rent and any right to process sugar beets at the plant ended in March 2002. Sugar beet processing operations ceased in Febraury 2001 and never resumed. No sugar beet crop was planted for processing by Pacific Northwest in 2001, 2002, or 2003. On July 23, 2001, the State of Washington administratively dissolved Pacific Northwest for failure to file its requisite annual license renewal application. At the day-long "summit meeting", held in July 2002, the Directors of Pacific Northwest told their lawyers their financial advisors and everyone else in attendance, they would no longer pay anyone for advice and assistance on how to revive the plant's operations. In no uncertain terms, the Board of Directors told everyone that Pacific Northwest would never again attempt to operate the plant to process sugarbeets (Tr. Sept 22, at 119-132).

American Crystal's third and final argument, and CCC's only one, is that even in light of these facts, a beet sugar processor cannot be said to have permanently terminated its operations until CCC says so. However, the Act requires CCC to make the determination when the facts are such that there has been a permanent termination of operations other than in conjunction with a sale of the processor or all of the processor's assets. Senator Conrad's statement of Feb 8, 2002, explained that the reallocation of all allotments are to be based on industry events. When such events occur, action by CCC is mandated

by the plain language of the Act and CCC's discretion in making reallocations is circumscribed.

On July 1, 2004, subsequent to granting this transfer, CCC amended its regulations to add a provision respecting permanent termination of operations 7 C.F.R.§1435.308(b) was amended to read (69 Fed. Reg. 39811, 39813 (July 1, 2004)):

> ... CCC will permanently eliminate the processor's remaining allocation and distribute it to all other processors on a pro-rate basis when the processor:
>
> (1) Has been dissolved,
>
> (2) Has been liquidated in a bankruptcy proceeding, or
>
> (3) Has permanently terminated operations by:
>
> (i) Not processing sugarcane or sugarbeets for 2 consecutive years, or
>
> (ii) Notify CCC that processor has permanently terminated operations.

But even if this regulation had been in effect, the parties do not agree on the meaning of "2 consecutive years". American Crystal and CCC argue that the regulation means two consecutive crop years and Pacific Northwest cannot be said to have ceased operations for that long in that the 2002-2003 crop year didn't end on September 30, 2003. Conversely, Petitioner argues that since "crop year" was not the term used in this provision while it was plainly stated elsewhere in the Act and the regulations, the word "year" should be given its ordinary meaning denoting a twelve-month time period. Under this interpretation, because Pacific Northwest ceased operations in February of 2001, two consecutive years had indeed passed by the time the transfer was approved on September 16, 2003. I agree with Petitioner that the specific use of "crop year" in other sections of the sugar regulations as well as within subsection 1435.308 itself while not used in subsection 1435.308(b)(i), is subject to the rule of construction that the disparity is intentional and purposeful. *See Barnhardt v. Sigmon Coal, Co., Inc., et al*, 534 U.S.C. 438, 452 (2002); and R*ussello v. U.S.*, 464 U.S.16, 23 (1983). Petitioner next urges that we look to the new regulation for guidance. My problem with this approach is that the new regulation fails to clarify why two years of inactivity results in a presumption that a termination of operations is permanent. The

amended regulation was issued as a final rule without notice and comment. It may well be that CCC issued the regulation for purposes of administrative convenience rather than as a reflection of industry practices. But there really is no need to apply the regulation retroactively.

Pacific Northwest's decision to stay completely shut down and no longer be a processor seeking to reopen, was clearly established by the pronouncement of its Board of Directors at the 'summit meeting" in July 2002.

The evidence of record in the proceeding clearly demonstrates that Pacific Northwest permanently terminated operations prior to and not due to selling its rights to its marketing allocation.

**3. There must be a sale of a processor of beet sugar or all of the assets of the processor.**

The Act is very specific. There must be a sale of the processor, or all of the assets of the processor for its allocation to be transferred.

Pacific Northwest itself was not sold. The assets that it still owned at the time of the sale, consisted of its right to the allocation and what a spokesman for American Crystal described to CCC as "immaterial assets". These immaterial assets were "goodwill", production rights, production history and books and records listing growers and customers. Without a plant, equipment or sugar beets, Pacific Northwest's production rights had become inoperative. The production history that had been used to obtain Pacific Northwest's marketing allocation had no further value. No purchasing processor needed a list of growers who hadn't planted sugar beets for over three years. Nor was there any real value in learning who had once bought sugar from Pacific Northwest. The obvious concern of a processor acquiring additional marketing allocation is the ability to meet its own customer demands and not how it might increase them.

American Crystal points out in its brief (American Crystal brief at 16) that it also bought equipment from Central Leasing to meet conditions imposed by CCC for approving the transfer. Inasmuch as the equipment was once owned by Pacific Northwest, American Crystal seems to suggest that this secondhand acquisition helped it meet the

Act's requirement that a qualifying sale include "all of the assets of the processor". However, CCC in its brief (CCC brief at 11), clarifies that it required American Crystal to acquire these other assets because of its concern that if others acquired control of them they might in the future request allocation as a new entrant or because they had acquired and reopened the factory for sugar beet production. Such a claim for allocation could be made under 7 U.S.C.§1359dd(b)(2)(H), and CCC feared there could be a double counting of Pacific Northwest's former allocation.

In sum, the only assets American Crystal bought that were still owned by Pacific Northwest were its rights to the marketing allocation and what its spokesman aptly described to CCC as "some other generally immaterial assets".

The Act does not treat a marketing allocation as an asset that a processor can simply buy and sell. CCC can change a processor's allocation if it sells a factory or if a new sugar beet processor enters into the industry, reopens a factory, or acquires an operating factory with a production history. *See* 7 U.S.C.§§1359dd(b)(2)(G), (H) and (I). Allocations can be changed during a crop year (AMAL-SM-78). CCC is empowered by the Act to transfer or temporarily reassign part of a processor's allocation when there is a shortfall in the processor's production that another processor can make up 7 U.S.C.§1359 ee. A sugar beet processor's allocation is further subject to the requirement that allocations "be shared among producers served by the processors in a fair and equitable manner" 7 U.S.C.§1359 ff. When a sugar beet processor closes a factory, the growers who were delivering beets to the closed factory can elect to deliver their crops to another processor and request CCC to transfer allocation commensurate with the growers' production history to their new processor 7 U.S.C.§1435.308(a). The Secretary of Agriculture is not required to compensate a processor who loses allocation in any of these circumstances or first seek the processor's permission. A marketing allocation is not, therefore, an asset that can be transferred without the concurrence of USDA. For there to be a "sale of all assets", more than the marketing allocation itself needs to be conveyed.

CCC apparently recognized this fact when prior applications to transfer Pacific Northwest's allocation were received from others. Scott

Lybbert, the sole owner of Washington Sugar, the would-be successor to Pacific Northwest, sought to obtain it and was advised he would have to provide a "…bill of sale showing that virtually all of the assets of Pacific Northwest including the factory, have been acquired by the Washington Sugar Company" (Finding of Fact 20 and A.R. add at 4). CCC explains that as a new entrant the requirements for Washington Sugar were different. But they were also set differently for petitioner, Amalgamated, an established processor, when it too was advised that the transfer would only be authorized "…if Amalgamated purchases virtually all of the assets of PNW including the factory… (Finding of Fact 21; A.R. add at 6; Tr. Oct.4 at 134-137). These communications took place in the fall of 2002. What transpired in the year that followed that altered CCC's interpretation of the controlling provisions is unexplained.

In any event, CCC did impose different requirements for its approval of the allocation's transfer to American Crystal.

The fact that it imposed any conditions at all for its approval of the transfer is inconsistent with the argument that the language of the Act left it no choice but to give its approval.

Both CCC and American Crystal assert that subparagraph (F) required the allocation's transfer just because it had not been previously distributed to other sugar beet processors under subparagraph (E). If subparagraph (F) is read this simplistically, things of no real worth, such as pencils and paper clips could be the only assets sold with a marketing allocation, and CCC would have to approve the transfer. This would be an absurd result. CCC must evaluate the transfer and place such conditions on its approval as may be needed to effectuate the objectives of the Act. CCC did find it necessary to condition its approval of the transfer.

Inasmuch as the plant and processing equipment was owned by Central Leasing and not by Pacific Northwest, "...CCC wanted to insure that if it transferred the Pacific Northwest allocation to American Crystal, another entity would not come along and, on the basis of other assets relating to the beet sugar processing operation of Pacific Northwest, apply for an allocation" (CCC's brief, at 11). CCC did so by requiring American Crystal to acquire equipment no longer owned by Pacific Northwest. CCC, therefore, did condition its approval even

though it now argues that subparagraph (F) left it without discretion to withhold approval.

The Reconsidered Determination by the Executive Vice President of CCC, that is the subject of this appeal, also recognized that for a transfer to be approved under subparagraph (F) the sale of the processor's assets must be the cause of the processor's permanent termination of operations. For an act to be the proximate cause of a consequence, as is so often stated in Tort law, the consequence would not have occurred but for the act.

Here, it cannot be said but for the sale of the assets still owned by Pacific Northwest when its allocation was transferred to American Crystal, Pacific Northwest would still have been able to process sugar beets. "Good will", production history, inoperative production rights, and books and record of past dealings would not have been enough. Pacific Northwest needed ownership or control of a factory and equipment to once again process sugar beets into sugar. It sold or lost those assets long before this transaction. The permanent termination of its operations was not proximately caused by its sale of these immaterial assets and they were not sufficient to meet the statutory requirements for a transfer to be approved.

**Additional Comments, Findings and Conclusions**

The language of the Act, as supported by underlying legislative history, places restrictions on the sale of sugar beet marketing allocations by one processor to another.

CCC is to transfer the allocations of allotments by a processor of beet sugar to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor".
Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC, and a pro rata distribution of an equivalent allocation is to be made by CCC to the other beet sugar processors.
*See* 7 U.S.C.§1359dd(b)(2)(E) and (F.

The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets or

the will. Actually, under the laws of the State of Washington it was dissolved as an entity although it was later reactivated for the sole purpose of signing the transfer papers.

Setting aside for a moment its sale of its plant and the subsequent loss of its lease and the fact it had no sugar beets under contract for processing, the Board of Directors of Pacific Northwest made it clear that it would never again attempt to operate the plant to process sugar beets (Tr Sept 22, at 119-132).

That was a signal event. Despite the fact that others may still have had hopes to restart operations, Pacific Northwest did not. Central Leasing, the plant's owner, was actively attempting to convert the plant for ethanol production (Tr. Sept. 22, at 133) and sold off equipment needed to operate it for sugar beet processing (Tr. Oct 5, at 63-65).

One man, Scott Lybbert, a director of Pacific Northwest, did want to resume operations at the plant, but for his own company, Washington Sugar, and not for Pacific Northwest. To do so, Washington Sugar had to obtain needed financing, the use of the plant and Pacific Northwest's marketing allocation. It was unable to obtain any of them. Its overtures to CCC seeking the transfer of the marketing allocation were thwarted by CCC's requirement that Washington Sugar had to first acquire the factory. By then, Central Leasing had other potential uses for the plant and Washington Sugar could not meet this requirement. The financing source Mr. Lybbert had turned to for needed capital to start the plant, was American Crystal. But American Crystal, upon investigation of the situation at Moses Lake decided that financing the revival of beet sugar processing operation at the plant would be a bad investment. Instead, American Crystal, as was the case with many other industry members, coveted Pacific Northwest's marketing allocation to support processing operations at plants outside of Washington State. When the deal with American Crystal was made, two parties besides Pacific Northwest asserted claims to the sale proceeds. Central Leasing owned the Moses Lake plant and any remaining equipment that it had not by then sold to others. The equipment may still have included the diffuser and molasses desugaring equipment that CCC required American Crystal to acquire as a condition for its approval. But they were not listed on the Bill of Sale. Scott Lybbert, the alter ego and sole owner of Washington Sugar, also claimed a share of the proceeds. He had the energy and drive to put the

deal through, but owned none of the assets to be conveyed. He never acquired the marketing allocation, the use of the plant, or the needed capital to reopen it.

Pacific Northwest the essential "processor of beet sugar" owned what American Crystal's spokesman described to CCC as "immaterial assets." Its possession of rights to a marketing allocation existed only because CCC had failed to take action under 7 U.S.C.§1359dd(b)(2)(E), to eliminate it even though Pacific Northwest had by then permanently terminated operations.

I have been unable to discern any essential purpose of the Act that was served by CCC's approval of the transfer. The approval was not given to assure that local growers would still have a processing outlet for their sugar beets. It was not given in order that a new processor would have entry to this industry that largely forecloses newcomers under government regulations. It was given to increase the marketing allocation of American Crystal, that already had the distinction of being the largest holder of sugar beet marketing allocation in America (AMAL-SM-73 at 2).

Moreover, the conditions CCC set for the transfer primarily show concern for administrative convenience. The parties waived rights to bring an action against USDA, CCC, and any Departmental Official in the event a third party successfully challenged the transfer in court; agreed to drop Pacific Northwest's appeal of CCC's earlier adverse decision against it; and furnished settlement documents showing that American Crystal took actions to preclude the need for CCC to entertain any future applications by new entrants or others who might acquire or reopen the factory as a sugar beet processor, by securing the rights to make sugar at the facility and purchasing some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest has used to make sugar (A.R. at 234-235).

The Act, as amended, intended that CCC take actions responsive to events. CCC through its day-to-day operations, knew that Pacific Northwest had ceased all operations, had sold its plant, and had not had a beet crop planted for processing in 2001, 2002, or 2003. In a public hearing held on June 16, 2003, the Executive Vice President of CCC, whose Reconsidered Determination is the subject of this appeal, was informed by virtually every beet sugar organization in the industry,

including American Crystal, that Pacific Northwest had terminated operations and was unlikely to operate in the future (AMAL-SM-61 at 1-27).

Moreover, when American Crystal described the proposed transfer to CCC in July 2003, it stated (A.R. add. At 89-90):

> American Crystal's Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.
>
> ASCS does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

For CCC to say in light of all this information, as it did in the Reconsidered Determination that Pacific Northwest was "terminated in conjunction with the sale of its assets" is untenable.

Moreover, CCC had duties as a fact finder. The facts before it appear sufficient for it to have declared Pacific Northwest to have permanently terminated operations. At very least, those facts were sufficient to require CCC to resolve gaps in its knowledge by conducting fact finding. By not taking the steps necessary to make the determination, CCC has encouraged what appears to be a sham transaction contrary to objectives of the Act. This omission taken together with inconsistent treatment of applicants who had earlier sought the allocation's transfer, is conduct of the type the APA instructs reviewers to set aside for being "arbitrary, capricious, an abuse of discretion…" (5 U.S.C.§706(2)(A)).

CCC employed inconsistent standards for the transfer of the allocation

that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised they would need to acquire virtually all of Pacific Northwest's assets including the factory.

CCC points out that Washington Sugar would have been a new entrant to the industry and for that reason different rules would apply. But Amalgamated's status was the same as American Crystal's and yet Amalgamated was required to meet a more stringent standard.

CCC also argues that the applicable statutory provisions are ambiguous and deference should be given to its interpretation. It is our policy to give some deference to interpretations by agency officials, who administer a statute's provisions. *See In re: Southern Minnesota Beet Sugar Cooperative, supra*, slip opinion, at 17. But since my function is take the evidence to determine whether CCC's actions were in accord with the law, the deference that may be accorded its actions is necessarily limited. Here, the way the provisions were interpreted and applied was in conflict with the language and objectives of the Act.

For these reasons, the Reconsidered Determination by the Executive Vice President of CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7U.S.C.§1359dd(b)(2)(E) of the Act.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties and each of the Intervenors, and shall become final and effective 25 days after the Hearing Clerk has served the decision upon the Executive Vice President, unless a party or an Intervenor files an appeal petition within 20 days after service of this decision.

* *

ADDENDUM I

**[*]The Rules of Practice**

[*]Rules of Practice not included – Editor

* *

ADDENDUM 2

**Order Denying Motion to Dismiss and**
**[**]Motion for Summary Judgment**

---

**In re: SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE.**
**SMA Docket No. 03-0001.**
**Decision and Order.**
**Filed May 9, 2005.**

**SMA – Sugar beets – Adjustment to allocation – Opened sugar beet processing factory – Substantial quality losses on stored sugar beets – Credibility determinations – Statutory construction – Ordinary meaning of words – Opened defined – Judicial officer's authority to rule statute unconstitutional – Due process – Regulatory taking.**

The Judicial Officer affirmed Chief Administrative Law Judge (Chief ALJ) Marc R. Hillson's decision denying Petitioner's request for an increase in its beet sugar marketing allotment allocation. The Judicial Officer rejected Petitioner's contention that its modification of a sugar beet processing factory constituted opening a sugar beet processing factory, thereby entitling Petitioner to an allocation adjustment under the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(I), (b)(2)(D)(ii)(I)). The Judicial Officer held the common meaning of the verb *to open* is *to begin, initiate, or commence* and the word *opened* would not be commonly understood to include the mere modification of an existing sugar beet processing factory. The Judicial Officer also rejected Petitioner's contention that a beet sugar processor that suffers substantial quality losses in two separate crop years is entitled to two adjustments to its beet sugar marketing allotment allocation under the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(IV), (b)(2)(D)(ii)(IV)). The Judicial Officer, stating that he gives great weight to administrative law judge credibility determinations, rejected Petitioner's contention that the Chief ALJ erroneously found credible Intervenors' claims that, if Petitioner were entitled to an allocation adjustment for opening a new sugar beet processing factory, some of the Intervenors would likewise be entitled to the same adjustment. Finally, the Judicial Officer rejected Petitioner's claims that it was denied due process and that the failure to adjust Petitioner's allocation constitutes a regulatory taking.

---

[**]Order found in Miscellaneous Orders this volume – Editor

Jeffrey Kahn, for the Executive Vice President.
Steven A. Adduci, Gina L. Allery, David A. Bieging, and Peter D. LeJeune, Washington, DC, for Petitioner.
Phillip L. Fraas and Karen M. Johnson, Washington, DC, for Intervenors.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

On October 1, 2002, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], announced the 2002-crop sugar allotments and allocations. On October 9, 2002, Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner] requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the October 1, 2002, beet sugar marketing allotment allocation for Petitioner. On December 10, 2002, the Executive Vice President denied Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. On January 23, 2003, Petitioner filed a Petition for Review of the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. Petitioner filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program regulations (7 C.F.R. pt. 1435); and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On February 13, 2003, the Executive Vice President filed an Answer, a certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination, and a list of "affected persons."[1] The Hearing Clerk served the Petition for Review

[1]Beet sugar allocations are a "zero-sum" situation, in that any increase in allocation to any beet sugar processor means a corresponding reduction in allocations of all other beet sugar processors. Rule 2(c) of the Rules of Practice defines an "affected person" as a beet sugar processor, other than the petitioner, affected by the Executive Vice (continued...)

and Answer upon each affected person. Seven affected persons, American Crystal Sugar Company, Imperial Sugars Corporation, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, Western Sugar Cooperative, and The Amalgamated Sugar Company [hereinafter Intervenors], intervened. On May 21, 2003, Intervenors filed Intervenors' Response to the Petition.

On November 10, 12, and 13, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Washington, DC. Steven A. Adducci and Peter D. LeJeune, Dorsey & Whitney, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, represented the Executive Vice President. Phillip L. Fraas and Karen M. Johnson, Washington, DC, represented Intervenors.

On January 21, 2004, the Executive Vice President filed Post-Hearing Brief of Commodity Credit Corporation and Petitioner filed Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative. On January 22, 2004, Intervenors filed Joint Brief of the Intervenors in Opposition to the Petition for Review. On February 18, 2004, the Executive Vice President filed Post-Hearing Reply Brief of Commodity Credit Corporation. On February 23, 2004, Petitioner filed Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative and Intervenors filed Joint Brief of the Intervenors in Response to the Initial Briefs Filed by the Petitioner and the Government. On February 27, 2004, Intervenors filed Corrected Joint Brief of the Intervenors in Opposition to the Petition for Review.

On July 21, 2004, the Chief ALJ filed a Decision [hereinafter Initial Decision]: (1) affirming the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation; and (2) denying Petitioner's January 23, 2003, Petition for Review.

On August 18, 2004, Petitioner appeal to, and requested oral argument before, the Judicial Officer. On September 9, 2004, the Executive Vice President filed a response to Petitioner's appeal petition,

---

[1](...continued)
President's reconsidered determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

and, on September 15, 2004, Intervenors filed a response to Petitioner's appeal petition. On September 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Petitioner's request for oral argument before the Judicial Officer, which, pursuant to Rule 11(d) of the Rules of Practice, the Judicial Officer may grant, refuse, or limit, is refused, because Petitioner, the Executive Vice President, and Intervenors have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's July 21, 2004, Initial Decision. Therefore, except for the Chief ALJ's discussion of the deference he gave to the CCC's interpretation of the Agricultural Adjustment Act of 1938 and minor modifications, I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's findings and conclusions as restated.

Petitioner's exhibits are designated by "CX." Intervenors exhibits are designated by "IX." Exhibits from the certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination are designated by "CR." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the November 10, 2003, segment of the hearing. References to "Tr. II" are to the volume of the transcript that relates to the November 12, 2003, segment of the hearing. I make no reference to the volume of the transcript that relates to the November 13, 2003, segment of the hearing.

## APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

. . . .

### CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

## SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

### § 1359dd. Allocation of marketing allotments

#### (a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

#### (b) Hearing and notice

. . . .

##### (2) Beet sugar

###### (A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

. . . .

###### (D) Adjustments

###### (i) In general

The Secretary shall adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor—

(I) during the 1996 through 2000 crop years, opened a sugar beet processing factory;

(II) during the 1998 through 2000 crop years, closed a sugar beet processing factory;

(III) during the 1998 through 2000 crop years, constructed a molasses desugarization facility; or

(IV) during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year.

**(ii) Quantity**

The quantity of beet sugar produced by a beet sugar processor under subparagraph (C) shall be—

(I) in the case of a processor that opened a sugar beet processing factory, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is opened by the processor;

(II) in the case of a processor that closed a sugar beet processing factory, decreased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;

(III) in the case of a processor that constructed a

> molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and
>
> (IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

7 U.S.C. § 1359dd(a), (b)(2)(A), (D) (Supp. II 2002).

## CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

### Decision Summary

I deny Petitioner's January 23, 2003, petition to overturn the decision of the Executive Vice President. I find the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation is in accord with the express language of the Agricultural Adjustment Act of 1938. I thus find Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation either for opening a sugar beet processing factory or for sustaining substantial quality losses on stored sugar beets during the 1999 crop year.

### Statutory and Regulatory Background

The United States has regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied

widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Market Transition Act, also known as the "Freedom to Farm Act," which removed the previous sugar marketing allotments that had limited the sale of beet sugar and other commodities. Then, Congress passed the Farm Security and Rural Investment Act of 2002, which requires the Secretary of Agriculture to establish allotments for the marketing by processors of sugar processed from sugar beets and from domestically-produced sugarcane and to allocate those allotments among the processors covered by the allotment. The allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect are based on the weighted average quantity of beet sugar produced by each beet sugar processor during the 1998 through 2000 crop years. At issue in this proceeding are the provisions allowing for adjustments to these weighted averages for opening a sugar beet processing factory, closing a sugar beet processing factory, and suffering substantial quality losses on stored sugar beets (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(II), (IV)).

Neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations define what is meant by "opened" or "closed" with respect to a sugar beet processing factory, nor is there any specific guidance on the implementation of the "substantial quality losses on sugar beets stored during any crop year" provision.

While I base my decision primarily on the unambiguous language of the Agricultural Adjustment Act of 1938, I also discuss below, in the alternative, the legislative history, in the form of a statement by Senator Conrad, which is the sole discussion by Congress respecting the beet sugar allocation adjustment provisions. Senator Conrad, who cosponsored this provision, stated:

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the

> law.
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

**Facts**

Petitioner is a beet sugar processing cooperative that was formed in 1972. Petitioner currently consists of 585 farmer/shareholders in Minnesota. The cooperative is located in Renville, Minnesota, and currently employs approximately 275 year-round workers and 450 seasonal workers. (Tr. I at 219-20.)

In 1999, Petitioner borrowed approximately $100,000,000 and engaged in extensive renovations of its sugar beet processing factory (Tr. I at 193-95). At the hearing, Petitioner detailed the scope and magnitude of the construction project, which it termed "Vision 2002" (Tr. I at 32-86; CX 1, 5, 8-10, 12-22, 25, 41). Petitioner states substantial portions of the old sugar beet processing factory were demolished, and, in effect, the extensive nature of renovations is equivalent to the opening of a new sugar beet processing factory, as referred to in the Agricultural Adjustment Act of 1938. As a result of all

this construction, Petitioner states its design capacity for processing sugar beets into sugar is more than double the capacity of the sugar beet processing factory as it previously existed on the same site (Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative at 22).

Petitioner significantly modernized and increased the capacity of its Renville, Minnesota, sugar beet processing factory. Likewise, the record contains considerable testimony that some Intervenors also undertook significant and highly costly—though not as costly over as short a period as Petitioner—modifications and improvements to their sugar beet processing factories. Thus, Kevin Price, director of governmental affairs, American Crystal Company, the largest beet sugar processor, testified to two major expansions totaling approximately $134,000,000 during the period from 1996 through 2000 (Tr. II at 32-46). Inder Mathur, president and chief executive officer, Western Sugar Cooperative, testified to a $22.5 million expansion project (Tr. II at 120-23). Victor Krabbenhoft, chairman of the board, Minn-Dak Farmers Cooperative, testified to a $93,000,000 expansion (Tr. II at 170-71, 179).

The process of extracting sugar from the sugar beet is complicated, time-consuming, and expensive. The extraction process presents difficult material handling problems in a harsh climate. It is complicated by a perishable raw material that is delivered in the fall of the year (usually after a frost to enhance sugar content) to begin what is called the "beet slicing campaign." The raw as-received sugar beets degrade if not processed by the time the springtime warm weather arrives. Once the sugar beets are converted to an intermediate product of thick, syrupy liquid ("thick juice" or "in-process sugar"), the time constraints on further processing are less intense, other than to finish the process before the next year's crop of sugar beets starts arriving. The beet end of the sugar beet processing factory is normally shut down for lack of raw product between beet slicing campaigns. The sugar end of the overall process consists of a year-round concentration and crystallization process. With the aid of intermediate product storage tanks, processing of the thick juice may proceed at a slower daily rate than operations at the beet end of the factory.

Shortly after regulations were issued implementing the 2002

amendments to the Agricultural Adjustment Act of 1938, the CCC sent out a survey to all beet sugar processors. This Beet Processor Allotment Production History Adjustment Survey (CR 004-005) contained four questions concerning the four bases for adjustments available under the Agricultural Adjustment Act of 1938. While Petitioner did state it had suffered a loss more than 20 percent above normal on stored sugar beets during the 1999 and 2000 crop years, it answered "No" to the question:

> 1. Did your company start processing sugar beets at a new processing facility in the period, October 1, 1996, through September 30, 2001?

Petitioner elicited testimony that it did not realize that this survey was official, since the survey was not on a printed form or on letterhead and that Petitioner simply made a mistake in filling out this form. John Richmond, president and chief executive officer of Petitioner, testified that, since the survey's wording did not exactly track the regulations, Petitioner was "unsure of what to do." (Tr. I at 135.)

Mr. Richmond also testified that the sugar beet processing portion of the factory was rebuilt in essentially one off-season, between March and September of 1999. By reconstructing a plant "so that it was now two or three times bigger than it was before, I believe means that we reopened the plant and we constructed a new plant simultaneously." (Tr. I at 140.) "[W]hat we did was demolish the beet end of a factory, and rebuild that factory and add another factory at the same time. We did not permanently terminate the operation at that factory. We essentially rebuilt that factory and right with it, built another factory at the same time." (Tr. I at 142.) Shortly after this statement that Petitioner essentially had two factories on the same site where it previously had one, apparently as a result of the degree of expansion in processing capacity, Mr. Richmond engaged in this short colloquy with the Executive Vice President's counsel:

> Q. MR. KAHN: . . . And you have never had more than one factory, have you, on that site?
>
> A. MR. RICHMOND: There has only ever been one sugar

factory.

Tr. I at 143.

Petitioner also introduced evidence, for comparison purposes, of the reopening of a sugar beet processing factory that had been idle for two decades in Moses Lake, Washington (Tr. I at 95-99). Pacific Northwest Sugar Company, the owner of the Moses Lake, Washington, factory, received an adjustment for opening a sugar beet processing factory. While there was some testimony indicating that portions of the infrastructure from the Moses Lake factory that had sat idle for 20 years still existed in a usable condition, other testimony showed that a significant portion of the factory's equipment had been cannibalized (Tr. II at 236-37).

There was no dispute that the CCC found Petitioner had incurred substantial quality losses on stored sugar beets in crop year 2000 entitling Petitioner to a favorable adjustment in its allocation. At the hearing, a good deal of evidence was presented as to whether Petitioner was entitled to a second such adjustment for substantial losses on stored sugar beets allegedly suffered during crop year 1999. Petitioner testified that it suffered substantial quality losses on stored sugar beets because of a major boiler failure, which resulted in the work at the factory slowing down. The boiler failure, combined with abnormally warm weather, caused the quality of the sugar beets, and the resulting output of sugar, to significantly deteriorate. (Tr. I at 144-45.) The record contains considerable testimony as to whether losses triggered by an equipment failure even qualify as "substantial quality losses" under the Agricultural Adjustment Act of 1938. The term has not been defined by the CCC through either regulation or other guidance.

Mr. Richmond testified the "straight house" recovery method was an appropriate way to determine the relative performance of sugar beet processing factories and a 20 percent loss in sugar production calculated according to this method was an appropriate measure of substantiality (Tr. I at 117-18). He further testified, in order to establish a baseline to determine the extent of the loss, it was appropriate to use a standard of recovering a minimum of 75 percent of the sugar in the harvested sugar beets. He stated that, applying this methodology, the recovery average

for 1999 was well below the 10-year average recovery percentage.

Intervenors strongly contested Petitioner's methodology and results. Intervenors argued that the 75 percent standard for evaluating straight house recovery was inappropriate and unsubstantiated and testified, if it was the appropriate standard, then a number of other companies would have been similarly entitled to an allocation adjustment. (Tr. II at 22-26, 124, 157-58, 204-05, 237; IX 29.) Intervenors also contended the statutory term "quality losses" was not meant to cover every type of loss that could occur in the processing of sugar beets and equipment problems, such as boiler failure, constitute a "non-quality" loss not intended to be covered by the statutory adjustment of allocation.

All parties acknowledge that the beet sugar allotment allocation program is a "zero-sum" situation—that is, any increase in one beet sugar processor's allocation results in a decrease in the amount of the allocations of the other beet sugar processors. Every year the Secretary of Agriculture estimates the amount of sugar that will be consumed in the United States, along with projected domestic production and imports, and establishes an overall allotment quantity, which is allotted according to a statutory formula between sugar derived from sugar beets and sugar derived from sugarcane. Thus, the total amount of sugar to be processed by the beet sugar industry is a fixed amount, subject to some periodic interim adjustments. Thus, an allocation increase of 1.25 percent for one beet sugar processor would result in a reduction of a total of 1.25 percent in the cumulative allocations of the other beet sugar processors, resulting in zero net gain or loss to all the beet sugar processors combined.

## Discussion

### *Petitioner is Not Entitled to an Adjustment for Opening a Sugar Beet Processing Factory*

I affirm the Executive Vice President's denial of Petitioner's request for an adjustment in its beet sugar marketing allotment allocation for opening a sugar beet processing factory. I find the language in the Agricultural Adjustment Act of 1938 is clear and unambiguous that substantial expansions, modifications, or modernizations of a sugar beet processing factory are not equivalent to the opening of a factory.

Further, the legislative history supports the CCC's interpretation of the Agricultural Adjustment Act of 1938. Moreover, I find the CCC's granting Pacific Northwest Sugar Company an adjustment for opening a sugar beet processing factory in Moses Lake, Washington, is not inconsistent with the Executive Vice President's denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation.

In its request for reconsideration of beet sugar marketing allotment allocation by the Executive Vice President, dated October 9, 2002, Petitioner states:

> Beginning in crop year 1998, SMSBC substantially re-built and expanded its processing facility, resulting in what is essentially a new sugar beet processing factory on the same site and partially using existing buildings. Nearly every major unit operation in the facility was replaced or substantially modified.

CR 010. Petitioner then refers to this re-building and expansion as an "essentially new factory" (CR 010) and states Petitioner:

> reconstructed and reconfigured its Renville, Minnesota sugar beet processing factory thus creating a new sugar beet processing factory on the same site. The new factory increased production capacity and enhanced efficiency and productivity thereby driving down the costs of production.

Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matters at 4. Petitioner is thus essentially arguing that by significantly improving efficiency and expanding its capacity, it has "opened" a new sugar beet processing factory.

Congress could have chosen to reward a beet sugar processor for expanding significantly in size. By limiting the allocation increase to beet sugar processors that "opened" a sugar beet processing factory, however, Congress did not make the choice urged by Petitioner. That choice being made, it is not the role of the CCC nor the undersigned to second-guess Congress. That Congress chose a different course after earlier passing the Freedom to Farm Act and that Petitioner might have

made business decisions in reliance on the Freedom to Farm Act does not give the CCC any ground to implement the current Agricultural Adjustment Act of 1938 in a manner contrary to its express terms. Moreover, the record indicates that farm bills have a limited life and that those regulated by these bills have learned to expect periodic changes of greater or lesser significance. As I read it, the Agricultural Adjustment Act of 1938 simply does not make any provision for adjusting a beet sugar processor's allocation simply because it has increased its processing capacity, even if the increase was substantial. Indeed, granting allocation adjustments for increasing capacity would, based on the evidence presented by several Intervenors, potentially result in a number of adjustments in allocation, which would all have to come out of the same total beet sugar allotment. Moreover, imposing a rule that arguably doubling capacity is the equivalent of opening a sugar beet processing factory, while any lesser number would not result in an adjustment, would likely be viewed as arbitrary, particularly given the clear meaning of "opened" in this context. Congress was certainly familiar with the potential for expanding the capacity of a sugar beet processing facility, and Congress appears to have decided to limit the allocation increase to beet sugar processors who "opened" a sugar beet processing factory rather than include those who expanded a presently existing factory.

Alternatively, Petitioner contended that it effectively demolished its old sugar beet processing factory—although Petitioner never ceased operating other than in the normal off-season for this industry—and built two new factories in its place (Tr. I at 139, 162). On the other hand, Petitioner seems to recognize, as Mr. Richmond testified, that just one sugar beet processing factory exits in Renville, Minnesota, albeit a significantly larger and probably more efficient factory than the pre-expansion factory. The legal argument that Petitioner effectively demolished its old sugar beet processing factory and opened two new factories on the same location is less than compelling. Petitioner argues "[t]he entire beet end of the facility was demolished and reconstructed . . ." (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 16-17) and the beet end of a facility is the "factory" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 21). However, Petitioner also goes on to argue in its Post

Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative that it should not suffer the downward adjustment that the Agricultural Adjustment Act of 1938 mandates for a beet sugar processor which has "closed" a sugar beet processing factory. Yet, if a factory is demolished, I find it difficult to conceive of the factory not being closed. In fact, Petitioner's approach would logically mandate that the CCC deem a sugar beet processing factory "closed" if a beet sugar processor reduced factory capacity by 50 percent, since that would appear to be the converse of accepting Petitioner's argument that the doubling of capacity is "opening" an additional factory. Contending the "beet end" and the "sugar end" are two different factories and, therefore, now two factories exist where there once was one seems little more than a bootstrap approach to arguing that allegedly doubling the potential capacity to process sugar beets is the same as opening a new factory.

I also find significant, but not controlling, that in response to the Beet Processor Allotment Production History Adjustment Survey conducted by the CCC, Petitioner indicated that it had not opened a new sugar beet processing factory during the time period that would trigger the increased allocation. Although Petitioner, through testimony and argument, indicates that its answer to the survey was a mistake, that the survey form was confusing because the form did not track the language of the Agricultural Adjustment Act of 1938, and that the survey did not appear to be an official survey, I find apparent that, at the time of the survey, Petitioner considered its extensive renovation of its factory just that, a renovation, and not the opening of a new sugar beet processing factory.

Even if I were to find the Agricultural Adjustment Act of 1938 language is ambiguous, which I do not, the legislative history would be of no help to Petitioner. Senator Conrad pointed out that the Farm Security and Rural Investment Act of 2002 was designed to create "a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry." The amorphous standard suggested by Petitioner, which would require the CCC to determine that "opening" a sugar beet processing factory includes expanding a factory's capacity more than an unspecified amount (and suggests that a factory must be found to have "closed" if capacity has diminished by a likewise unspecified amount), provides neither

certainty nor predictability and does not comport with the objectives mentioned by Senator Conrad.

Petitioner also contends "[a] conservative and common sense reading" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 23) of Senator Conrad's statement that the Secretary of Agriculture has the authority to adjust allocations "if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets" means a beet sugar processor who increases processing capacity through improved technology is entitled to an adjustment to its allocation. However, reading Senator Conrad's statement in conjunction with the four bases for adjusting allocations provided in the Agricultural Adjustment Act of 1938, it is evident that the phrase concerning "increased processing capacity through improved technology to extract more sugar from beets" refers not to an increase in beet slicing capacity or a modernization of technology but rather to the allocation increase for constructing a molasses desugarization facility. Looking at Senator Conrad's comments in context, it is apparent he is making a reference to each of the four bases for adjustments—opening a factory, closing a factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for these provisions, does not support Petitioner's position.

Finally, the CCC's adjustment of the Pacific Northwest Sugar Company allocation is not inconsistent with the Agricultural Adjustment Act of 1938 and with CCC's handling of Petitioner's allocation. The Renville, Minnesota, sugar beet processing factory was never closed during the period of its expansion, other than during the normal off-season for the beet end of the factory. The Moses Lake factory for which Pacific Northwest Sugar Company was awarded an adjustment of its allocation for opening a sugar beet processing facility had been closed for 20 years. That it was a closed factory for 20 years is

manifest—most of the old equipment had been removed from the site. There had been no sugar beet processing at that location from 1978 until Pacific Northwest Sugar Company opened a sugar beet processing factory at the same site in 1998. (Tr. I at 95-98.) The two situations are simply not analogous.

*Petitioner is Not Entitled to a Second Adjustment for Substantial Quality Losses on Stored Sugar Beets*

I affirm the Executive Vice President's denial of an adjustment for substantial quality losses on stored sugar beets for the 1999 crop year. I find the clear, unambiguous language of the Agricultural Adjustment Act of 1938 only allows a single adjustment for substantial quality losses on stored sugar beets during the three crop years (1998 through 2000) that are used to calculate each beet sugar processor's allocation and the CCC had already allowed Petitioner such an adjustment for the 2000 crop year. Further, the legislative history offers no help to Petitioner's interpretation.

The Agricultural Adjustment Act of 1938 provides for an adjustment if the Secretary of Agriculture determines the beet sugar processor, "during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year."[2] Petitioner contends it is entitled to a second adjustment for the 1999 crop year, in addition to the quality loss adjustment Petitioner received for the 2000 crop year, while the Executive Vice President contends that it was immaterial and irrelevant whether Petitioner suffered substantial quality losses in the 1999 crop year. The Executive Vice President and Intervenors contend, in order to properly apply the statutory provision, the CCC never had to decide the issue of whether Petitioner had suffered substantial quality losses in the 1999 crop year since suffering substantial quality losses during the 2000 crop year was a sufficient basis for the CCC to make the single adjustment permitted under the Agricultural Adjustment Act of 1938.

The CCC interpretation is in accord with the clear and unambiguous language of the Agricultural Adjustment Act of 1938. There are four

[2]7 U.S.C. § 1359dd(b)(2)(D)(i)(IV).

different bases for adjustments under the Agricultural Adjustment Act of 1938, and three of them—for opening or closing a sugar beet processing factory and for constructing a molasses desugarization facility, apply to each opening, closing, or construction. In contrast, the adjustment for substantial quality losses on sugar beets stored during any crop year from 1998 through 2000 does not specify that the adjustment applies to each such loss. The rules of statutory construction require the presumption that Congress' word choices are intentional and that where Congress uses one word—each—in describing three of the bases for adjustments, while not using that word to apply to the fourth basis for an adjustment, then Congress must have had a purpose in so doing. Where Congress includes particular language in one section of a statute, but omits that language in another section of the statute, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997). Where Congress provided that an adjustment be made for each opening, closing, or construction in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III) and chose a different approach in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(IV), the only proper conclusion is that Congress did not want the same standard to apply.

Once again, even if I found that I needed to look to the legislative history, I find nothing that would support Petitioner's interpretation. The legislative history does not address whether Congress intended there to be one, two, or three adjustments based on sustaining substantial quality losses. While all parties agree that the purpose of the adjustment provisions of the Agricultural Adjustment Act of 1938 are to provide a predictable, transparent, and equitable formula, Senator Conrad's statements shed no light, one way or the other, as to how this particular adjustment is to be applied.

A considerable portion of the hearing was devoted to testimony and exhibits as to what Congress meant by "substantial quality losses" on stored sugar beets. Because I affirm the Executive Vice President's determination that the Agricultural Adjustment Act of 1938 only allows for one quality loss adjustment and because the CCC has already awarded Petitioner such an adjustment for the 2000 crop year, I do not find it necessary to make any determination as to whether Petitioner showed it has suffered substantial quality losses on stored sugar beets

during the 1999 crop year and what standards would apply to make such a determination.

*Petitioner's Due Process, Regulatory Taking, and Significant Impact Claims Provide No Basis for Overturning the Executive Vice President's Decision*

Petitioner alleges its due process rights were violated by the Executive Vice President's lack of a "thorough and proper investigation" of Petitioner's request that the Executive Vice President reconsider the CCC's October 1, 2002, beet sugar marketing allotment allocation decision; denying it the requested allocation adjustments would constitute a regulatory taking; and the impact of a denial of the requested allocation adjustments would be significant and discriminatory (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 13-15).

The Judicial Officer's jurisdiction to rule on constitutional claims is limited. I cannot declare an Act of Congress unconstitutional. "[G]enerally an administrative tribunal has no authority to declare unconstitutional a statute that it administers." *In re Jerry Goetz*, 61 Agric. Dec. 282, 287 (2002). However, I am charged with assuring that parties receive due process.

Petitioner has received ample due process. Petitioner's principal due process contention appears to be that, on reconsideration, the Executive Vice President did not conduct a hearing; however, neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations entitles Petitioner to a hearing before the Executive Vice President. Moreover, Petitioner received an in-person hearing before the Chief ALJ and had a full opportunity to adduce the facts that would support Petitioner's claim for an increase in its beet sugar marketing allotment allocation.

Petitioner's regulatory taking and unfair impact arguments are essentially disagreements with Congress' legislative decisions in crafting the Agricultural Adjustment Act of 1938. Since I have sustained the CCC's interpretations as totally consistent with the Agricultural Adjustment Act of 1938 and since I have no authority to alter or overrule the statutory scheme authorized by Congress, I find no

basis for reversing the determination of the Executive Vice President.

**Findings and Conclusions**

1. Petitioner, during the years 1996 through 2000, engaged in a significant modernization and expansion of its sugar beet processing factory in Renville, Minnesota.
2. Petitioner's significant modernization and expansion of its sugar beet processing factory in Renville, Minnesota, did not constitute opening a new sugar beet processing factory.
3. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for opening a sugar beet processing factory.
4. Petitioner received an increase in its beet sugar marketing allotment allocation as a result of suffering substantial quality losses on stored sugar beets during the 2000 crop year.
5. Under the Agricultural Adjustment Act of 1938, no beet sugar processor is entitled to more than one adjustment for substantial quality losses on stored sugar beets during the 1998 through 2000 crop years.
6. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for suffering substantial quality losses on stored sugar beets during the 1999 crop year.
7. Petitioner was not denied due process during the course of this proceeding.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises 11 issues in "Southern Minnesota Beet Sugar Cooperative Appeal Petition to the Judicial Officer" [hereinafter Petitioner's Appeal Petition] and "Southern Minnesota Beet Sugar Cooperative Brief in Support of Appeal Petition" [hereinafter Petitioner's Appeal Brief].

First, Petitioner contends the Chief ALJ's finding that the Agricultural Adjustment Act of 1938 is clear and unambiguous, is error. Petitioner contends the word *opened*, as used in the adjustment provisions of the Agricultural Adjustment Act of 1938, is ambiguous because it is not defined in the Agricultural Adjustment Act of 1938 or in the Sugar Program regulations. Petitioner asserts a beet sugar

processor that significantly increases sugar beet processing capacity at an existing sugar beet processing factory has *opened a sugar beet processing factory* as that term is used in the Agricultural Adjustment Act of 1938. (Petitioner's Appeal Pet. at 2; Petitioner's Appeal Brief at 15-21.)

As an initial matter, Petitioner cites no authority, and I cannot find authority, for Petitioner's position that words used in a statute that are not defined in that statute are ambiguous *per se*. Instead, it has long been held, when not defined by statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[3]

---

[3]*Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) (stating, when interpreting a statute, words must be given their ordinary or natural meaning); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (stating we give the words of a statute their ordinary, contemporary, common meaning absent an indication Congress intended them to bear some different import); *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (stating, in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating, when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating, in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating, in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating, in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at

(continued...)

The common and ordinary meaning of the verb *to open* (as in *opened a sugar beet processing factory*) is "to make available for or active in regular function ([opened] a new store),"[4] "[t]o begin; initiate; commence . . .[t]o commence the operation of."[5] I cannot locate any authority which indicates that the word *opened* in relation to a business, factory, or other establishment would commonly or ordinarily be understood to include the modification of an existing establishment.

Second, Petitioner asserts the word *opened*, as used in the Agricultural Adjustment Act of 1938, when examined in conjunction with the congressional intent to account for a beet sugar processor's addition of sugar beet processing capacity, directly supports Petitioner's entitlement to an allocation adjustment (Petitioner's Appeal Pet. at 2-3; Petitioner's Appeal Brief at 21-25).

The legislative history contains only one reference to *capacity*: Senator Conrad, during Senate debate on the Farm Security and Rural Investment Act of 2002, stated, as follows:

---

[3](...continued)
variance with the evident purpose of the legislation); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating, unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions).

[4]Merriam-Webster's Collegiate Dictionary 814 (10th ed. 1997).

[5]The American Heritage Dictionary of the English Language 920 (1976).

> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or *increased processing capacity through improved technology to extract more sugar from beets*.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

Looking at Senator Conrad's statement in context, it is apparent he is making a reference to each of the four bases for adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years—opening a sugar beet processing factory, closing a sugar beet processing factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for the adjustment provisions of the Agricultural Adjustment Act of 1938, does not support Petitioner's position that its modification of the existing Renville, Minnesota, sugar beet processing factory entitles Petitioner to an allocation adjustment.

Third, Petitioner contends an adjustment for an increase in capacity of a sugar beet processing factory is consistent with the purpose of the Agricultural Adjustment Act of 1938. Petitioner states the purpose of the baseline formula and related adjustments is to establish a fair, equitable, and representative allotment allocation for each sugar beet processor. (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 25.)

Again, Petitioner ignores the plain language of the Agricultural Adjustment Act of 1938 which specifically refers to an adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, *opened* a sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(D)(i)(I), (b)(2)(D)(ii)(I)). Moreover, I find no legislative history that supports Petitioner's contention that Congress intended that the Secretary of Agriculture adjust the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, expanded the capacity of an existing sugar beet processing factory.

Petitioner also cites Pacific Northwest Sugar Company as an example of a beet sugar processor that was provided an adjustment for increasing the capacity of a sugar beet processing factory (Petitioner's Appeal Brief at 25). However, Petitioner's assertion is not supported by the record which establishes that the CCC adjusted Pacific Northwest Sugar Company's weighted average quantity of beet sugar based on Pacific Northwest Sugar Company's opening a sugar beet processing factory. Moreover, Petitioner undermines its contention that Pacific Northwest Sugar Company was provided an adjustment for increasing the capacity of its Moses Lake, Washington, sugar beet processing factory by also asserting that the Pacific Northwest Sugar Company decreased the Moses Lake, Washington, sugar beet processing factory capacity from 10,000 tons of beets per day to 6,000 tons of beets per day (Petitioner's Appeal Brief at 32).

Fourth, Petitioner contends the Beet Processor Production History Adjustment Survey conducted by the CCC is irrelevant to the determination of whether Petitioner is entitled to an adjustment for opening a sugar beet processing factory and the Chief ALJ erroneously placed significant weight on the survey and the mistaken way in which Petitioner completed the survey (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 26-27).

The Chief ALJ found significant, but not controlling, that, in response to the Beet Processor Production History Adjustment Survey conducted by the CCC, Petitioner indicated it had not opened a sugar beet processing factory during the time period that would trigger the increased allocation. The Chief ALJ concluded Petitioner's answer to

the Beet Processor Production History Adjustment Survey makes apparent that, at the time of the survey, Petitioner considered its renovation of its Renville, Minnesota, sugar beet processing factory just that, a renovation, and not the opening of a sugar beet processing factory. (Initial Decision at 15.)

I agree with the weight the Chief ALJ placed on Petitioner's response to the Beet Processor Production History Adjustment Survey and the conclusion the Chief ALJ drew from Petitioner's response. Moreover, I find Petitioner's assertion, that it did not understand the significance of an incorrect response to the Beet Processor Production History Adjustment Survey, was belied by the care with which Petitioner explained its affirmative answer to the question regarding substantial quality losses on stored sugar beets during the period October 1, 1998, through September 30, 2001; by Petitioner's entrusting the completion and return of the Beet Processor Production History Adjustment Survey to its comptroller, Ron T. Bailey; and by Petitioner's concern that it return the Beet Processor Production History Adjustment Survey to the CCC before the CCC's deadline for issuing beet sugar marketing allotment allocations.

Fifth, Petitioner contends the Chief ALJ erroneously found credible Intervenors' claims that, if Petitioner is granted an adjustment to its weighted average baseline beet sugar production quantity for opening a sugar beet processing factory, various Intervenors would also be entitled to the same adjustment (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 27-30).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[6] The Administrative Procedure Act provides that, on appeal from

---

[6]*See also In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re David M. Zimmerman*, 57 Agric.
(continued...)

an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

---

[6](...continued)
Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

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

*Appeals and review*. . . .

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

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[7]

I have examined the record and find no basis to reverse the Chief ALJ's credibility determinations with respect to Intervenors' claims that they undertook significant and highly costly modifications and improvements to their sugar beet processing factories.

Sixth, Petitioner contends the Chief ALJ erroneously found Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company in which the CCC awarded Pacific Northwest Sugar Company an increase in its beet sugar marketing allocation for opening its Moses Lake, Washington, sugar beet processing factory. Petitioner asserts the undisputed evidence establishes Pacific Northwest Sugar Company built the sugar beet processing factory on the site of an existing, but non-operational, sugar beet processing factory and used existing, used, and new equipment and buildings. Petitioner argues, in awarding an adjustment to Pacific Northwest Sugar Company, the CCC determined that the use of existing, used, and new equipment to create

---

[7]*In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718, 2001 WL 401594 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

new sugar beet processing capacity on the footprint of a previously-operational sugar beet processing factory constitutes opening a sugar beet processing factory. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 30-32.)

I agree with the Chief ALJ's finding that Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company. The Chief ALJ very clearly articulates the stark difference between Petitioner's situation and that of Pacific Northwest Sugar Company (Initial Decision at 9-10, 18), and I have adopted, with very minor modifications, the Chief ALJ's discussion in this Decision and Order, *supra*. I find no reason to reiterate that discussion here.

Seventh, Petitioner contends the Chief ALJ erroneously held that no more than one substantial quality loss adjustment may be made under the Agricultural Adjustment Act of 1938. Petitioner contends it is entitled to two adjustments for the two substantial quality losses on stored sugar beets that Petitioner suffered during the 1998 through 2000 crop years—one in crop year 1999, the other, for which Petitioner was given an adjustment, in crop year 2000. Petitioner argues the use of the plural (substantial quality *losses* on stored sugar beets) in the adjustment provisions of the Agricultural Adjustment Act of 1938 means the Secretary of Agriculture must adjust the weighted average quantity of beet sugar produced by a beet sugar processor for each substantial quality loss suffered during any crop year from 1998 through 2000. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 34-40).

A beet sugar processor can be awarded more than one of each of the first three permissible adjustments in section 359d(b)(2)(D)(i)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(III)); however, the language of each of these three bases for adjustment is in the singular so that it conforms to the parallel language in section 359d(b)(2)(D)(ii)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III)) awarding an adjustment for *each* event. Thus, for instance, the Secretary of Agriculture may make an adjustment if the Secretary determines a beet sugar processor has opened *a* sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(i)(D)(I)) and the amount of the adjustment is 1.25 percent for *each* sugar beet processing factory that is opened by the beet sugar processor (7 U.S.C. § 1359dd(b)(2)(ii)(D)(I)).

However, in section 359d(b)(2)(i)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(i)(D)(IV)), which provides for adjustment based upon substantial quality losses, the singular is not needed because the parallel provision in section 359d(b)(2)(ii)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(ii)(D)(IV)) does not provide for an adjustment for *each* event.

Congress provided for an adjustment for *each* sugar beet processing factory that is opened by a beet sugar processor, for *each* sugar beet processing factory that is closed by a beet sugar processor, and for *each* molasses desugarization facility that is constructed by a beet sugar processor. Congress did not provide for an adjustment for each substantial quality loss on stored sugar beets suffered by a beet sugar processor; instead, Congress provided for an adjustment in the case of a beet sugar processor that has suffered substantial quality losses on stored sugar beets.

Petitioner, referring to Senator Conrad's statement, argues the legislative history establishes that the Secretary of Agriculture is to make *adjustments* (plural) when a beet sugar processor suffers substantial quality losses on stored sugar beets (Petitioner's Appeal Brief at 39).

Again, I disagree with Petitioner. Senator Conrad states:

> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make *adjustments* in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

I find *adjustments* is plural not because Congress intended multiple

adjustments for substantial quality losses on stored sugar beets, but because Senator Conrad is referring to the four bases for adjustments: opening a sugar beet processing factory, closing a sugar beet processing factory, constructing a molasses desugarization facility, and suffering substantial quality losses on stored sugar beets.

Eighth, Petitioner contends the Chief ALJ erroneously failed to find that Petitioner met all the applicable standards for what constitutes substantial quality losses (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 40-43).

The Chief ALJ did not find it necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year or to make any determination regarding the standards that would apply to determine whether a sugar beet processor has established that it suffered substantial quality losses on stored sugar beets. The Chief ALJ concluded he was not required to make these determinations because the Agricultural Adjustment Act of 1938 only allows one substantial quality loss adjustment on stored sugar beets suffered during the 1998 through 2000 crop years and the undisputed evidence establishes that Petitioner had already received an adjustment for substantial quality losses on stored sugar beets suffered during the 2000 crop year (Initial Decision at 20-21). I agree with the Chief ALJ's conclusions and the reasons for his conclusions that it is not necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year and what standards would apply to make such a determination.

Ninth, Petitioner contends the Chief ALJ erroneously granted deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938 (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 43-45).

While the Chief ALJ stated the CCC's interpretation of the Agricultural Adjustment Act of 1938 was entitled to some deference, the Chief ALJ clearly based the Initial Decision on what he independently found to be the plain language of the Agricultural Adjustment Act of 1938. Therefore, even if I agreed with Petitioner that the Chief ALJ's statements regarding the deference to be given the CCC's interpretation of the Agricultural Adjustment Act of 1938 was error, nevertheless, I

would find the Chief ALJ's statements harmless error. Moreover, I do not base this Decision and Order on deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938. Instead, I find, without reference to the CCC's interpretation, that Petitioner did not open a sugar beet processing factory within the meaning of the adjustment provisions of the Agricultural Adjustment Act of 1938 and is not entitled under the adjustment provisions of the Agricultural Adjustment Act of 1938 to two adjustments for substantial quality losses on stored sugar beets during crop years 1998 through 2000.

Tenth, Petitioner asserts the Executive Vice President and Intervenors objected to Petitioner's right to a hearing at which oral and written evidence could be introduced. Petitioner contends these objections resulted in unnecessary delay in the proceeding; forced Petitioner to engage in an academic briefing exercise; and forced Petitioner to suffer for an extended period of time without its proper sugar marketing allotment allocation, while the rest of the industry benefited from an improper increased sugar marketing allotment allocation. Petitioner suggests the Executive Vice President's and Intervenors' challenge to Petitioner's right to a hearing resulted in a denial of due process. (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-46.)

As an initial matter, the record indicates that the Executive Vice President and Intervenors filed briefs regarding the nature and purpose of the hearing in response to a May 14, 2003, request by Administrative Law Judge Jill S. Clifton, who was then assigned to conduct this proceeding (Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matter at 1-2; Joint Response of the Intervenors To the Brief of the Petitioner Concerning Suggested Procedural Matter at 1-3; Brief of Commodity Credit Corporation Concerning Suggested Procedural Questions at 1-2). The record does not establish that the Executive Vice President or Intervenors challenged Petitioner's right to a hearing for purposes of delay. Further, the Chief ALJ, after consideration of the Executive Vice President's, Petitioner's, and Intervenors' briefs on procedural matters determined that an in-person hearing was warranted (Summary of Telephone Conference & Order Requiring Pre-Hearing Exchanges at 1). Subsequently, the Chief ALJ conducted a 3-day in-person hearing at which Petitioner introduced

oral and written testimony. Under these circumstances, I reject Petitioner's contention that it was denied due process.

Eleventh, Petitioner contends, if it does not receive the requested adjustments, Petitioner will suffer a regulatory taking (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-48).

The inquiry into whether a taking has occurred is essentially an ad hoc factual inquiry not directed by a set formula. However, the Supreme Court of the United States has identified three factors to be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking: (1) the character of the governmental action; (2) the economic impact of the governmental action; and (3) the governmental action's interference with reasonable investment-backed expectations.[8] A taking may more readily be found when the governmental interference with property can be characterized as a physical invasion by government, than when the interference arises from a public program adjusting the benefits and burdens of economic life to promote the common good.[9] I do not find the Secretary of Agriculture's denial of Petitioner's request for two adjustments to its weighted average quantity of beet sugar produced during the 1998 through 2000 crop years can be construed as an unconstitutional taking of Petitioner's property. In any event, this forum is not the proper forum for Petitioner's inverse condemnation claim.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. The determination made by the Executive Vice President on

---

[8] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96 (1981); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

[9] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

December 10, 2002, denying Petitioner's request for an increase in its beet sugar marketing allotment allocation under the Agricultural Adjustment Act of 1938 is sustained.

2. Petitioner's Petition for Review is denied.

---

**In re: CARGILL, INC.**
**SMA Docket No. 03-0002.**
**Decision and Order.**
**Filed June 27, 2005.**

**SMA – Sugar Beets – Adjustment of allocation – Statutory construction – New entrant status.**

Steven Adducci, Dave Bieging, John M. Gross, and Mathew J. Clark, for Complainants
Jeffrey Kahn and Bret Kappel, for Respondent
Phillip Fraas, for Intervenors
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson*

## Decision

In this decision, I deny the Petition of Cargill, Inc. to overturn the decision of the Executive Vice-President of the Commodity Credit Corporation (CCC) that it was not entitled to an allocation of beet sugar as a "new entrant" in the beet sugar processing industry. I find that the decision of the CCC is in accord with the new entrant provisions of the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 (Act)(7 U.S.C. §1359dd(b)(2)(H)). I thus find that Cargill is not entitled to the 80,000 short ton allocation requested in its initial application to the CCC.

## Procedural Background

This matter was initiated by Cargill's January 6, 2003 request, to the Executive Vice-President of the CCC, for a determination that Cargill's Dayton, Ohio factory was a sugar processing facility under the Act.

A.R. 001.[1] Submitted with the request was an application for a marketing allocation of 80,000 short tons of sugar produced from sugar beets. A.R. 005. On February 28, 2003, Daniel Colacicco, Director of the Dairy and Sweetness Analysis Group of USDA's Farm Service Agency, denied Cargill's request. A.R. 006-007. On March 10, 2003, Cargill asked the CCC to reconsider the denied application. A.R. 008-012. On June 16, 2003, a hearing on Cargill's reconsideration request (which was consolidated with another reconsideration request not at issue here) was conducted before James Little, the Executive Vice-President of the CCC. On July 17, 2003, Mr. Little formally denied Cargill's Request for Reconsideration. A.R. 065-066.

On August 6, 2003, Cargill filed its Petition for Review and Request for Hearing, asking that it be granted a hearing before an administrative law judge, and that the decision of the CCC be overturned. As per the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Vice President, Commodity Credit Corporation, the CCC on August 26, 2003, filed its answer, along with a certified copy of the record upon which the Executive Vice President of the CCC made his determination. Pursuant to Rule 5(a), the CCC also filed a list of each person "affected" by the CCC decision. This list consisted of all ten sugar beet processors in the United States.[2] Pursuant to Rule 5(d), the Hearing Clerk served each affected person with a copy of Cargill's petition for review and the CCC's answer, and advised them of their right to intervene in the proceeding.

Southern Minnesota Beet Sugar Cooperative (SMBSC) intervened in favor of Cargill's petition, while Amalgamated Sugar Company, American Crystal Sugar Company, Imperial Sugar, Inc., Michigan Sugar Cooperative, Minn-Dak Farmers Cooperative, Monitor Sugar Company and Western Sugar Cooperative (Joint Intervenors) intervened in opposition to the petition.

---

[1] A. R. refers to the certified administrative record of the proceedings before the CCC.

[2] As will be discussed in more detail, each year there is a fixed amount of sugar beets that can legally be marketed for human consumption in the United States, so that any increase or decrease in a company's allotment, or any allotment awarded to a new entrant, directly impacts all sugar beet processors.

On October 16, 2003, Cargill filed an "amended and restated" petition for review and request for hearing. The CCC and the Joint Intervenors moved to strike the amended petition. At a February 12, 2004 conference call, I denied the motion to strike, and directed Cargill to file a revised version of its amended petition indicating what was changed from the initial filing.

I conducted a hearing in this matter on June 15, 16 and 17, 2004 in Washington, D.C. Witnesses were called by Cargill, SMBSC and the Joint Intervenors. The CCC declined to present any testimony, but did cross-examine witnesses called by the other parties. A portion of the first day of testimony concerned confidential business information, and remains under seal. [3]

## Statutory and Regulatory Background

The federal government has regulated sugar beets, along with other commodities, for many years. In 2002, Congress passed the Farm Security and Rural Investment Act, 7 U.S.C. § 1359 *et seq*. This Act required the Secretary to establish, by the beginning of each crop year, the overall allotment quantity (OAQ) of sugar produced from sugar beets and domestically produced sugar cane. The OAQ is divided so that 54.35 percent is allotted to producers of sugar derived from sugar beets, and 45.65 percent is allocated to producers of sugar derived from sugar cane. The marketing allotments for the processing of beet sugar are based on the average weighted quantity of beet sugar produced by a given processor during the 1998 to 2000 crop years. Thus, these allotments are intended to apply to processors already in the sugar beet processing business. Adjustments to the allotments of these producers for opening or closing a sugar beet processing facility, for constructing a molasses desugarization facility, or for suffering substantial quality losses on stored sugar beets are also provided for, but are not at issue here.

The Act also makes specific provision for "new entrants" into the sugar beet processing business. 7 U.S.C. § 1359dd(b)(2)(H) provides:

**(H) New entrants starting production or reopening factories**

[3] Tr. 78-117, and CX 18, 19 and 20

**(i) In general**

Except as provided by clause (ii), if an individual or entity that does not have an allocation of beet sugar under this subpart (referred to in this paragraph as a "new entrant") starts processing sugar beets after the date of enactment of this subparagraph, or acquires and reopens a factory that produced beet sugar during previous crop years that (at the time of acquisition) has no allocation associated with the factory under this subpart, the Secretary shall –

**(I)** assign an allocation for beet sugar to the new entrant that provides a fair and equitable distribution of the allocations for beet sugar; and

**(II)** reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

**(ii) Exception**

If a new entrant acquires and reopens a factory that previously produced beet sugar from sugar beets and from sugar beet molasses but the factory last processed sugar beets during the 1997 crop year and the new entrant starts to process sugar beets at such factory after May 13, 2002, the Secretary shall –

**(I)** assign an allocation for beet sugar to the new entrant that is not less than the greater of 1.67 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years as determined under subsection (b)(2)(C) of this section, or 1,500,000 hundredweights; and

**(II)** reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

Thus, in order to qualify as a new entrant, a company must start

processing sugar beets after the date the law was enacted (May 13, 2002). If a company satisfies this condition, the Secretary "shall" assign it an allocation, but the amount of the allocation, rather than being subject to the rigid criteria established for companies that are already sugar beet processors, must be "fair and equitable."

The Secretary adopted regulations to implement the statute, several of which are pertinent to this decision.

TITLE 7--AGRICULTURE

CHAPTER XIV--COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

PART 1435--SUGAR PROGRAM--Table of Contents

Subpart A--General Provisions

Sec. 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration.

*Beet sugar* means sugar that is processed directly or indirectly from sugar beets or sugar beet molasses.

*Beet sugar allotment* means that portion of the overall allotment quantity allocated to sugar beet processors.

. . .

*In-process sugar* means the intermediate sugar containing products, as CCC determines, produced in the processing of domestic sugar beets and sugarcane. It does not include raw sugar, liquid sugar, invert sugar, invert syrup, or other finished products that are otherwise eligible for a loan.

. . .

*Overall allotment quantity* means, on a national basis, the total quantity of sugar, raw value, processed from domestically produced sugarcane or domestically produced sugar from sugar beets, and the raw value equivalent of sugar in sugar products, that is

permitted to be marketed by processors, during a crop year or other period in which marketing allotments are in effect.

. . .

*Raw sugar* means any sugar that is to be further refined or improved in quality other than in-process sugar.

. . .

*Sugar* means any grade or type of saccharine product derived, directly or indirectly, from sugarcane or sugar beets and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, liquid sugar, edible molasses, and edible cane syrup. For allotments, sugar means any grade or type of saccharine product processed, directly or indirectly, from sugarcane or sugar beets (including sugar produced from sugar beet or sugarcane molasses), produced for human consumption, and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, and liquid sugar.

*Sugar beet processor* means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

Sec. 1435.308 Transfer of allocation, new entrants

. . .

(f) New entrants, not acquiring existing facilities, may apply to the Executive Vice President, CCC, for an allocation.

(1) Applicants must demonstrate their ability to process, produce, and market sugar for the applicable crop year.

(2) CCC will consider adverse effects of the allocation upon existing processors and producers.

There is not much pertinent legislative history concerning beet sugar allocations. A statement by Senator Conrad, a co-sponsor of the Act,

gives some perspective on Congress's intent in establishing the current allocation program, but has nothing specific to say about the new entrant provision.

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
>
> . . .
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

107th Cong., 148 Cong. Rec. 10, p. S514 (Feb. 8, 2002).

**The Facts**

Petitioner Cargill is a large processor of agricultural commodities into food products. Among many other business interests, Cargill operates a sugar processing facility in Dayton, Ohio. A.R. 001. Cargill has considerable experience in marketing edible sugar suitable for human consumption from this facility. Tr. 119. This facility, operating on the site of an idle corn processing plant, begin operating in August 2000, and primarily was used to manufacture sugar products from intermediate sugar products such as liquid cane molasses. Tr. 30-31. Although details of the cost of this facility were testified to in closed session, it is fair to state that the cost of adapting this facility to handle beet thick juice was dramatically less than the typical cost for starting up a full-scale sugar beet processing facility.

Intervenor SMBSC, a beet sugar processing cooperative located in Renville, Minnesota, and a supporter of Cargill's petition, has indicated that it has unused capacity at its factory. Tr. 144-5, 151-2, 167. Cargill and SMBSC have both testified that some sort of an agreement exists between the two companies, where Cargill is effectively buying sugar beets from SMBSC, Tr. 45, is paying SMBSC to process the beets into beet thick juice, Tr. 74, and then arranges to have the beet thick juice transported from Renville to Dayton where Cargill performs the final stages of processing into other sugar products. Tr. 34-35, 76, 181-4. Although this agreement was mentioned numerous times during this proceeding by Cargill and SMBSC, and there are several disparities between the two parties as to what the agreement actually provides for, no agreement was ever submitted as part of this record.

According to Cargill and SMBSC, all processing of the sugar beets allegedly owned by Cargill at SMBSC's factory would be accomplished under the terms of a "tolling" agreement. Tr. 48-52, 58. Traditionally, in the sugar beet processing business, a tolling agreement is a set-up where one processor performs some processing functions on beets owned by another processor. Its usage in the business is not uncommon.

The beet sugar allocation program is a form of "zero-sum game," as the parties readily admit. Thus, when the Secretary issues the annual total allocation, it is divided among all the beet sugar processors according to the formula spelled out in the statute, based on production

during the 1998-2000 crop years, and subject to the adjustments for opening or closing a factory, for opening a molasses desugarization facility or for substantial quality losses. Any additions to a processor's allocation result in a proportional reduction of the allocations of the other processors. Cargill has requested that it be allocated 80,000 short tons of beet sugar as a "new entrant" in the sugar beet processing field. A.R. 001-2. If granted, this would result in a combined 80,000 ton reduction of the allocations of the other sugar beet processors, to be shared proportional to their initial allocation. While SMBSC would also share in this reduction, it would at the same time substantially profit from the additional sales of sugar beets and the payment for the processing of these beets by Cargill, since its farmers would be allowed to grow more beets, and its factory would be more fully utilized.

One of the key factual determinations made by the CCC is that, for the purposes of the Act, beet thick juice is sugar. Since Cargill was already receiving sugar in the form of beet thick juice at its Dayton plant, it could not be processing the juice into sugar, but was rather just refining one form of sugar into another form of sugar. A.R. 006. Indeed, this determination was totally consistent with an earlier determination, sought by SMBSC in September 2002, that beet sugar was sugar for purposes of the Act, and that specifically selling of beet thick juice constituted the selling of sugar. John Richmond, SMBSC's Chief Executive Officer, acknowledged at the hearing that the product his company was shipping to Cargill, even in the form of beet thick juice, was sugar for purposes of the sugar program. Tr. 193.

I heard considerable testimony on the financial impact of granting the proposed allocation to Cargill. Unsurprisingly, Cargill and SMBSC contended that the financial impact would not be significant, even stating that it was de minimus and comparing it to the 2 percent discount for prompt payment that is prevalent in the industry. The Joint Intervenors, equally unsurprisingly, portrayed the losses they would suffer as significant, and the additional revenues SMBSC would receive as "windfall" and worth approximately $138,000,000 over the period from 2004 to 2008 inclusive. While SMBSC would have to suffer the same proportional loss in allotment as the other sugar beet processors if Cargill was granted the requested allocation, it is abundantly clear as

well that, from a financial perspective, they would be far and away the prime beneficiary of the granting of Cargill's petition.

Other financial testimony, including expert testimony, examined the alleged losses that would be suffered by various parties, and the gains that would be experienced by SMBSC, from a marginal cost perspective. In addition to losses in revenues and profits, the Joint Intervenors testified that granting of Cargill's petition would result in "a significant loss of asset values for other allotment holders," JIX 9, p. 8, Report of Patrick M. O'Brien, while SMBSC would achieve significant gains in revenues, profits and asset values.

The Joint Intervenors also contended that if Cargill's petition was granted and SMBSC could have the ability to utilize a tolling arrangement with someone who was only a processor of a product that was already "sugar," such as beet thick juice, everyone else in the industry could easily execute similar agreements, throwing the entire carefully crafted allotment system into chaos. They contended, as did the CCC, that the ease of such "copycatting"—and there was no dispute that any of the Joint Intervenors who had available capacity and the ability to grow more sugar beets could enter into a similar arrangement to the one Cargill had with SMBSC—would lead to a situation, counter to the one anticipated by the Act, where the processors of sugar beets would be subject to numerous allocation changes, in a serial fashion, and that the sugar beet program would operate in a manner quite the opposite of the "certainty and predictability" anticipated by Senator Conrad.

## Discussion

Cargill is not entitled to a beet sugar marketing allocation as a new entrant. The CCC determination that granting Cargill new entrant status would be inconsistent with the Act is amply supported by the evidence, as well as the statute, the underlying regulations, and the limited legislative history. Although my holding that Cargill is not entitled to new entrant status eliminates the need for me to address some of the other issues brought up by the parties, I make several additional findings in this area in the event my new entrant ruling is overturned subsequently. Thus, I hold that if a party is a new entrant, it is

mandatory that the CCC grant it an allocation, but that the CCC may consider a variety of factors in determining the size of the allocation. 7 C.F.R. § 1435.308(f).

Cargill does not process sugar beets as contemplated by the new entrant provisions of the Act. While the downstream conversion of beet thick juice into edible sugar is a part of the overall process of making commercially useful sugar out of the sugar beet, the definitions and determinations of the CCC, A.R. 006, make it clear that beet thick juice is already considered sugar under the Act, so that the processing of beet thick juice at a remote facility cannot be considered the processing of sugar beets so as to entitle Cargill to a new entrant allocation.

While Cargill and SMBSC contend that Cargill is entitled to an allocation based on the fact that it is simply purchasing beets from SMBSC's growers and is having the greater part of the processing performed through a tolling arrangement with SMBSC, there is no documentary evidence supporting this contention, and the testimony supporting the existence of such an agreement, not to mention its specific terms, is less than convincing. No agreement between the two companies was ever introduced into evidence, and I have some doubt as to whether such a written agreement, with definite terms and fixed obligations, even exists. Cargill and SMBSC had ample opportunity to submit such an agreement, and it could have been kept under seal, as were other testimony and exhibits in this case, but they chose not to do so. Further, I heard markedly conflicting testimony from witnesses employed by the two companies as to what the "agreement" stated.

Indeed, in its request that the CCC determine that it was a new entrant sugar beet processor under the Act, A.R. 001-005, Cargill indicated that it had entered into an agreement for the purchase of sugar beets from SMBSC. Daniel Pearson testified before the CCC that the sugar beets were to be purchased from the growers of SMBSC, and that the beet thick juice would "at no time" be the property of SMBSC. *Id.*, at 25. At the hearing before me, no evidence was introduced to substantiate these contentions. On the contrary, John Richmond, SMBSC's CEO and President, testified that it was SMBSC as an entity, not the growers, who would contract with Cargill. Tr. 181-2. Rather than owning beets it specifically purchased from growers, SMBSC

might just be selling "some portion of the beets that we have in the pile," Tr. 182, and that beets "owned" by SMBSC and Cargill would likely be commingled. Tr. 183-6. It might be just as likely that the SMBSC growers would receive their payment for the "Cargill" beets from SMBSC as they would from Cargill. Tr. 202-3. Basically, the cumulative written and oral testimony, as well as the failure to produce any written contract, fall far short of convincing me that there is some sort of contract in effect whereby Cargill is buying beets from the growers, and maintaining ownership, and the inherent risks of ownership, from harvest through the processing of the beets into sugar.

I agree with the CCC and the Joint Intervenors that Cargill does not meet the statutory criteria for new entrant status. The new entrant provisions are designed so that an entity that has expanded the substantial funds necessary to purchase or build a sugar beet processing facility receives a fair allocation of the OAQ that it would otherwise be shut out of, since the allocation, in the absence of a new entrant, is distributed among sugar beet processing facilities according to their 1998 through 2000 weighted average crop year production. It allows a company the opportunity to benefit from a significant investment, and is not designed to allow a company to bootstrap itself into an allocation by making relatively little or no investment into a small part of the process. Nor is it designed to allow a company, such as SMBSC, to circumvent the statutory process by contracting with another company to perform a small part of the process, and effectively increase its own allocation to utilize excess unused capacity.

In order to be a new entrant, Cargill must show it is a "sugar beet processor." To so qualify, it must commercially produce sugar, directly or indirectly, from sugar beets. 7 C.F.R. § 1435.2. Yet the product it would receive from SMBSC is already "sugar," as SMBSC is well aware, it having requested and received an interpretation from the CCC that beet thick juice constitutes sugar under the Act. Thus, if Cargill is only processing one form of sugar into other forms of sugar, it could not be a sugar beet processor under the Act or regulations. However, Cargill and SMBSC contend that by purchasing beets from SMBSC growers and then having SMBSC handle all aspects of the processing of the beets

through the beet thick juice stage by means of a tolling agreement, Cargill still qualifies as a new entrant. I disagree.

In the sugar beet industry, tolling is a process by which one processor pays another to handle a portion of the processing of the beets into sugar. Here, Cargill contends it had a contract with SMBSC "to purchase beets to toll through the plant," and that "we have rented the plant for a certain percentage of their capacity" for which they pay a "toll fee." Tr. 48. Cargill and SMSBC have represented that their tolling arrangement is similar to many others in the industry. However, the CCC and Joint Intervenors have pointed out that the agreements of other parties cited by Cargill and SMBSC give little support to the position that a non-sugar beet processor can achieve new entrant status by utilizing tolling agreements as attempted here. SMBSC Opening Brief at 17-19. None of the three examples cited involved a company seeking a new entrant allocation. Indeed, none of the three examples even took place in a time period where both new entrant and similar allocation provisions were present.

No evidence presented by Cargill or SMBSC demonstrates that tolling has ever been utilized to bootstrap a non-sugar beet processor into processor status. Since Cargill, by processing beet thick juice, is only processing a product that has already been classified as "sugar," the only real question is whether a tolling agreement can, in and of itself, propel Cargill into new entrant status. By attempting to classify itself as a sugar beet processor, through a combination of a tolling agreement and contractual agreements that are not even a part of this record, and by its processing of a product that is already sugar, Cargill is no different from any individual, corporation or other entity who could enter into a contract to "toll" sugar beets through SMBSC, and thereby be entitled to new entrant status. In other words, if I were to find that Cargill is entitled to new entrant status, there would be no bar on anyone entering into a tolling agreement with an existing sugar beet processor with unused capacity to grow and process sugar beets, and thereby attain an allotment.

It is obvious that the real beneficiary of awarding new entrant status to Cargill would be SMBSC. As was discussed in great detail in *In re: Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. (July 21,

2004), affirmed by the Judicial Officer at 64 Agric. Dec. 65 (May 9, 2005), SMBSC spent roughly $100,000,000 to renovate its sugar beet processing facility, a significant sum of money, but not inconsistent with funds expended by similar facilities to modernize. Tr. 129. Throughout the litigation of that case, the parties expounded on the major expenditures that were necessary to engage in the sugar beet processing industry.[4] At the same time, it is clear that Cargill's expenditures to attempt to become a sugar beet processing facility were relatively minimal.[5] In the earlier case, and again in this case, it was made clear by SMBSC that it had significant unused capacity as a result of the renovation and expansion, capacity which it obviously seeks to utilize through its dealings with Cargill. While their efforts to increase their allocation in the above-cited case proved unsuccessful, the instant case was proceeding concurrently.

Cargill and SMBSC rely on an "unused capacity" argument—that the capacity added by SMBSC and not used to calculate SMBSC's allotment arguably constitutes a new facility, which Cargill can utilize as a new entrant. Such a contention is unconvincing and inconsistent with the Act. It is exceedingly clear in the Act that a sugar beet processor's allotment is calculated based on its actual production of sugar from sugar beets during the 1998-2000 crop years. Whether the capacity of a processor was used or not, or increased or decreased, is simply not relevant to allotments. The only thing that matters is actual production, subject to the adjustments also permitted in the statute, none of which are at issue here.

It would also be unreasonable to allow Cargill's petition in the face of statutory language requiring that a new entrant be an entity that "starts

---

[4] Thus, American Crystal Company testified that it had committed $134,000,000 to two major expansions between 1996 and 2000, Western Sugar Cooperative spent $22.5 million and Minn-Dak Farmers Cooperative underwent a $93,000,000 expansion. *Southern Minnesota, supra,* J.O. decision slip op., 10-11.

[5] The costs of setting up operations at Cargill's Dayton plant to accommodate the receipt of beet thick juice were discussed in closed session, with that portion of the transcript under seal. Tr. 115-7. Since Cargill's facility was already handling cane sugar products, the accommodation to handle the beet thick juice was relatively insignificant. *Id.*

processing sugar beets after the date of enactment of this subparagraph." 7 U.S.C. § 1359dd(2)(H)(i). While Cargill claims that it is just entering the sugar beet processing business, the entity that would be doing all the sugar beet processing for Cargill was operating for several decades before the passage of the subparagraph in question. Moreover, all the capacity that would be utilized by Cargill under the "tolling" agreements was already in existence two crop years before the subparagraph in question was enacted. That the very excess capacity that SMSBC was not allowed to use in its own right could be used to entitle a non-sugar beet processor like Cargill to generate an allocation is inimical to the statute. As the CCC contends in its brief, interpreting the statute in Cargill's (and thereby SMBSC's) favor, "would totally undermine the statutory formula for making beet sugar allocations, opening up a free-for-all as all processors under various guises file for new entrant status on the basis of their unused capacity." CCC opening brief at 15.

While there is nothing wrong with exploiting a statutory or regulatory loophole for one's benefit, I agree with the CCC that there simply is not the loophole here that Cargill and SMBSC insist exists. The CCC interpretation of the statute is the only one that properly considers the relationship between the beet sugar marketing allocation provisions and the new entrant provisions. Any other interpretation of the Act would likely lead not to the "certainty and predictability" that was in the minds of the drafters of the Act as summarized by Senator Conrad, but would instead lead to a constant flow of petitions for adjustment of allocations as sugar beet processors with unused capacity and sugar beet farmers with unplanted land could engage in round after round of "contracts" with entities that are not even sugar beet processors to increase their allotments and to reduce market share of other processors who are actually in the business of processing sugar beets.

Thus, I agree with the CCC that a finding "that granting Cargill a new entrant allocation under the proposed arrangement with the Southern Minnesota Beet Sugar Cooperative (Southern Minnesota) is not consistent with the beet sugar allocation formula under the sugar marketing allocation program" is mandated by the Act. A.R. 063. Similarly, the CCC's holding that granting Cargill's petition would

"subvert the carefully crafted beet sugar allocation formula for existing beet processors," *Id.*, is well supported by this record.

Granting of the petition, and acceptance of the arguments of Cargill and SMBSC, could lead to bizarre outcomes that even more strongly illustrate the correctness of the CCC interpretation. Thus, if Cargill simply purchased SMBSC's entire operation, there is little question that it would be entitled to nothing but SMBSC's current allocation, based on the SMBSC 1998-2000 production of sugar from sugar beets. 7 C.F.R. 1435.308(d). Yet by not buying SMBSC's factory, and effectively buying the unused capacity of the factory, Cargill and SMBSC would create out of whole cloth an additional 80,000 tons of sugar production out of the exact same factory that has already been ruled not entitled to any additional allocation. Alternatively, if Cargill were awarded new entrant status and given an allocation, there would be nothing stopping SMBSC from purchasing Cargill's "sugar beet processing facility" and its allocation, and thus, by gaming the system, effectively gaining an allocation for its unused capacity at the expense of the other sugar beet processors. This would wreak havoc on the system carefully crafted by Congress, and would greatly exacerbate the uncertainty that Congress sought to avoid in promulgating the Act.

In affirming the decision of the CCC, I find that the clear language of the statute, the legislative history, the regulations, and the nature of the sugar beet industry mandate a finding that Cargill is not entitled to new entrant status, and that their petition was properly denied. When one reads the requirements for determining the quantity of allocations provisions of the Act in conjunction with the new entrant provisions, the conclusion that a new entrant must be a full-scale sugar beet processor, with the requisite investment in a sugar beet processing facility, in order to achieve new entrant status, is inescapable. While such a construction might not be mandated by looking at the new entrant provision standing alone, when the new entrant provision is read along with the allocation provision, it is clear that construing the new entrant provision to allow Cargill's petition would undercut the detailed and balanced allocation system devised by Congress.

Moreover, while the legislative history is sparse, its principal theme, that the allocation process must be one that is "fair and open and

provides some certainty and predictability to the industry," is fully embraced by the CCC decision and would be utterly disregarded if the Cargill/SMBSC interpretation prevailed. The uncertainties imposed upon the system, condoning artifice and encouraging bootstrapping, would be just the opposite of the system carefully crafted by Congress and managed by the CCC. [6]

I do agree with Petitioner and SMBSC that, if Cargill was entitled to new entrant status, the CCC would be required to assign Cargill "a fair and equitable" allocation. However, since neither the CCC nor I find that Cargill qualifies as a new entrant, there is no need to determine what a fair and equitable allocation would be. Thus, although there was significant testimony at the hearing as to the economic impact of granting the requested allocation, the CCC never got to the point of making the regulatory required determination of considering "adverse effects of the allocation upon existing processors and producers." 7 C.F.R. § 1435.308(f)(2). If I had found that Cargill was entitled to new entrant status, I would have remanded this matter to the CCC to make a determination of what a fair and equitable allocation would be.

## Findings and Conclusions

1. Petitioner, a large processor of agricultural commodities into food products, operates a sugar processing facility in Dayton, Ohio.
2. Among many products received for processing at the Dayton facility is beet thick juice, which is a form of sugar.

---

[6] Even if the statute was subject to multiple interpretations, I find the CCC would be entitled to some deference in its interpretation of a statute which Congress charged it with administering. However, as I discussed in the *Southern Minnesota* case, Supra, slip up at 17. CCC would not be entitled to the full deference accorded in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because that holding specifically applies to federal judicial review of final agency actions. Since the Judicial Officer acts for the Secretary on appeals from administrative law judge decisions, perhaps the federal courts will give his decision full *Chevron* deference. I still believe that the CCC is the "agency" "charged" with the administration of the statute, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and that some deference is due the CCC, but because I hold that because the statute itself requires this result, and the legislative history strongly supports this result, I do not rely on deference to sustain the CCC decision.

3. Petitioner does not qualify as a new entrant under the Act because it does not process sugar beets within the meaning of the Act.
4. Intervenor SMBSC is a processor of sugar beets who engaged in a significant and costly renovation of their Renville, Minnesota facility from 1996-2000. This renovation left SMBSC with capacity to process sugar beets in excess of their statutory allocation.
5. Granting of the petition would result in SMBSC being able to grow and process sugar beets which they would not be allowed to grow and process under their own beet sugar allocations, and would constitute a circumvention of the carefully crafted sugar beet allotment program.
6. The preponderance of the evidence does not support a finding that there is a contract between Petitioner and SMBSC under which Cargill purchases sugar beets directly from SMBSC growers, and owns said beets throughout their processing into sugar.
7. In the sugar beet processing industry, a tolling agreement is made between two sugar beet processors where, for a fee, one processor will process the sugar beets of another processor. Since Petitioner is not a sugar beet processor, it cannot bootstrap itself into new entrant status through a tolling agreement with an entity that is a sugar beet processor.
8. Granting of the petition would cause great uncertainty in the sugar beet processing industry, would inevitably result in significant copycatting by other processors who find they have unused capacity, and is counter to the statutory provisions, the legislative history, and the regulations governing this industry.

## Conclusion and Order

The determinations made by the Executive Vice-President of the CCC on July 17, 2003 denying Petitioner's request for beet sugar allocations as a new entrant under the Act are sustained. The Petition for Review is DENIED.

This decision shall become final 25 days after service on the Executive Vice-President of the CCC, unless a party or an intervenor files an appeal petition to the Judicial Officer pursuant to Rule 11.

Copies hereof shall be served upon the parties.

_____

## GENERAL

## MISCELLANEOUS ORDERS

**In re: BOGHOSIAN RAISIN PACKING CO., INC.**
**2004 AMA Docket No. F&V 989-1.**
**Dismissal Order.**
**Filed February 16, 2005.**

Frank Martin, Jr., for Respondent.
Howard Sagaser, for Petitioner.
*Dismissal Order issued by Victor W. Palmer, Administrative Law Judge.*

Petitioner, Boghosian Raisin Packing Co., Inc., is represented by Howard A. Sagaser, Esq. Respondent, Administrator of the Agricultural Marketing Service, U.S. Department of Agriculture, is represented by Frank Martin, Esq.

At the hearing scheduled to start **Wednesday, February 16, 2005,** Counsel for Petitioner informed that Petitioner is withdrawing its Petition for Review.

Accordingly, this case is **DISMISSED** with prejudice.

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

---

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.**
**2005 AMA Docket No. F&V 989-1.**
**Order.**
**Filed March 7, 2005.**

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This matter is before the Administrative Law Judge upon the Motions of the Administrator of the Agricultural Marketing Service filed on February 14, 2005 for a Decision on the Motion to Dismiss and To Strike

the Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That are not in Accordance with Law, or in the alternative, for a thirty day extension of time in which to file a motion to dismiss or answer.

This action was commenced by the filing of a Petition by the Petitioner on November 10, 2004 seeking various relief from certain Raisin Marketing Order provisions. The Administrator sought and received an extension of time until December 29, 2004 in which to file a response to the Petition and on December 29, 2004 filed Motion to Dismiss the Petition.

The Petitioner then sought and obtained an Extension of Time in which to Respond to the Respondent's Motion to Dismiss the Petition By Order dated January 21, 2005, the Petitioner was granted until and through February 9, 2005 in which to respond. On February 8, 2005, the Petitioner filed an Amended Petition seeking essentially the same relief sought before, but remedying certain of the matters raised in the Motion to Dismiss. The case was reassigned to the undersigned by Order dated March 1, 2005.

This case presents an apparent oversight or omission in the Rules of Practice. Rule 1.130 of the Rules of Practice (titled Scope and applicability of this subpart) clearly includes certain proceedings under the Agricultural Marketing Act of 1937, as amended. Section 8c(14), 7 U.S.C. 608c(14). Under the usual provisions of the rules, a party may (pursuant to Rule 1.137), amend a complaint, petition for review, answer or response to petition for review at any time prior to the filing of a motion for a hearing. Unfortunately for the Petitioner in this case, the legal basis for their petition, if any, comes within the ambit of section 608c(15), 7 U.S.C. 608c(15) and the usual rule does not apply, but rather the more obscure provisions found in 7 C.F.R. 900.52 which authorize the filing of an amended petition within twenty days after the entry of a Judge's order dismissing the petition or at any time prior to the close of the hearing pursuant to 7 C.F.R. 900.52b.

If the amended petition is viewed as premature and consideration of the Motion to Dismiss is required prior to allowing the amendment of the petition, the Respondent's Motion is well founded as the original petition is clearly deficient as it lacks certain of the elements required by Section

900.52(b). The Petitioner failed to directly respond to the Motion to Dismiss, but rather sought to correct the deficiencies with the Amended Petition. Such a failure likely would not be fatal in other forums or for that matter in most federal practice; however, strict compliance with procedural requirements has been sought by the Respondent. Given the history of the disputes between the parties, it is easy to predict that such a result may well only delay the ultimate resolution of this case, an argument advanced against allowing the amendment; however, alternative approaches resolving all issues at one time still consistent with the Regulations have not been advanced.

Accordingly, being sufficiently advised, it is **ORDERED** as follows:

1. The Motion to Strike the Amended Petition as being premature is **GRANTED.**

2. The Motion to Dismiss for failure to comply with form and content requirements of the Regulations is **GRANTED.**

3. The Petitioner may, consistent with 7 C.F.R. 900.52(c)(2), file any amended petition within twenty (20) days of service of this Order by the Hearing Clerk's Office.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

---

**In re: MARK MCDOWELL; JIM JOENS; RICHARD SMITH; AND THE CAMPAIGN FOR FAMILY FARMS, INCLUDING IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, LAND STEWARDSHIP PROJECT, MISSOURI RURAL CRISIS CENTER, ILLINOIS STEWARDSHIP ALLIANCE, AND CITIZENS ACTION COALITION OF INDIANA ON BEHALF OF THEIR PORK CHECKOFF-PAYING HOG FARMER MEMBERS.**
**AMA PPRCIA Docket No. 05-0001.**
**Dismissal Without Prejudice.**
**Filed April 12, 2005.**

Susan Stokes, for Petitioner.
Respondent, Frank Martin, Jr.
*Dismissal Without Prejudice issued by Jill S. Clifton, Administrative Law Judge.*

[1]A letter dated March 2, 2005, on Farmers' Legal Action Group, Incorporated (FLAG) letterhead, over the signature of Susan E. Stokes, Legal Director, addressed to the Secretary of Agriculture, has become the "Petition" in this case.

[2]The "Petition" identifies the following as "Petitioners": Iowa hog farmer Mark McDowell, Minnesota hog farmers Jim Joens and Richard Smith, and the Campaign for Family Farms, including Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana on behalf of their pork checkoff-paying hog farmer members.

[3]The "Petition" was filed with the Hearing Clerk, United States Department of Agriculture ("USDA"), on March 14, 2005. The Hearing Clerk docketed the case as AMA PPRCIA (Pork Promotion, Research, and Consumer Information Act) Docket No. 05-0001. The case was assigned to me on April 6, 2005.

[4]A Motion to Dismiss was filed on April 1, 2005, by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture. The applicable Rules of Practice are found at 7 C.F.R. Part 1200, specifically 7 C.F.R. § 1200.52. For the reasons stated in the Motion to Dismiss, I find that the "Petition" should be and hereby is **dismissed, without prejudice**.

[5]Copies of this Dismissal shall be served by the Hearing Clerk upon "Petitioners" at the only address provided, that is, the address of Farmers' Legal Action Group, Incorporated (FLAG), attention: Susan E. Stokes, Legal Director; and upon the Administrator of the Agricultural Marketing Service; **together with a copy of Respondent's Motion to Dismiss filed April 1, 2005**. The Hearing Clerk shall notify "Petitioners" that any request for reconsideration of this Dismissal and any papers submitted in opposition to the Motion to Dismiss shall be filed with the Hearing Clerk within twenty (20) days of service.

———

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.**
**2005 AMA Docket No. F&V 989-2.**
**Order Dismissing Petition With Prejudice.**
**Filed May 3, 2005.**

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
*Order Dismissing Petition With Prejudice issued by Victor W. Palmer, Administrative Law Judge.*

Lion Raisins, Inc. ("Lion") instituted this proceeding by filing a petition on March 1, 2005, pursuant to § 608c (15)(A) of the Agricultural Marketing Agreement Act, as amended (7 U.S.C. §§ 601-627; § 608c (15)(A); the "AMAA"). The petition purportedly challenges obligations imposed upon Lion under the marketing order issued pursuant to the AMAA, that regulates the handling of "Raisins Produced From Grapes Grown in California" (7 C.F.R. Part 989; "Raisin Order" or "Order").

On March 11, 2005, Respondent, the Administrator of the Agricultural Marketing Service, filed a Motion to Dismiss Petition. On April 4, 2005, Petitioner filed an Opposition to Respondent's Motion fo Dismiss. This proceeding was thereupon assigned to me.

Upon consideration of the Petition and the arguments of the parties as set forth in the Motion to Dismiss and the Opposition thereto, I have decided that the Petition should be dismissed with prejudice.

Lion seeks to add language to an implementing regulation (7 C.F.R. § 989.159(d), issued pursuant to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d), to require the Processed Products Standardization and Inspection Branch of USDA ("Inspection Service") to transmit original inspection certificates to Lion's customers upon request. Lion also seeks a ruling allowing it to issue certificates of analysis to its customers that contain test results from multiple sources, including the Inspection Service, which the Inspection Service may not then construe to be improperly created facsimiles of USDA certificates.

Lion premises its requests upon that fact that, since 1990, it has been preparing certificates of analysis for its raisin customers that contain various test results from Lion, USDA, and/or indpendent testing laboratories. Lion does this to satisfy customer requests and because it believes information on the USDA certificates prepared by the Inspection Service is inaccurate.

This practice has led to charges by the Inspection Service accusing Lion of altering or forging USDA certificates and issuing "facsimile" certificates misrepresenting USDA test results to its customers.

As Respondent points out, 7 C.F.R.. § 989.59(d), the provision Lion specifies as supporting its right to file a petition under the AMAA, says nothing about a handler obtaining original certificates of inspection or how the inspection agency may choose to transmit them. 7 C.F.R. § 989.59(d) states:

> (d) Inspection and certification. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause an inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the Untied States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

The full extent of Lion's obligation under the Raisin Order is to have the raisins it handles inspected by the Inspection Service and send the Raisin Order's administrative committee, copies of the certificates obtained frm the Inspection Service. Apparently, Lion also uses the inspection certificates as a marketing tool. It is this additional use for the certificates as well as its preparation and use of other certificates of analysis that have caused it to be in conflict with the Inspection Service.

The regulation that the Inspection Service has applied to charge Lion with fraud or misrepresentation in its use of inspection certificates and

"facsimiles" (7 C.F.R. § 52.54(a)(1)(2005)), was promulgated pursuant to section 203 (h) of the Agricultural Marketing Act of 1946 (7 U.S.C. § 1622 (h); "the 46 Act"). Modifications and exemptions from that regulation cannot be sought or obtained in a proceeding brought pursuant to § 608(c)(15)(A) of the AMAA. Likewise, the refusal of the Inspection Service to send original certificates of inspection directly to Lion's customers, is not based upon powers conferred upon the Inspection Service by the AMAA, but by the 46 Act. The two statutes are different, and the provisions of the AMAA for challenging marketing orders and obligations under marketing orders do not extend to other USDA regulatory programs.

We recently stated that a proceeding under § 8(c)(5)(A) of the AMAA may not be used as forum to debate questions of policy, desirability, or effectiveness of a marketing order's provisions. *In re: Lion Raisin*, *et al.*, 63 *Agric. Dec.* 1, WL2619833 (2004). So too, a section 8(c)(15)(A) AMAA proceeding cannot be used to challenge the policy, desirability, or effectiveness or regulations and practices that are based upon a completely different statute.

Accordingly, the Petition is Dismissed with Prejudice.

---

**In re: DAVID McCAULEY.**
**AWA Docket No. 02-0010.**
**Order Denying Late Appeal.**
**Filed July 12, 2004.***

**AWA – Late appeal.**

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Marc R. Hillson's decision became final.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Administrative Law Judge.
*Order issued by William G. Jenson, Judicial Officer*.

---

*This case was inadvertently left out of *63 Agric. Dec. Jul-Dec*. (2004). Editor.

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 4, 2002. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that David McCauley [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II). On March 15, 2002, Respondent filed an answer denying the material allegations of the Complaint.

On October 9, 2002, Complainant filed a "Motion for Hearing," and on December 3, 2002, former Chief Administrative Law Judge James W. Hunt[1] [hereinafter the former Chief ALJ] conducted a telephone conference with Complainant's counsel and Respondent during which the former Chief ALJ scheduled a hearing to begin on July 16, 2003, in San Antonio, Texas.[2] On July 10, 2003, the former Chief ALJ postponed the hearing scheduled to begin on July 16, 2003.[3] On July 18, 2003, the former Chief ALJ

---

[1]Chief Administrative Law Judge James W. Hunt retired from federal service effective August 1, 2003.

[2]"Summary of Telephone Conference--Scheduling of Hearing."

[3]"Order Postponing Hearing."

reassigned the proceeding to Administrative Law Judge Marc R. Hillson [hereinafter the ALJ].[4]

On July 28, 2003, the ALJ conducted a telephone conference with Complainant's counsel and Respondent in which the ALJ scheduled the hearing to begin on October 22, 2003, in San Antonio, Texas.[5] On August 26, 2003, with the agreement of Complainant and Respondent, the ALJ changed the commencement of the hearing from October 22, 2003, to October 23, 2003.[6] On October 2, 2003, the ALJ issued a notice setting the specific time for the commencement of the October 23, 2003, hearing and the specific location of the October 23, 2003, hearing.[7]

Respondent failed to appear at the hearing. Section 1.141(e)(1) of the Rules of Practice (7 C.F.R. § 1.141(e)(1)) provides, if a respondent fails to appear at the hearing, the complainant may follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) or present evidence before the administrative law judge, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (e) *Failure to appear*. (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be

---

[4]"Order."

[5]"Summary of Telephone Conference-Rescheduling of Hearing."

[6]"Rescheduling of Hearing."

[7]"Notice of Hearing."

> a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1).

Complainant chose to proceed by presenting oral testimony before the ALJ, and on October 23, 2003, the ALJ conducted a hearing in San Antonio, Texas. Robert A. Ertman, Office of the General Counsel, Washington, DC, represented Complainant. Complainant presented the testimony of two witnesses and submitted 43 exhibits, which the ALJ received into evidence.[8]

On December 12, 2003, Complainant filed a "Proposed Decision and Order Upon Admission of Facts By Reason of Default and Motion for Adoption." On January 30, 2004, the ALJ filed a "Decision": (1) concluding that Respondent operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of the Animal Welfare Act and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations; (3) assessing Respondent a $10,000 civil penalty; and (4) revoking Respondent's class B Animal Welfare Act license (Decision at 5-6).

On February 11, 2004, the Hearing Clerk served Respondent with the ALJ's Decision.[9] On May 13, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Memorandum in Response to Late Appeal." On June 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

## CONCLUSION BY THE JUDICIAL OFFICER

---

[8]Transcript and Complainant's Exhibits.

[9]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4078.

The record establishes that the Hearing Clerk served Respondent with the ALJ's Decision on February 11, 2004.[10] Section 1.145(a) of the Rules of Practice provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than March 12, 2004. Respondent did not file his appeal petition with the Hearing Clerk until May 13, 2004.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[11] The ALJ's Decision became

---

[10]See note 9.

[11]*In re Belinda Atherton*, 62 *Agric. Dec.* 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order became final); *In re Samuel K. Angel*, 61 *Agric. Dec.* 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, 60 *Agric. Dec.* 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Harold P. Kafka*, 58 *Agric. Dec.* 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 *Agric. Dec.* 340 (1999) (dismissing

(continued...)

[11](...continued)
Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 *Agric. Dec.* 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 *Agric. Dec.* 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 *Agric. Dec.* 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 *Agric. Dec.* 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 *Agric. Dec.* 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 *Agric. Dec.* 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 *Agric. Dec.* 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became final and effective); *In re Amril L. Carrington*, 52 *Agric. Dec.* 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 *Agric. Dec.* 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 *Agric. Dec.* 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 *Agric. Dec.* 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 *Agric. Dec.* 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 *Agric. Dec.* 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 *Agric. Dec.* 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 *Agric. Dec.* 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 *Agric. Dec.* 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 *Agric. Dec.* 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co.*, 43 *Agric. Dec.* 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986)
(continued...)

final on March 17, 2004.[12] Respondent filed an appeal petition with the Hearing Clerk on May 13, 2004, 1 month 26 days after the ALJ's Decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

**Rule 4. Appeal as of Right—When Taken**

**(a) Appeal in a Civil Case.**

(1) **Time for Filing a Notice of Appeal.**

---

[11](...continued)
(unpublished); *In re Dock Case Brokerage Co.*, 42 *Agric. Dec.* 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 *Agric. Dec.* 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 *Agric. Dec.* 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 *Agric. Dec.* 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 *Agric. Dec.* 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's decision and order became final and effective), *reconsideration denied*, 41 *Agric. Dec.* 2147 (1982); *In re Mel's Produce, Inc.*, 40 *Agric. Dec.* 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 *Agric. Dec.* 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 *Agric. Dec.* 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

[12]7 C.F.R. § 1.142(c)(4); Decision at 6.

> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[13]

---

[13] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[14] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's Decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[15]

---

[14]Fed. R. App. P. 4(a)(5).

[15]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the

(continued...)

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

For the foregoing reasons, the following Order should be issued.

## ORDER

Respondent's appeal petition, filed May 13, 2004, is denied. Administrative Law Judge Marc R. Hillson's Decision, filed January 30, 2004, is the final decision in this proceeding.

---

**In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.**
**AWA Docket No. 03-0023.**
**Ruling Denying Complainant's Motion for Shortened Time for John F. Cuneo, Jr., and The Hawthorn Corporation to File a Response to Complainant's Appeal Petition.**
**Filed August 31, 2004.**[*]

**AWA – Animal Welfare Act – Appeal petition – Motion for shortened time to respond.**

---

[15](...continued)
Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

[*]This case was inadvertently left out of 63 *Agric. Dec.* Jul-Dec. (2004). Editor.

Bernadette R. Juarez and Colleen A. Carroll, for Complainant.
Vincent J. Colatriano, Derek L. Shaffer, and Michael Weitzner, Washington, DC, for Respondents.
*Ruling issued by William G. Jenson, Judicial Officer.*

On August 26, 2004, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Appeal Petition" and "Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition." On August 27, 2004, John F. Cuneo, Jr., and The Hawthorn Corporation [hereinafter Respondents] filed "Hawthorn Respondents' Opposition to Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition."

Section 1.145(b) of the rules of practice applicable to this proceeding* provides that a party may respond to an appeal petition within 20 days after the Hearing Clerk serves the party with the appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
>
> (b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

7 C.F.R. § 1.145(b).

Complainant requests that I shorten Respondents' time for filing a response to Complainant's Appeal Petition from 20 days after the Hearing Clerk serves Respondents with Complainant's Appeal Petition to 3 days after the Hearing Clerk serves Respondents with Complainant's Appeal

---

*The rules of practice applicable to this proceeding are the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" (7 C.F.R. §§ 1.130-.151).

Petition (Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition at 7). I carefully reviewed Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition, and I do not find good reason to shorten Respondents' time for filing a response to Complainant's Appeal Petition.

For the foregoing reasons, the following Ruling should be issued.

## RULING

Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition, filed August 26, 2004, is denied.

---

**In re: DAVID McCAULEY.**
**AWA Docket No. 02-0010.**
**Order Denying Petition for Reconsideration.**
**Filed September 2, 2004.***

**AWA – Animal Welfare Act – Late-filed petition for reconsideration.**

The Judicial Officer denied Respondent's petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal, as required by 7 C.F.R. § 1.146(a)(3).

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Administrative Law Judge.
*Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 4, 2002. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal

---

*This case was inadvertently left out of 63 *Agric. Dec.* Jul-Dec. (2004). Editor.

Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges David McCauley [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II). On March 15, 2002, Respondent filed an answer denying the material allegations of the Complaint.

Administrative Law Judge Marc R. Hillson [hereinafter the ALJ] scheduled a hearing to commence in San Antonio, Texas, on October 23, 2003. Respondent failed to appear at the hearing. Section 1.141(e)(1) of the Rules of Practice (7 C.F.R. § 1.141(e)(1)) provides, if a respondent fails to appear at the hearing, the complainant may follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) or present evidence, in whole or in part, in the form of affidavits or by oral testimony before the administrative law judge. Complainant chose to proceed by presenting oral testimony before the ALJ, and on October 23, 2003, the ALJ conducted a hearing in San Antonio, Texas.

Following the hearing, Complainant filed a "Proposed Decision and Order Upon Admission of Facts By Reason of Default and Motion for Adoption." On January 30, 2004, the ALJ filed a "Decision," which the Hearing Clerk served on Respondent, on February 11, 2004.[1] On May 13, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Memorandum in Response to Late Appeal," and on July 12, 2004, I issued an Order Denying Late Appeal in which I denied Respondent's late-filed appeal petition and stated the ALJ's Decision, filed January 30, 2004, is the final decision in this proceeding. *In re David McCauley*, 64 *Agric. Dec.* 639 (2004) (Order Denying Late Appeal).

---

[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4078.

On July 15, 2004, the Hearing Clerk served Respondent with the Order Denying Late Appeal.[2] On August 17, 2004, Respondent filed a petition for reconsideration.[3] On August 31, 2004, Complainant filed "Memorandum in Response to Late Petition for Reconsideration." On September 1, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the July 12, 2004, Order Denying Late Appeal.

## CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon

---

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0762.

[3]Respondent entitles his August 17, 2004, filing "Appeal." However, Respondent previously filed an appeal petition on May 13, 2004. The Rules of Practice do not provide that a party may file multiple appeal petitions, and Respondent did not request the opportunity to supplement his May 13, 2004, appeal petition. Moreover, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that, within 30 days after receiving service of the administrative law judge's written decision, a party who disagrees with that decision may appeal to the Judicial Officer by filing an appeal petition with the Hearing Clerk. Thus, Respondent's August 17, 2004, filing is not a timely-filed appeal petition. Based on Respondent's having previously filed an appeal petition and the contents of Respondent's August 17, 2004, filing, I infer the August 17, 2004, filing is Respondent's petition for reconsideration.

> the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent filed his petition for reconsideration 1 month 2 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal. Accordingly, Respondent's petition for reconsideration is late and must be denied.[4]

---

[4]*See In re Heartland Kennels, Inc.*, 61 *Agric. Dec.* 562 (2002) (Order Denying Second Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch*, 61 *Agric. Dec.* 593 (2002) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 15 days after the date the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp*., 61 *Agric. Dec.* 409 (2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand); *In re Jerry Goetz*, 61 *Agric. Dec.* 282 (2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 *Agric. Dec.* 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 *Agric. Dec.* 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 *Agric. Dec.* 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 *Agric. Dec.* 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 *Agric. Dec.* 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 *Agric. Dec.* 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 *Agric. Dec.* 1280 (1998)

(continued...)

For the foregoing reasons, the following Order should be issued.

**ORDER**

Respondent's petition for reconsideration, filed August 17, 2004, is denied.

---

**In re: DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.**
**AWA Docket No. 05-0003.**
**Order Vacating Decision and Order.**

---

[4](...continued)
(Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 *Agric. Dec.* 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 *Agric. Dec.* 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 *Agric. Dec.* 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 *Agric. Dec.* 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 *Agric. Dec.* 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 *Agric. Dec.* 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 *Agric. Dec.* 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 *Agric. Dec.* 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

**Filed April 8, 2005.**

**AWA – Animal Welfare Act – Order vacating default decision.**

Colleen A. Carroll and Frank Martin, Jr., for Complainant.
Richard D. Rogovin, Columbus, Ohio, for Respondents.
*Order issued by William G. Jenson, Judicial Officer*.

On March 29, 2005, I issued a Decision and Order finding Diana R. McCourt and Siberian Tiger Conservation Association [hereinafter Respondents] in default as a result of their failure to file a timely answer.[1] On April 7, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a motion to vacate the March 29, 2005, Decision and Order. On April 7, 2005, Respondents' counsel informed me Respondents decline the opportunity to file a written response to Complainant's motion to vacate, but fully support Complainant's motion. Based on the agreement of the parties and my finding that vacating the March 29, 2005, Decision and Order would not harm the public interest, the following Order should be issued.

## ORDER

The Judicial Officer's Decision and Order, filed March 29, 2005, is vacated and this proceeding is remanded to Chief Administrative Law Judge Marc R. Hillson for further proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

---

**In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.**
**AWA Docket No. 04-0017.**

---

[1] *In re Diana R. McCourt*, 64 *Agric. Dec.* 223 (2005).

**Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson.**
**Filed April 13, 2005.**

**AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Sanction – Cease and desist order – Civil penalty.**

The Judicial Officer rejected Respondents' request for a reduction of the $17,050 civil penalty assessed against each Respondent for 31 willful violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer rejected Respondents' contention that their violations were not willful stating, based on Respondents' failure to file a timely answer to the Complaint, Respondents were deemed to have admitted their violations were willful as alleged in the Complaint. The Judicial Officer found Respondents' reason for filing a late answer and the tax-exempt status and non-profit status of Respondents' business irrelevant to Respondents' request that the Judicial Officer reduce the civil penalty. The Judicial Officer rejected Respondents' contention that they did not operate a large business. The Judicial Officer also found Respondents' 31 willful violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act belied Respondents' assertion that they "tried to do the right thing as far as [their] animals were concerned." Finally, the Judicial Officer rejected Respondents' contention that their cessation of all activities regulated under the Animal Welfare Act was a basis for reducing the civil penalty. The Judicial Officer pointed out that the civil penalty assessed against Respondents was 20 percent of the maximum that could have been assessed and that the civil penalty was not only appropriate and necessary to deter Respondents from future violations of the Animal Welfare Act, but also appropriate and necessary to deter others from future violations of the Animal Welfare Act.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
*Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by

the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Ricky M. Watson, Cheri Watson, Tiger's Eyes, Inc., and Richard J. Burns willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 6-12).

The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and a service letter on May 26, 2004.[1] Respondents Ricky M. Watson and Cheri Watson were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents Ricky M. Watson and Cheri Watson filed an answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served them with the Complaint.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Ricky M. Watson and Cheri Watson By Reason of Admission of Facts" [hereinafter Proposed Default Decision as to Ricky M. Watson and Cheri Watson]. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[2] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant's Motion for Default Decision.

On November 17, 2004, during a teleconference with Respondents Ricky M. Watson and Cheri Watson, representatives of Tiger's Eyes, Inc., counsel for Respondent Richard J. Burns, and counsel for Complainant,

---

[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 8488 and Article Number 7001 0360 0000 0304 8471.

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4318 and Article Number 7003 2260 0005 5721 4325.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision.[3]

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[4] On January 5, 2005, Respondent Ricky M. Watson filed a response in opposition to Complainant's Appeal Petition. On January 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On February 23, 2005, I issued a Decision and Order as to Ricky M. Watson and Cheri Watson reversing the ALJ's denial of Complainant's Motion for Default Decision and concluding Respondents Ricky M. Watson and Cheri Watson willfully violated the Animal Welfare Act and the Regulations and Standards.[5]

On March 18, 2005, Respondents Ricky M. Watson and Cheri Watson filed a petition to reconsider *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). On April 7, 2005, Complainant filed "Complainant's Reply to Respondents' Petition for Reconsideration." On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider.

## CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents Ricky M. Watson and Cheri Watson request that I reduce the $17,050 civil penalty assessed against each of them in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 198 (2005). Respondents Ricky M. Watson and Cheri Watson state six bases for their request that I reduce the civil penalty. First, Respondents Ricky M. Watson and Cheri Watson contend they were not "willfully neglectful" as alleged in the Complaint (Pet. to Reconsider at 1).

---

[3]Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1, filed by the ALJ on November 22, 2004.

[4]Complainant's Appeal Petition.

[5]*In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005).

As an initial matter, I cannot locate, and Respondents Ricky M. Watson and Cheri Watson do not cite, any allegation in the Complaint that Respondents Ricky M. Watson and Cheri Watson were "willfully neglectful"; however, Complainant alleges Respondents Ricky M. Watson and Cheri Watson "willfully violated" the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 8-14).

Respondents Ricky M. Watson and Cheri Watson are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint that they willfully violated the Animal Welfare Act and the Regulations and Standards because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint.[6] Therefore, I find no basis upon which to conclude Respondents Ricky M. Watson's and Cheri Watson's violations of the Animal Welfare Act and the Regulations and Standards were not willful.

Second, Respondents Ricky M. Watson and Cheri Watson contend the reason for their late-filed answer was their effort to rationally explain the allegations of the Complaint (Pet. to Reconsider at 1).

Often, as Respondents Ricky M. Watson and Cheri Watson suggest, preparation of an answer that explains each allegation of a complaint is more difficult and time consuming than preparation of an answer that merely admits or denies each allegation of the complaint. However, I do not find Respondents Ricky M. Watson's and Cheri Watson's reason for failing to file a timely answer relevant to their request that I reduce the $17,050 civil penalty assessed against each of them in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 198 (2005).

Third, Respondents Ricky M. Watson and Cheri Watson contend, while they often maintained more than 200 animals, they did not operate a large business because the vast majority of their animals were free-roaming on more than 200 acres of grassland and required less care and attention than animals that were caged. Consequently, Respondents Ricky M. Watson and Cheri Watson state they "never needed more than 2 paid workers." Moreover, Respondents Ricky M. Watson and Cheri Watson state their

---

[6]7 C.F.R. § 1.136(a), (c).

income from customers was approximately $1,000 per month. (Pet. to Reconsider at 1.)

One of the factors that I must consider when determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards is the size of the violator's business.[7] I based my finding that Respondents Ricky M. Watson and Cheri Watson operated a large business on the number of animals Respondents Ricky M. Watson and Cheri Watson are deemed to have admitted that they maintained at their facility. Respondents Ricky M. Watson and Cheri Watson confirm this number in their petition to reconsider *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005) (Pet. to Reconsider at 1). Moreover, while the number of Respondents Ricky M. Watson's and Cheri Watson's paid employees and the income from customers would indicate Respondents Ricky M. Watson's and Cheri Watson's business was not large, the 200 or more acres on which Respondents Ricky M. Watson and Cheri Watson assert they operated the business supports my conclusion that Respondents Ricky M. Watson and Cheri Watson operated a large business. Therefore, I decline to reconsider my conclusion that Respondents Ricky M. Watson and Cheri Watson operated a large business.

Fourth, Respondents Ricky M. Watson and Cheri Watson assert they operated a tax-exempt, non-profit sanctuary and all new, tax-exempt, non-profit sanctuaries go through "growing pains." Moreover, Respondents Ricky M. Watson and Cheri Watson assert their "record is better than most new sanctuaries." (Pet. to Reconsider at 1-2.)

Neither the tax-exempt status nor the non-profit status of Respondents Ricky M. Watson's and Cheri Watson's sanctuary is relevant to the civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson. Moreover, the failure of other new sanctuaries to comply with the Animal Welfare Act and the Regulations and Standards is not relevant to the civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson for their violations of the Animal Welfare Act and the Regulations and Standards.

---

[7] 7 U.S.C. § 2149(b).

Fifth, Respondents Ricky M. Watson and Cheri Watson assert they "continuously tried to do the right thing as far as [the] animals were concerned" (Pet. to Reconsider at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's assertion regarding the treatment of their animals is belied by the 31 willful violations of the Animal Welfare Act and the Regulations and Standards each are deemed to have committed. Moreover, as stated in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 195 (2005), many of Respondents Ricky M. Watson's and Cheri Watson's violations are serious violations which directly jeopardized the health and well-being of Respondents Ricky M. Watson's and Cheri Watson's animals.

Sixth, Respondents Ricky M. Watson and Cheri Watson contend they: (1) ceased operations, (2) allowed their Animal Welfare Act license to lapse, and (3) do not intend to apply for another Animal Welfare Act license (Pet. to Reconsider at 2).

Respondents Ricky M. Watson's and Cheri Watson's cessation of all activities regulated under the Animal Welfare Act and intention to refrain from activities regulated under the Animal Welfare Act are not bases for reducing the $17,050 civil penalty assessed against each of them. Respondents Ricky M. Watson and Cheri Watson each committed 31 willful violations of the Animal Welfare Act and the Regulations and Standards. Respondents Ricky M. Watson and Cheri Watson could each be assessed a maximum civil penalty of $85,250 for their violations of the Animal Welfare Act and the Regulations and Standards.[8] The civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson is only 20 percent of the maximum civil penalty which I conclude could be assessed against each of them. Moreover, the civil penalty which I assess against Respondents Ricky M. Watson and Cheri Watson are not only

---

[8]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

appropriate and necessary to deter Respondent Ricky M. Watson and Respondent Cheri Watson from future violations of the Animal Welfare Act and the Regulations and Standards, but also appropriate and necessary to deter others from violating the Animal Welfare Act and the Regulations and Standards. Therefore, even if I were to find that Respondents Ricky M. Watson and Cheri Watson would never again engage in activities regulated under the Animal Welfare Act, I would assess each of them a $17,050 civil penalty.

For the foregoing reasons and the reasons set forth in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005), Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider was timely filed and automatically stayed *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). Therefore, since Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson.

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Respondents Ricky M. Watson and Cheri Watson, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents Ricky M. Watson and Cheri Watson.

2. Respondents Ricky M. Watson and Cheri Watson are each assessed a $17,050 civil penalty. The civil penalties shall be paid by certified checks

or money orders made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents Ricky M. Watson and Cheri Watson. Respondents Ricky M. Watson and Cheri Watson shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 04-0017.

## RIGHT TO JUDICIAL REVIEW

Respondents Ricky M. Watson and Cheri Watson have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents Ricky M. Watson and Cheri Watson must seek judicial review within 60 days after entry of this Order.[9] The date of entry of this Order is April 13, 2005.

---

**In re: DELTA AIR LINES, INC.**
**AWA Docket No. 00-0033.**
**Order Dismissing Case.**
**Filed May 26, 2005.**

Colleen A. Carroll, for Complainant.

---

[9]See 7 U.S.C. § 2149(c).

Respondent, Pro se.
*Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

Complainant's Notice of Withdrawal of Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on May 26, 2000, be withdrawn.

Accordingly, this case is **DISMISSED.**

---

**In re: JAMES B. GARRETSON d/b/a JUNGLE PARADISE ZOO.**
**AWA Docket No. D-05-0001.**
**Order Dismissing Case.**
**Filed June 1, 2005.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
*Order Dismissing Case issued by Jill S. Clifton, Administrative Law Judge.*

During a teleconference on June 1, 2005, Applicant/Petitioner Mr. James B. Garretson, doing business as Jungle Paradise Zoo, representing himself, orally withdrew his request for hearing. Counsel for Respondent Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS), Colleen A. Carroll, Esq., indicated that APHIS had no objection.

Accordingly, this case is **DISMISSED.**

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

---

**In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.**
**AWA Docket No. 04-0017.**
**Order Granting Motion to Withdraw Appeal Petition and Vacate Decision.**
**Filed June 3, 2005.**

**AWA – Animal Welfare Act – Withdrawal of appeal petition – Order vacating decision.**

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
*Order issued by William G. Jenson, Judicial Officer*.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 19, 2004. Ricky M. Watson and Cheri Watson failed to file timely answers to the Complaint, and on September 3, 2004, Complainant filed a motion for a default decision, which Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied.

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's motion for a default decision, and on February 23, 2005, I issued a Decision and Order as to Ricky M. Watson and Cheri Watson reversing the ALJ's denial of Complainant's motion for a default decision.[1]

On June 1, 2005, Complainant filed a motion to withdraw his appeal petition and vacate the February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson. On June 2, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's motion.

A party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right. In considering whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.[2] Based on the record

---

[1]*In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). *See also In re Ricky M. Watson* (Order Denying Pet. to Reconsider as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 655 (2005).

[2]*See Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the particular circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to

(continued...)

before me, I find no basis for denying Complainant's motion to withdraw his appeal petition and vacate the February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson.

For the foregoing reasons, the following Order should be issued.

## ORDER

Complainant's June 1, 2005, motion to withdraw his appeal petition is granted. The Judicial Officer's February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson and the Judicial Officer's April 13, 2005, Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson are vacated. This proceeding is remanded to the ALJ for further proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

———————

[2](...continued)
dismiss appeal); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) (stating an appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have discretionary authority not to dismiss the case in appropriate circumstances); *United States v. State of Washington, Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978) (stating the court has discretionary authority to decline to grant the appellants' motion to dismiss their own appeal); *In re Hartford Packing Co.*, 60 *Agric. Dec.* 851, 853 (2001) (Order Granting Motion to Withdraw Appeal) (stating a party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right); *In re Vermont Meat Packers, Inc.*, 48 *Agric. Dec.* 158 (1989) (Order Permitting Withdrawal of Appeal) (stating withdrawal of appeal is not a matter of right); *In re Smith Waller*, 34 *Agric. Dec.* 373, 374 (1975) (Order Granting Motion to Withdraw Appeal) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest); *In re Henry S. Shatkin*, 34 *Agric. Dec.* 296, 297 (1975) (Order Granting Motion to Withdraw Appeal) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

**In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.**
**AWA Docket No. 04-0033.**
**Remand Order as to Susan F. Korn.**
**Filed June 22, 2005.**

**AWA – Animal Welfare Act – Opportunity to file objections – Remand order.**

The Judicial Officer concluded that Administrative Law Judge Peter M. Davenport (ALJ) failed to provide Susan F. Korn 20 days within which to file objections to Complainant's motion for a default decision as required by the applicable rules of practice (7 C.F.R. § 1.139). Consequently, the Judicial Officer vacated the ALJ's February 25, 2005, Initial Decision, as it relates to Susan F. Korn, and remanded the proceeding, as it relates to Susan F. Korn, to the ALJ to provide Susan F. Korn an opportunity to file objections to Complainant's motion for default decision.

Colleen A. Carroll, for Complainant.
Respondent Susan F. Korn, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
*Remand Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 8, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that during the period March 2001 through August 2003, For The Birds, Inc., Jerry L. Korn, Susan F. Korn, and Ben Korn willfully violated the Regulations and Standards (Compl. ¶¶ 8-52). For The Birds, Inc., Jerry L. Korn, and Susan F. Korn failed to file answers to the

Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed: (1) a Motion for Adoption of Decision and Order as to Respondent Jerry L. Korn [hereinafter Motion for Default Decision as to Jerry L. Korn] and a proposed Decision and Order as to Respondent Jerry L. Korn [hereinafter Proposed Default Decision as to Jerry L. Korn]; (2) a Motion for Adoption of Decision and Order as to Respondent Susan F. Korn [hereinafter Motion for Default Decision as to Susan F. Korn] and a proposed Decision and Order as to Respondent Susan F. Korn [hereinafter Proposed Default Decision as to Susan F. Korn]; and (3) a Motion for Adoption of Decision and Order as to For The Birds, Inc. [hereinafter Motion for Default Decision as to For The Birds, Inc.], and a proposed Decision and Order as to Respondent For The Birds, Inc. [hereinafter Proposed Default Decision as to For The Birds, Inc.].

On January 27, 2005, the Hearing Clerk served: (1) Jerry L. Korn with Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, and a service letter; and (2) For The Birds, Inc., with Complainant's Motion for Default Decision as to For The Birds, Inc., Complainant's Proposed Default Decision as to For The Birds, Inc., and a service letter.[1] On February 16, 2005, Jerry L. Korn and For The Birds, Inc., filed objections to Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, Complainant's Motion for Default Decision as to For The Birds, Inc., and Complainant's Proposed Default Decision as to For The Birds, Inc.[2] On February 25, 2005, the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn,

---

[1]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3786 and Article Number 7003 2260 0005 5721 3779.

[2]Objection to Motion for Adoption of Decision and Order as to Respondents Jerry L. Korn, For the Birds, Inc., and Ben Korn; and Request for Telephonic Hearing.

Complainant's Proposed Default Decision as to Susan F. Korn, and a service letter.[3]

On February 25, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding For The Birds, Inc., Jerry L. Korn, and Susan F. Korn willfully violated the Regulations and Standards; (2) directing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn, jointly and severally, a $28,050 civil penalty (Initial Decision at 21-30).

On March 11, 2005, Complainant filed Complainant's Appeal Petition. For The Birds, Inc., and Jerry L. Korn failed to file responses to Complainant's Appeal Petition. On May 26, 2005, Susan F. Korn filed a late-filed response to Complainant's Appeal Petition. On May 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to For The Birds, Inc., Jerry L. Korn, and Susan F. Korn. Simultaneous with my filing this Remand Order as to Susan F. Korn, I file a Decision and Order as to For The Birds, Inc., and Jerry L. Korn.

## CONCLUSION BY THE JUDICIAL OFFICER

Section 1.139 of the Rules of Practice provides that a respondent may file objections to a complainant's motion for a default decision within 20 days after service of the motion, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon the

[3]Memorandum to File from Tonya Fisher dated February 25, 2005.

> respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto.

7 C.F.R. § 1.139.

The record establishes that the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn on February 25, 2005,[4] the same day the ALJ issued the Initial Decision. As the ALJ did not provide Susan F. Korn with 20 days within which to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn, the proceeding as it relates to Susan F. Korn should be remanded to the ALJ to provide Susan F. Korn an opportunity to file objections in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

For the foregoing reasons, the following Order should be issued.

## ORDER

1. Administrative Law Judge Peter M. Davenport's February 25, 2005, Initial Decision as it relates to Susan F. Korn is vacated.

2. The proceeding, as it relates to Susan F. Korn, is remanded to Administrative Law Judge Peter M. Davenport:

(a) to provide Susan F. Korn an opportunity to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139); and

(b) for further proceedings as to Susan F. Korn in accordance with the Rules of Practice.

---

**In re: CITETEC.**
**CRPA Docket No. 04-0001.**

---

[4]See note 3.

**Order Dismissing Case.**
**Filed June 6, 2005.**

Babak Rastgoufard, for Respondent.
Alan Charles Raul, for Petitioner.
*Order Dismissing Case issued by Victor W. Palmer, Administrative Law Judge.*

Petitioner's request, pursuant to 7 C.F.R. §§ 1200.52(d) and 900.53, to withdraw its Petition, filed June 3, 2005 is **GRANTED**.

Accordingly, this case is **DISMISSED.**

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

---

**In re: ALLEN SPRENGER.**
**FCIA Docket No. 05-0004.**
**Order.**
**Filed March 3, 2005.**

Donald A. Brittenham, Jr., for Complainant
David M. Cran, for Respondent.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This matter is before the Administrative Law Judge upon the Complainant's Request for Dismissal as a Result of Settlement.

Being sufficiently advised, it is **ORDERED** that this action be **DISMISSED** as settled and the same is **STRICKEN** from the Docket.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

---

**In re: PLATINUM FOODS OF FLORIDA, INC., AND JOSEPH CANOSSA, SR.**
**FMIA Docket No. 04-0001.**
**PPIA Docket No. 04-0001.**
**Order To Terminate Stipulation and Consent Order.**
**Filed June 1, 2005.**

Thomas Bolick, for Complainant.
Eric N. Olsen, for Respondent.
*Order issued by Marc R. Hillson, Administrative Law Judge.*

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601 *et seq.*) ("FMIA"), the Poultry Product Inspection Act, as amended (21 U.S.C. §§ 451 *et seq.)* ("PPIA"), and the applicable Rules of Practice (7 C.F.R. §§ 1.130 *et seq.* and 9 C.F.R. §§ 500 *et seq.*) to withdraw Federal Inspection services from respondent Platinum Foods of Florida, Inc. This proceeding was commenced by a complaint filed on October 29, 2003, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), which is responsible for the administration of Federal meat inspection and poultry product inspection services. On January 16, 2004, the parties agreed that this proceeding should be terminated by entry of the Stipulation and Consent Order which was filed and effective on that same date. Upon consideration of the joint motion filed by respondent Platinum Foods of Florida, Inc. ("Platinum Foods"), and Complainant to terminate the agreed Stipulation and Consent Order with respect to respondent Platinum Foods, it is hereby

ORDERED that, except for the terms and provisions set forth below, all the terms and provisions affecting respondent Platinum Foods that were set forth in the Stipulation and Consent Order in this matter shall be terminated on the date this Order is signed by the Administrative Law Judge.

1. Respondent Platinum Foods admits all the jurisdictional allegations of the Complaint filed in this matter on October 29, 2003, and waives:

(a) Any further procedural steps:

(b) Any requirement that the final decision and order in this proceeding contain any findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this order and this proceeding.

2. Respondent Platinum Foods waives any action against the USDA under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. §§ 504 *et seq.*) for fees and other expenses incurred by respondents in connection with this proceeding.

3. Respondent Platinum Foods and its owners, officers, directors, partners, successors, assigns, and affiliates waive, in addition to the action waived in paragraph 2 above, any other action against USDA or its employees in connection with any actions taken by them in reference to this proceeding.

---

**In re: STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.**
**FSP Docket No. 02-0004.**
**Order Dismissing Case.**
**Filed March 8, 2005.**

Angela Gusky and Jill Maze, for Appelle.
Brian McCalmon, for Appellant.
*Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

On March 8, 2005, Appellant withdrew its Notice of Appeal for the above-captioned case.

Accordingly, this case is **DISMISSED.**

---

**In re: STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.**
**FSP Docket No. 03-0004.**
**Order Dismissing Case.**
**Filed March 8, 2005.**

Angela Gusky and Jill Maze, for Appelle.
Brian McCalmon, for Appellant.
*Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

On March 8, 2005, Appellant withdrew its Notice of Appeal for the above-captioned case.

Accordingly, this case is **DISMISSED.**

---

**In re: TIM GRAY, an individual.**

**HPA Docket No. 01-D022 (formerly**
**HPA Docket No. 01-A022 (formerly**
**HPA Docket No. 01-0022)**
**Confirmation of Oral Decision and Order.**
**Filed March 10, 2005.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
*Confirmation of Oral Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, is represented by Colleen A. Carroll, Esq. Respondent, Tim Gray, is representing himself.

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Tim Gray violated section 5(2)(B) of the Act by entering a horse named "JFK All Over" in a horse show while the horse was sore. Respondent Tim Gray timely filed an answer to the complaint, which, among other things, denied the horse was sore.

On March 7, 2005, I issued my Decision and Order as to Respondent Tim Gray **orally** at the close of the hearing, in accordance with 7 C.F.R. § 1.142(c)(1). The transcript may not be available to the Hearing Clerk or the parties for weeks, so I provide this documentation. This writing confirms my oral Decision and Order and instructs the Hearing Clerk to comply with 7 C.F.R. § 1.142 (c)(2): see attached Appendix 2.

Four witnesses testified and I now identify the exhibits that were admitted into evidence. The four videotapes (CX10, CX11, CX12, and CX13) and CX2 are all located in Complainant's exhibit notebook marked HPA Docket No. 01-0022 and used for the first time in HPA Docket No. 01-B022. The remainer of the exhibits admitted in this case are located with this record file: CX3, CX4a, CX4b, CX4c, CX7 and CX20.

**Abbreviated Summary of Findings of Fact Announced Orally**

___1.Respondent Tim Gray is an individual whose mailing address is 3125 Highway 231 North, Shelbyville, Tennessee 37160, and who is engaged in the business of training and showing Tennessee Walking Horses.

2. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

3. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

**Abbreviated Summary of Conclusions Announced Orally**

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent Tim Gray has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

3. The following order is authorized by the Act and warranted under the circumstances.

**Abbreviated Summary of Order Announced Orally**

1. Respondent Tim Gray is assessed a civil penalty of $2,200, which shall be paid by May 6, 2005, by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

2. Respondent Tim Gray is disqualified for two years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.[1]

---

[1]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where

(continued...)

3. Respondent Tim Gray, his agents and employees, successors and assigns, directly or indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder.

My oral Decision and Order becomes final and effective without further proceedings on **Monday, April 11, 2005**, UNLESS an appeal to the Judicial Officer is filed with the Hearing Clerk by **Wednesday, April 6, 2005**, in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1).

Copies of this Confirmation shall be served by the Hearing Clerk upon the parties; Respondent's copy shall be sent by ordinary mail, and also by FAX to 931-684-0379, in addition to being served by certified mail. Further, the Hearing Clerk shall use the same means to serve the transcript excerpt when it is available.

---

**In re: PATTI MAGEE AND MICHAEL MAGEE.**
**HPA Docket No. 02-0004.**
**Ruling Dismissing Complainant's Motion to Abrogate Consent Decision.**
**Filed March 22, 2005.**

**HPA – Motions entertained by Judicial Officer.**

The Judicial Officer dismissed Complainant's Motion to Abrogate Consent Decision. The Judicial Officer stated the Rules of Practice (7 C.F.R. § 1.143(a)) provides that motions filed or made prior to the filing of an appeal of an administrative law judge's decision, except motions which directly relate to an appeal, shall be ruled on by the administrative law judge. As no appeal from an administrative law judge's decision had been filed in the proceeding and Complainant's motion did not relate to an appeal from an administrative law judge's decision, the Judicial Officer could not entertain Complainant's motion.

Donald A. Tracy, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
*Ruling issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

---

(...continued)
spectators are not allowed, and financing the participation of others in equine events.

On November 24, 2004, Administrative Law Judge William B. Moran [hereinafter the ALJ] entered a Consent Decision agreed to by Patti Magee and Michael Magee [hereinafter Respondents] and the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant]. On February 25, 2005, Complainant requested that the Judicial Officer abrogate the Consent Decision based upon Respondents' purported failure to comply with the terms of the Consent Decision.[2] On March 14, 2005, Respondents filed a response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision denying there is a basis for abrogating the Consent Decision.[3] On March 17, 2005, Complainant filed a response to Respondents' response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision.[4] On March 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion To Judicial Officer To Abrogate Consent Decision.

## CONCLUSION BY THE JUDICIAL OFFICER

Section 1.143(a) of the rules of practice applicable to this proceeding[5] provides that motions filed or made prior to the filing of an appeal of an administrative law judge's decision, except motions which directly relate to an appeal, shall be ruled on by the administrative law judge, as follows:

**§ 1.143 Motions and requests.**

---

[2]"Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

[3]"Respondents' Response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

[4]"Complainant's Response to Respondents Response To Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

[5]Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

> (a) *General*. All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. *The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal*. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a) (emphasis added).

No appeal from the ALJ's Consent Decision has been filed in this proceeding. Moreover, Complainant's Motion To Judicial Officer To Abrogate Consent Decision does not relate to an appeal from the ALJ's Consent Decision. Therefore, the Judicial Officer cannot entertain Complainant's Motion To Judicial Officer To Abrogate Consent Decision and Complainant's Motion To Judicial Officer To Abrogate Consent Decision must be dismissed.[6]

For the foregoing reasons, the following Ruling should be issued.

## RULING

Complainant's Motion To Judicial Officer To Abrogate Consent Decision, filed February 25, 2005, is dismissed.

---

**In re: ROBERT B. McCLOY, JR.**
**HPA Docket No. 99-0020.**
**Order Lifting Stay Order.**
**Filed March 22, 2005.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
*Order issued by William G. Jenson, Judicial Officer.*

---

[6]*See In re Lion Raisins, Inc.*, 63 *Agric. Dec.*828, 830, (2004).

## PROCEDURAL HISTORY

On March 22, 2002, I issued a Decision and Order concluding Robert B. McCloy, Jr. [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831).[1] On April 22, 2002, Respondent filed a petition for reconsideration of the March 22, 2002, Decision and Order, which I denied.[2]

On July 15, 2002, Respondent requested a stay of the Order in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), pending the outcome of proceedings for judicial review, and on July 17, 2002, I granted Respondent's request for a stay.[3]

On December 2, 2003, the United States Court of Appeals for the Tenth Circuit affirmed *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002),[4] and on October 4, 2004, the Supreme Court of the United States denied Respondent's petition for writ of certiorari.[5] On February 14, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a motion to lift the July 17, 2002, Stay Order on the ground that proceedings for judicial review have been concluded.[6] The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay Order on February 15, 2005. Respondent failed to file a response to Complainant's Motion to Lift Stay Order within 20 days after service, as required by the rules of practice applicable to this proceeding.[7] On March 15, 2005, the Hearing Clerk

---

[1]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002).

[2]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 228 (2002) (Order Denying Pet. for Recons.).

[3]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 745 (2002) (Stay Order).

[4]*McCloy v. United States Dep't of Agric.*, 351 F.3d 447 (10th Cir. 2003).

[5]*McCloy v. United States Dep't of Agric.*, ___ U.S. ___, 125 S. Ct. 38 (2004).

[6]Complainant's Motion to Lift Stay Order.

[7]See 7 C.F.R. §§ 1.130-.151 and, in particular, 7 C.F.R. § 1.143(d).

transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

## CONCLUSION BY THE JUDICIAL OFFICER

I issued the July 17, 2002, Stay Order to postpone the effective date of the Order issued in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), pending the outcome of proceedings for judicial review. Proceedings for judicial review are concluded. Therefore, Complainant's Motion to Lift Stay Order is granted; the July 17, 2002, Stay Order is lifted; and the Order issued in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), is effective, as set forth in the following Order.

## ORDER

1. Respondent Robert B. McCloy, Jr., is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

2. Respondent Robert B. McCloy, Jr., is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions

to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

---

**In re: ROBERT RAYMOND BLACK, II, AN INDIVIDUAL; CHRISTOPHER B. WARLEY, AN INDIVIDUAL; BLACK GOLD FARM, INC., A TEXAS CORPORATION; ROBBIE J. WARLEY, AN INDIVIDUAL, d/b/a BLACK GOLD FARMS; AND HERBERT DERICKSON AND JILL DERICKSON, INDIVIDUALS, d/b/a HERBERT DERICKSON TRAINING FACILITY, a/k/a HERBERT DERICKSON STABLES, a/k/a HERBERT DERICKSON BREEDING AND TRAINING FACILITY.**
**HPA Docket No. 04-0003.**
**Order Dismissing Interlocutory Appeal as to Robert Raymond Black, II, and Remanding the Proceeding to the ALJ.**
**Filed May 3, 2005.**

**HPA – Interlocutory appeal.**

The Judicial Officer dismissed Complainant's appeal of Administrative Law Judge (ALJ) Peter M. Davenport's January 21, 2005, Order. The Judicial Officer rejected Complainant's contention that the ALJ's Order denied Complainant's motion for a default decision and found Complainant's appeal was interlocutory. The Judicial Officer held Complainant's interlocutory appeal must be dismissed because the Rules of Practice do not permit interlocutory appeals.

Colleen A. Carroll, for Complainant.
Jack G. Heffington, Christiana, TN, for Respondent Robert Raymond Black, II.
Order issued by Peter M. Davenport, Administrative Law Judge.
*Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant],

instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about March 21, 2002, Robert Raymond Black, II [hereinafter Respondent], violated section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)) (Compl. ¶¶ 11-12).

On August 20, 2004, the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and a service letter. On September 8, 2004, the United States Postal Service returned the August 20, 2004, certified mailing to the Hearing Clerk marked "Not Deliverable As Addressed/Unable to Forward/Return to Sender."[1] On September 13, 2004, the Hearing Clerk sent Respondent, by regular mail, the Complaint, the Rules of Practice, and the Hearing Clerk's August 20, 2004, service letter.[2] Respondent failed to answer the Complaint within 20 days after the date the Hearing Clerk mailed the Complaint to Respondent by regular mail, and, on October 19, 2004, the Hearing Clerk sent Respondent a letter informing him that he had failed to file an answer within the time prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).[3]

On October 21, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Robert Raymond Black II, by Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On November 22, 2004, the Hearing Clerk served Respondent with

---

[1]Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004, and envelope in which the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and the August 20, 2004, service letter.

[2]Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004.

[3]Letter dated October 19, 2003 [sic], from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Robert Raymond Black, II.

Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4]

On January 21, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) directing the Hearing Clerk to provide Respondent with the Complaint and all other pleadings; (2) providing Respondent 20 days in which to file an answer; and (3) deferring consideration of Complainant's Motion for Default Decision (ALJ's January 21, 2005, Order at 2-3).

On March 11, 2005, Complainant appealed the ALJ's January 21, 2005, Order to the Judicial Officer. On April 26, 2005, Respondent filed "Respondent Robert Raymond Black's Response to Complainant's Appeal Petition." On April 29, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

## CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant filed Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition pursuant to sections 1.139 and 1.145(a) of the Rules of Practice (7 C.F.R. §§ 1.139, .145(a)). Complainant contends the ALJ erroneously denied Complainant's Motion for Default Decision in the ALJ's January 21, 2005, Order.

Section 1.139 of the Rules of Practice provides a party may appeal an administrative law judge's denial of a complainant's motion for adoption of a proposed decision, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion

---

[4]See United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7328 establishing the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

> for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

I have reviewed the ALJ's January 21, 2005, Order, and I do not find the ALJ denied Complainant's Motion for Default Decision, as Complainant asserts. To the contrary, the ALJ explicitly states "[c]onsideration of the Complainant's Motion for Adoption of Proposed Decision and Order is deferred" (ALJ's January 21, 2005, Order at 3). Moreover, the ALJ's January 21, 2005, Order is not a decision issued under section 1.139 or section 1.142(c) of the Rules of Practice (7 C.F.R. §§ 1.139, .142(c)) that may be appealed to the Judicial Officer. Finally, the Rules of Practice do not permit interlocutory appeals.[5] Therefore, Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition must be rejected as premature.

For the foregoing reasons, the following Order should be issued.

---

[5]*In re Velasam Veal Connection*, 55 *Agric. Dec.* 300, 304 (1996) (Order Dismissing Appeal); *In re L. P. Feuerstein*, 48 *Agric. Dec.* 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 *Agric. Dec.* 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 *Agric. Dec.* 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

**ORDER**

1. Complainant's interlocutory appeal, filed March 11, 2005, is dismissed.

2. The proceeding is remanded to the ALJ to conduct the proceeding in accordance with the Rules of Practice.

---

**In re: CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.**
**HPA Docket No. 03-0005.**
**Stay Order.**
**Filed May 17, 2005.**

Bernadette R. Juarez, for Complainant.
Aubrey B. Harwell, III, Nashville, TN, for Respondents.
*Order issued by William G. Jenson, Judicial Officer.*

On April 11, 2005, I issued a Decision and Order: (1) concluding Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and regulations issued under the Horse Protection Act (9 C.F.R. pt. 11); (2) assessing Respondents a $4,400 civil penalty; and (3) disqualifying Respondents for 2 years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[1]

On May 10, 2005, Respondents filed a petition for review of *In re Chad Way*, 64 *Agric. Dec.*401 (2005), with the United States Court of Appeals for the Sixth Circuit. On May 11, 2005, Respondents filed a Motion for Order of Stay requesting a stay of the Order in *In re Chad Way*, 64 *Agric. Dec.* 401 (2005), pending the outcome of proceedings for judicial review.

---

[1]*In re Chad Way*, 64 *Agric. Dec.* 401 (2005).

On May 16, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, informed the Office of the Judicial Officer, through counsel, by telephone, that he has no objection to Respondents' Motion for Order of Stay.

In accordance with 5 U.S.C. § 705, Respondents' Motion for Order of Stay is granted.

For the foregoing reasons, the following Order should be issued.

## ORDER

The Order in *In re Chad Way*, 64 *Agric. Dec.*401 (2005), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

---

**In re: PATTI MAGEE and MICHAEL MAGEE.**
**HPA Docket No. 02-0004.**
**Order.**
**Filed June 7, 2005.**

Bernadette Juarez, for Complainant.
Brenda Bramlett, for Respondents.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This matter is before the Administrative Law Judge upon the Complainant's Request to Withdraw their Motion to Vacate the Consent Decision and Motion to Strike Respondents' Response to Complainant's Motion to Abrogate.

It appearing that Respondent Michael Magee has paid his assessed civil penalty and satisfactory representation has been made to when Respondent Patti Magee will satisfy her obligation, it is **ORDERED** that the Request to Withdraw their Motion to Vacate Consent Decision will be **GRANTED** and this matter is stricken from the active docket.

Copies of this Order will be served upon the parties by the Hearing Clerk.

---

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.**
**I & G Docket No. 03-0001.**
**Remand Order.**
**Filed June 30, 2005.**

**I&G – Remand order.**

The Judicial Officer stated the United States District Court for the Eastern District of California found the Judicial Officer had abused his discretion by entering a default judgment against Respondents because of their minor deviation from the Rules of Practice with no showing of prejudice to Complainant and remanded the case to the Judicial Officer for further proceedings. *Lion Raisins, Inc. v. United States Dep't of Agric.* No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005). Therefore, the Judicial Officer remanded the proceeding to the administrative law judge to whom the case had been previously assigned for further proceedings in accordance with the Rules of Practice.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, Clovis, California, and Charles Pashayan, Jr., Fresno, California, and Washington, DC, for Respondents.
*Order issued by William G. Jenson, Judicial Officer.*

Kenneth C. Clayton, Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 11, 2002. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

On May 24, 2004, I issued a Decision and Order: (1) finding Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] failed to file a timely answer to the Complaint; (2) holding Respondents are deemed, based upon their failure to file a timely answer, to have admitted the allegations of the Complaint and waived the opportunity for hearing; (3) concluding Respondents violated the Agricultural Marketing Act and the Regulations, as alleged in the Complaint; and (4) debarring Respondents for 1 year from receiving inspection services under the Agricultural Marketing Act.[1]

Respondents sought judicial review of *In re Lion Raisins, Inc.*, 63 *Agric. Dec.* 211 (2004). On May 12, 2005, the United States District Court for the Eastern District of California found that I abused my discretion by entering a default judgment against Respondents because of their minor deviation from the Rules of Practice with no showing of prejudice to Complainant and remanded the case to me for further proceedings.[2] A notice of appeal of *Lion Raisins, Inc. v. United States Dep't of Agric.*, No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005), is not due until July 11, 2005; however, on June 28, 2005, I received a determination against appeal issued on June 16, 2005, by the United States Department of Justice, Civil Division.

As proceedings for judicial review are concluded and the United States District Court for the Eastern District of California has remanded the case to me, the proceeding should be remanded to the administrative law judge to whom the case was previously assigned for further proceedings in accordance with the Rules of Practice.

For the foregoing reasons, the following Order should be issued.

## ORDER

This proceeding is remanded to Administrative Law Judge Jill S. Clifton for further proceedings in accordance with the Rules of Practice.

---

[1] *In re Lion Raisins, Inc.*, 63 *Agric. Dec.* 211 (2004).

[2] *Lion Raisins, Inc. v. United States Dep't of Agric.* No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005).

**In re: GALLO CATTLE COMPANY, A CALIFORNIA LIMITED PARTNERSHIP.**
**NDPRB Docket No. 05-0001.**
**Order Denying Interim Relief.**
**Filed May 20, 2005.**

**NDPRB – Application for interim relief.**

Sharlene Deskins, for Respondent.
Brian C. Leighton, Clovis, CA, and Marshall C. Whitney, Fresno, CA, for Petitioner.
*Order issued by William G. Jenson, Judicial Officer.*

On April 20, 2005, Gallo Cattle Company [hereinafter Petitioner] filed a petition[1] pursuant to section 118(a) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. § 4509(a)), requesting an exemption from, or modification of, the Dairy Promotion and Research Order (7 C.F.R. §§ 1150.101-.187). Petitioner also requests interim relief, as follows:

> 3. Petitioner is also entitled to interim relief, injunctive relief allowing Petitioner to escrow assessments in an interest type bearing account pending the decision of the case on the merits so that Petitioner's assessments are not used by the [National Dairy Promotion and Research] Board to convey the speech complained of herein, so that there is available source of money to refund when Petitioner prevails, and for the government to comply with the U.S. Supreme Court decision of *Chicago Teachers Union v. Hudson*[.]

Pet. at 9.

On May 17, 2005, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed

---

[1]Petitioner entitles its petition "Petition Pursuant To 7 U.S.C. § 4509 Contending That The National Dairy Promotion Program (7 U.S.C. § 4501 *et seq.*), Legislation, The Rules And Regulations Promulgated Thereunder, And The Assessments Imposed For The Same Violates Petitioner's Rights Guaranteed Under The First Amendment Of The United States Constitution, And Seeking A Modification Of The Order, An Exemption From The Order, And A Refund Of Assessments (7 C.F.R. § 1150.131 *Et seq.* And 7 C.F.R. § 900.50; Request For Interim Relief And An Escrowing Of Assessments" [hereinafter Petition].

Answer of Respondent. On May 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration of Petitioner's request for interim relief.

Petitioner's request for interim relief is denied for the following three reasons. First, interim relief is not available to Petitioner. The rules of practice governing this proceeding (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice] provide that a person who has filed a petition pursuant to 7 C.F.R. § 900.52 may, by separate application filed with the Hearing Clerk, apply to the Secretary of Agriculture for interim relief, pending final determination of the proceeding.[2] However, Petitioner filed the Petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioner.

Second, even if interim relief were available in this proceeding, Petitioner has not filed a separate application for interim relief, as required by the Rules of Practice.[3] Instead, Petitioner's request for interim relief is included in its Petition for exemption from, or modification of, the Dairy Promotion and Research Order.

Third, even if interim relief were available to Petitioner and Petitioner had filed a separate application for interim relief, Petitioner's request for interim relief would be denied based upon established precedent. The Judicial Officer consistently denies applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief.[4] The reasons for denial of

---

[2]7 C.F.R. § 900.70(a).

[3]7 C.F.R. § 900.70(a).

[4]*In re Dole DF&N, Inc.*, 53 *Agric. Dec.* 527 (1994); *In re Cal–Almond, Inc.*, 53 *Agric. Dec.* 527 (1994); *In re Gerawan Farming, Inc.*, 52 *Agric. Dec.* 925 (1993); *In re Independent Handlers*, 51 *Agric. Dec.* 122 (1992); *In re Cal-Almond, Inc.*, 50 *Agric. Dec.* 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 *Agric. Dec.* 836 (1990); *In re Lansing Dairy, Inc.*, 48 *Agric. Dec.* 867 (1989); *In re Gerawan Co.,* 48 *Agric. Dec.* 79 (1989); *In re Cal-Almond, Inc.*, 48 *Agric. Dec.* 15 (1989); *In re Wileman Bros. &*

(continued...)

applications for interim relief from marketing orders are applicable to Petitioner's application for interim relief from the Dairy Promotion and Research Order issued pursuant to the Dairy Production Stabilization Act of 1983.[5]

For the foregoing reasons, the following Order should be issued.

## ORDER

Petitioner's application for interim relief is denied.

_____

[4](...continued)
*Elliott, Inc.*, 47 *Agric. Dec.* 1109 (1988), *reconsideration denied*, 47 *Agric. Dec.* 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 *Agric. Dec.* 765 (1987), *reconsideration denied*, 46 *Agric. Dec.* 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 *Agric. Dec.* 561 (1987); *In re Borden, Inc.*, 44 *Agric. Dec.* 661 (1985); *In re Sequoia Orange Co.*, 43 *Agric. Dec.* 1719 (1984); *In re Dean Foods Co.*, 42 *Agric. Dec.* 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 *Agric. Dec.* 1246 (1981).

[5]*In re Gallo Cattle Co.*, 55 *Agric. Dec.* 340 (1996). *See generally In re Handlers Against Promoflor*, 55 *Agric. Dec.* 1042, 1044 (1996) (stating the reasons for denial of interim relief from marketing orders are applicable to petitioner's application for interim relief from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order issued pursuant to the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993).

**In re: SHI-E CHIANG and FU-TSEND CHEN.**
**P.Q. Docket No. 05-0010.**
**Order Dismissing Case.**
**Filed February 11, 2005.**

Thomas Bolick, for Complainant.
Respondent, Pro se.
*Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

The Motion of Complainant to dismiss the above-captioned matter is **GRANTED.**

Accordingly, this case is **DISMISSED.**

---

**In re: ALPHA OMEGA IMPORT and EXPORT, INC.**
**P.Q. Docket No. 04-0009.**
**Order.**
**Filed March 11, 2005.**

Thomas Bolick, for Complainant.
Respondent, Pro se.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This matter is before the Administrative Law Judge upon the Notice of Withdrawal of Alpha Omega Import and Export, Inc. as a Respondent in this action filed by the Complainant.

Being sufficiently advised, it is **ORDERED** that so much of the Complaint as relates to Alpha Omega Import and Export, Inc. is dismissed as a Respondent in this action. The caption in this case shall be amended to reflect only Alliance Airlines as a Respondent.

Copies of this Order shall be served upon the remaining parties by the Hearing Clerk.

---

**In re: NICLAS MAGNUSSON.**
**P.Q. Docket No. 05-0013.**
**Order.**
**Filed May 13, 2005.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This matter is before the Administrative Law Judge upon the Motion of the Complainant to Withdraw the Complaint and Motion for Adoption of Proposed Decision and Order as attempts to locate the Respondent have been unsuccessful.

Being sufficiently advised, it is **ORDERED** that the Complaint and Motion for Adoption of Proposed Decision are withdrawn and this action is **DISMISSED,** without prejudice.

---

**In re: ISSAM ZIEN. CHARRI.**
**P.Q. Docket No. 05-0011.**
**Order Dismissing Case.**
**Filed June 1, 2005.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Order issued by Marc R. Hillson, Chief Administrative Law Judge.*

Complainant's Motion to Withdraw Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on January 7, 2005, be withdrawn.

Accordingly, this case is **DISMISSED.**

---

**In re: ABX AIR, INC, a/k/a AIRBORNE EXPRESS.**
**P.Q. Docket No. 05-0022.**
**AQ. Docket No. 05-0009.**
**Order Dismissing Case.**

**Filed June 22, 2005.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

Complainant's Motion to Withdraw Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on April 22, 2005, be withdrawn.

Accordingly, this case is **DISMISSED** without prejudice.

---

**In re: AMALGAMATED SUGAR COMPANY, L.L.C**
**SMA Docket No. 04-0003.**
**Order Denying Motions to Dismiss.**
**Petitioner and Motion For Summary Judgment**
**Filed June 23, 2004.***

**SMA – Termination of operations, permanent – Sale of all assets – Allocation, transfer of.**

Steven Z. Kaplan, David P. Bunde, Daniel C. Mott for Petitioners.
Jeffrey Kahn, for Respondent.
Kevin Brosch, David A. Beiging, Michael Greear for Intervenors
*Order filed by Administrative Law Judge Victor M. Palmer.*

## Background

The parties in this case are, on one side, the Petitioner, Amalgamated Sugar Company, L.L.C. (Amalgamated), and two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. (SMBSC), and Wyoming Sugar Company (Wyoming). On the other side are the Commodity Credit Corporation (CCC) and its supporting Intervenor, American Crystal Sugar Company (American Crystal).

Amalgamated filed a Petition on December 4, 2003, to challenge the action taken by CCC in a decision issued on November 14, 2003, by James

---

*This case was inadvertently left out of *63 Agric. Dec. Jan.* - Jun. (2004) – Editor.

R. Little, CCC's Executive Vice President. In the decision, Mr. Little responded to Amalgamated's Request for Reconsideration of CCC's decision of September 16, 2003, transferring the marketing allocation of Pacific Northwest Sugar Company (Pacific Northwest or PNW) to American Crystal. He stated that "after careful reconsideration, I cannot find justification to overturn CCC's decision." He justified his decision as in accordance with section 359d(b)(2)(F) and section 359d(b)(2)(E) of the Farm Security and Rural Investment Act of 2002 (the Act). The two subparagraphs read as follows:

> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E)
>
> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR- If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall -
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

Mr. Little's decision went on to state:

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets,

> paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Intervenors seek to eventually benefit from the overturn of the CCC decision as beet sugar processors who would share in the distribution of the marketing allocation under subparagraph E which should control if paragraph F does not.

Amalgamated filed its petition initiating this proceeding on December 4, 2003. CCC filed an Answer and a Motion to Dismiss on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2004. Amalgamated filed a brief opposing the Motion to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in Support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004.

Upon consideration of these motions and the written arguments of the parties, I am denying the Motions to Dismiss and the Motion for Summary Judgment.

## Motions to Dismiss

### 1. Subject Matter Jurisdiction

CCC and American Crystal assert that I do not have subject matter jurisdiction to hear and decide the petition under section 359i of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. § 359 i). The section states:

> An appeal may be taken to the Secretary from <u>any decision under section 359d establishing allocations of marketing allotments,</u> or under section 359 f, by any person adversely affected by reason of any such decision. (Emphasis supplied)

CCC and American Crystal contend that the words "establishing allocations" limits the appeal process to those decisions under 359 d(b)(2)(A) that "make allocations" of beet sugar each year after allotments are determined, and do not allow appeals of decisions respecting a "transfer" of an allocation under 359d(b)(2)(F).

However, there is nothing in the Act or CCC's regulations that so define "establishing", or in any way restrict appeals from <u>"any decision under section 359 d"</u> to only those under 359d (b)(2)(A).

> The word 'any' is generally used in the sense of 'all' or 'every' and the meaning is most comprehensive. *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107, 115 (3rd Cir. 1992).

Moreover, CCC's own regulations specifically direct, at 7 C.F.R. §1435.319 (b), that:

> For issues arising under §§ 359d, 359f (b) and (c), and 359 (i)... a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal... with the Hearing Clerk.

Whereas the regulation expressly limits appeals arising under section 359 f to paragraphs (b) and (c), it places no limitation upon appeals under section 359 d. It is a basic rule of construction that when a limitation is expressed in one part of a statute or regulation, no further limitation will be implied. *See e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

Furthermore, the word "establish" that is undefined in both the statute and the implementing regulations, must be given its normal and ordinary meaning. *Richards v. United States,* 369 U.S. 1, 9 (1962); and *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority,* 964 F. Supp. 416, 428 (D.D.C. 1997).

Both Webster's Third New International Dictionary (1986) and the Oxford English Dictionary, Second Edition, Vol V, p 404, state that

"establish" is a word that is used to denote the legal settlement of rights or privileges.

Webster lists as a meaning of "establish":

"to settle (as an estate) upon someone; secure (as rights) to a group."

So too, the Oxford English Dictionary lists as a principal meaning of "establish":

"to secure or settle (property, privileges, etc.) to or upon persons."

The Oxford English Dictionary (p 404, 2b) explains that this usage was employed and recognized in the English common law.

It stands to reason that the Secretary secures the rights or privileges of marketing certain amounts of sugar by a particular entity vis-a-vis other competing interests whenever she makes or transfers marketing allotments.

One must conclude that in allowing affected parties to file an administrative appeal from "any decision under section 359 d", Congress intended to provide such recourse from any decision that secures or settles the benefits of a marketing allocation upon a particular person or group of persons.

2. Cognizable Claim Under the Act

CCC and American have also moved to dismiss the petition for failure to state a legally cognizable claim.

The Act specifically allows any one affected by an adverse decision respecting a marketing allocation established pursuant to Section 359d, to file an appeal to obtain a hearing by an Administrative Law Judge pursuant to the Administrative Procedure Act. When Mr. Little denied Amalgamated's request for reconsideration of CCC's transfer of Pacific Northwest market allocation to American Crystal, his denial adversely affected Amalgamated in two ways. First, a major competitor had been given added market share. Second, as Mr. Little acknowledged, if he had not granted the transfer of the market allocation under Paragraph F, the allocation would have been available under Paragraph E to Amalgamated and the Intervenor Processors.

A legally cognizable claim under the Act does exist and the Motions to Dismiss alleging the contrary are denied.

3. Judicial Estoppel

CCC and American Crystal further contend that in a prior proceeding in which Pacific Northwest Sugar Company sought to increase its 2003 crop year allocation, Amalgamated asserted facts and circumstances inconsistent with those now set forth in its petition. In the prior proceeding, Amalgamated along with American Crystal and other affected parties, argued against the increase sought, but did not argue that Pacific Northwest's existing allocation should be distributed to other beet sugar processors because Pacific Northwest had permanently terminated its operations. For this reason, CCC and American Crystal contend that Petitioner is now barred, under the doctrine of judicial estoppel, from making this assertion in this proceeding.

A succinct explanation of the use of estoppel doctrines by courts was given by the United States Court of Appeals for the District of Columbia Circuit in *Konstantinidis v. Chen*, 626 F. 2d 933, 936-940 (1980).

The court first explained that "judicial estoppel" differs from "equitable estoppel". For equitable estoppel to apply, the invoking party must have been an adverse party in the prior proceeding and must have acted in reliance upon his opponent's prior position and would be harmed if his opponent were now to change positions. Judicial estoppel, however, does not require proof of privity, reliance or prejudice. Whereas, equitable estoppel looks to the integrity of the relationship of parties to each other, judicial estoppel focuses on the integrity of the judicial process. Of particular concern is the sanctity of the oath and the placing of a restraint upon reckless and false sworn testimony and even if prior inconsistent statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts.

Under both estoppel doctrines, there must be a prior judicial acceptance of a factual assertion made by the party who now advances an inconsistent contention. A review of testimony and the filings in the prior proceeding in which Pacific Northwest sought to have its 2003 crop allocation increased, shows that Amalgamated, American Crystal and others referenced facts which are not inconsistent with the Petition's allegations.

The President of Amalgamated, Ralph Burton, testified in respect to Pacific Northwest's operations as of June of 2003, ( Ex. H, pages 70-71 attached to Response of Intervenor, SMBSC):

> ...the crop hasn't been grown for 2 years, nothing planted this year. Probably other portions of the farm bill will soon come into play in this regard, and at such time as that operation becomes viable, then I think the new processor portion of the farm bill can come into play.

His concerns about the viability of Pacific Northwest as a sugar processor were shared by others at the hearing. John Richmond, the President of Southern Minnesota Beet Sugar Cooperative testified (Id, pp 74-76):

> ... However, we also believe that the CCC should clarify when an entity is no longer a beet sugar processor that should receive an allocation. The 2002 farm bill says, and I quote, if a processor has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations other than in conjunction with the sale or disposition of the processor or assets of the processor, the allocation is to be eliminated and distributed pro rata to the other processors.
>
> The regulations, however, take a more limited approach, saying under paragraph (a) of this section, where growers can take their crop to other locations, that CCC will eliminate the allocation of a processor who has been dissolved or liquidated in a bankruptcy proceeding, a bit narrower definition, and the allocation distributed to other processors on a pro rata basis.
>
> From the information we have, it would appear that Pacific Northwest has been dissolved within the meaning of the 2002 farm bill, since we understand that the factory have (sic) also been sold, and that no sugar beets have been planted for 3 years.

If that is true, then it does not matter whether Pacific Northwest suffers a substantial quality loss or if it opened a molasses desugarization facility, because it wouldn't have any allocation to be adjusted at all.

In short, there is not only a lack of evidence of prior inconsistent statements by Amalgamated or by any of the Intervenors who support its Petition, but in fact their concerns about Pacific Northwest's viability as a sugar processor were specifically brought to the attention of CCC at the

prior hearing. It so happens that CCC used a different reason for denying the application of Pacific Northwest for an increase in its sugar allocation. But this was not because the Petitioner or any of the Intervenors misled CCC. Without evidence of Amalgamated having acted in bad faith, judicial estoppel is inappropriate. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F. 3d 355, 362 (3rd Cir. 1996)

> Additionally as the *Konstantinidis* decision further elaborated, at 938:
> Moreover, judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernible modern trend in that direction.
>
> . . .
>
> Furthermore, we agree with the Tenth Circuit that utilization of the judicial estoppel theory would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.

*Parkinson v. California Co.*, 233 F. 2d at 438.

The *Konstantinidis* Court concluded that (supra at 940):

> Judicial estoppel has yet to make its way into the law of this jurisdiction, and we do not believe that there is any tendency in favor of its adoption. Furthermore, the District of Columbia Court of Appeals would not adopt the doctrine on the facts before us.

On the basis of the facts before me, I do not find that the adoption of this doctrine is warranted or appropriate in this proceeding.

**Motion for Summary Judgment**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986). It will not be granted if "... there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved

in favor of either party." *Anderson, supra,* at 250. As will be demonstrated, the present record does not support such a resolution of this proceeding.

CCC and American Crystal argue that the plain meaning of section 359d(b)(2)(F) required CCC to transfer Pacific Northwest's market allocation to American Crystal because a finding had not yet been made that Pacific Northwest had permanently terminated operations and its market allocation had not been distributed to other sugar beet processors under section 359d(b)(2)(E).

However, before such a result may be said to be required, section 359d(b)(2)(F) specifies that one of two conditions must exist. Either the processor of beet sugar itself must be the subject of the sale to another processor of beet sugar; or the sale must be for "all of the assets of the processor."

American Crystal did not buy Northwest Pacific itself, and the present record does not identify the assets that were treated as still being Pacific Northwest assets at the time CCC transferred its market allocation to American Crystal.

The factory and the processing equipment had been previously sold to others. Pacific Northwest had no outstanding contracts for sugar beet crops and its production supply and processing operations had ended years before. Petitioner and SMBSC state that for these reasons alone, the statutory provision failed to authorize the transfer of market allocation to American Crystal. They contend that for the provision to be applicable, Pacific Northwest must have still been a viable processor selling assets it still owned.

I take it that CCC and American Crystal believe, to the contrary, that it is sufficient under the section for American Crystal to have acquired the assets Pacific Northwest formerly used to function as a sugar beet processor and the fact that they were owned and sold by entities other than Pacific Northwest did not matter. But the decision that is the subject of the Petition for Review does not elucidate reasoning that supports such an interpretation.

It may be that the market allocation itself was considered by CCC to be a marketable asset of Pacific Northwest which Pacific Northwest could pass to American Crystal because CCC had not yet redistributed the market allocation to others. If so, CCC's basis for such an interpretation needs to be supplied

All that the Executive Vice President's decisional letter of November 14, 2003, tells us is that he denied Amalgamated's request for reconsideration on the basis that Pacific Northwest "was permanently terminated in conjunction with the sale of its assets". But the decision does not specify what assets he considered to still be Pacific Northwest assets and to be the subject of the sale. Also, the decision does not clarify why assets that were acquired secondhand so to speak from others were treated as constituting a sale of Pacific Northwest assets.

There is also a troubling, apparent inconsistency that needs explanation. When Washington Sugar Company previously sought the transfer of Pacific Northwest's market allocation as part of its contemplated acquisition of virtually all of the assets of Pacific Northwest, CCC on October 11, 2002, advised it (Ex D, attached to Affidavit of Steven Z. Kaplan):

> ... Therefore, CCC will transfer Pacific Northwest's 2002 allocation of 15, 000 tons, raw value, to the Washington Sugar Company upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, <u>including the factory</u>, have been acquired by the Washington Sugar Company ... (emphasis supplied)

Inasmuch as American Crystal did not acquire Pacific Northwest's factory, this requirement was evidently dropped. But why?

American Crystal has also argued that in the event I believe the statutory provisions to be silent or ambiguous with respect to the specific issues before us I should accord *Chevron* deference to CCC's interpretation as set forth in Mr. Little's letter. *See Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984).

It is customary in USDA adjudicatory proceedings to look for guidance from those officials who administer the day-to-day operations of the various programs entrusted to USDA. *See*, *Greenville Packing Co., Inc*., 59 *Agric. Dec.* 194, 226 (2000) and In re: 50 *Agric. Dec.* 476, 497 (1991), *aff'd*, 991 F.2d 803, (9th Cir. 1993) (not to be treated as a precedent under 9th Circuit Rule 36-3). But controlling deference of the sort American Crystal urges should now be given the Executive Vice President's decision would be excessive and would vitiate the very review I am presently conducting on behalf of the Secretary. *Chevron* deference is only accorded to final action by an agency. That has not yet occurred. Additionally, before an agency

interpretation may receive *Chevron* deference, it must be found to be reasonable and based on a permissible construction of the statute. *See Chevron, supra* 467 U.S. 843-844.

There must also be a reasoned analysis demonstrating a rational connection between the facts and the decision made. *Orengo Caraballo v. Reich,* 11 F. 3d 186, 193 (D.C. Cir. 1993).

Without taking further evidence, I am as yet unable to come to that conclusion.

Accordingly, the Motions to Dismiss and the Motion for Summary Judgment are each denied.

---

**In re: PACIFIC NORTHWEST SUGAR COMPANY, INC. (Appeal of Southern Minnesota Beet Sugar Cooperative of Reconsidered Opinion of Beet Sugar Marketing Allotment Allocation Transfer From Pacific Northwest Sugar Company By Executive Vice President, Commodity Credit Corporation).**
**SMA Docket No. 04-0004.**
**Order.**
**Filed February 14, 2005.**

**SMA – Allocation, Transfer of.**

Jeffrey Kahn, for Respondent.
Steven A. Adducci, for Petitioner.
*Order issued by Peter M. Davenport, Administrative Law Judge.*

This action involves a Petition for Review filed by Southern Minnesota Beet Sugar Cooperative (hereafter "SMBSC") on March 22, 2004 of the Reconsidered Opinion of the Beet Sugar Marketing Allotment Allocation Transfer from Pacific Northwest Sugar Company to American Crystal Sugar Company, (hereafter "ACS") by the Executive Vice President of Commodity Credit Corporation (hereafter "CCC"). It will be noted that this action involves the same transfer of quota which was the subject of *In re: Amalgamated Sugar Company, L.L.C.*, SMA Docket No. 04-0003, decided by Judge Victor W. Palmer on February 7, 2005.

An Answer and Motion to Dismiss was filed by the Executive Vice President of Commodity Credit Corporation on April 12, 2004. On April 22, 2004, the transferee, American Crystal Sugar Company, filed a Notice

of Intervention and Answer, SMBSC filed their Response to the Motion to Dismiss filed by CCC on May 3, 2004.

In its Motion to Dismiss, CCC asserted, *inter alia*[1] that the doctrine of *res judicata* would apply as the transfer of the quota was the subject of the previously noted parallel litigation before Judge Palmer. In *In re: Amalgamated Sugar Company, L.L.C.,* SMA Docket No. 04-0003, Judge Palmer held:

> CCC employed inconsistent standards for the transfer of the allocation that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised that they would need to acquire virtually all of Pacific Northwest's assets including factory. ...
>
> ...the Reconsidered Determination by the Executive Vice President of CCC which is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute in future crop years, the amount of the marketing allocation that was transferred to American Crystal from Pacific Northwest to all sugar beet processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of Act. ...

(Slip Opinion at pages 36 and 37)

The specific relief sought in this action (i.e. to reverse the Reconsidered Determination of the Executive Vice President of CCC transferring the allocation from Pacific Northwest to American Crystal and having the allocation distributed to all sugar beet processors on a pro rata basis) having been granted in the parallel action, there is no longer a cause in controversy and this action may be dismissed.

---

[1] CCC asserted that Administrative Law Judges lacked subject matter jurisdiction and that the complaint failed to state cause upon which relief could be granted. Both of these grounds were rejected by Judge Palmer. In the instant action, CCC additionally argued that there was no reconsidered opinion and that the claim was time barred. In view of the disposition in the companion case and CCC's position that *res judicata* is applicable, it is unnecessary to address those arguments.

Accordingly, being sufficiently advised, there no longer being a cause in controversy, this action will be and hereby is **DISMISSED.**

## AGRICULTURAL MARKETING AGREEMENT ACT

## DEFAULT DECISIONS

**In re: JAMES L. QUINN, d/b/a GOOD EARTH FARMS.**
**AMAA Docket No. 04-0001.**
**Decision and Order upon Admission of Facts by Reason of Default.**
**Filed March 11, 2005.**

**AMMA – Default.**

Robert Ertman, for Complainant.
Respondent, Pro Se.
*Decision and Order filed by Administrative Law Judge Peter M. Davenport.*

### Preliminary Statement

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937 ("Act"), as amended (7 U.S.C. ' 601 *et seq.*), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order") and for Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), issued pursuant to the Act.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. § 1.130-1.151, were served on the Respondent by certified mail received on February 9, 2004. The Respondent has failed to file an Answer within the time prescribed in accordance with Section 1.136 of the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law. This decision and order are issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R.§ 1.139.

## Findings of Fact and Conclusions of Law

1. Respondent James L. Quinn is an individual whose mailing address is 7176 E. Butler, Fresno, California. Respondent Quinn does business as, and is the sole proprietor of, Good Earth Farms, located at the same address.

2. At all times mentioned herein, Respondent James L. Quinn, dba Good Earth Farms, operated as a "handler" of nectarines and peaches as defined in section 916.10 of the Nectarine Order (7 C.F.R. § 916.10) and section 917.6 of the Peach Order (7 C.F.R. § 917.6) during the 2000/01, 2001/02, and 2002/03 fiscal periods (beginning April 1, ending May 31). The Respondent has been a handler since at least 1989.

3. The Nectarine and Peach Orders require that handlers who handle nectarines and peaches shall, prior thereto, cause such nectarines and peaches to be inspected by the Federal or Federal-State Inspection Service and certified as meeting the applicable requirements of such regulations, and promptly after inspection and certification, the handlers must submit a copy of the certificate of inspection to the Nectarine Administrative Committee and the Peach Control Committee (Committees). 7 C.F.R. §§ 916.55 and 917.45.

4. The Nectarine and Peach Orders require that handlers pay an assessment on nectarines and peaches that they handled pursuant to a rate established by the Secretary. 7 C.F.R. §§ 916.41 and 917.37.

5. The rate of assessment on nectarines handled after March 1, 2001, is $0.20 per 25-pound container or container equivalent of nectarines. 7 C.F.R. § 916.234.

6. The rate of assessment on peaches handled after March 1, 1996, is $0.1900 per 25-pound container or container equivalent of peaches. 7 C.F.R. § 917.258.

7. The Nectarine and Peach Orders require that handlers must furnish to the Committees, prompt, accurate and periodic reports covering detailed information such as name of shipper and shipping point, identification of carrier, date and time of shipment, number and type of containers shipped, the quantities shipped with the variety, grade and size of fruit, destination, identification of the inspection certificate or waiver pursuant to which the fruits were handled, and price per package of peaches at which sold. 7 C.F.R.§§ 916.60 and 917.50.

8. The Orders require that handlers must furnish to the Committees a recapitulation of shipments of each variety shipped and destination reports, at such times and for such periods as the Committees may designate.

9. During the 2000/01 fiscal period, and continuing to the present, Respondent handled at least 180 cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

10. During the 2001/02 fiscal period, and continuing to the present, Respondent handled at least 996 cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

11. During the 2002/03 fiscal period, and continuing to the present, Respondent handled at least 600cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

12. During the 2000/01 fiscal period, and continuing to the present, Respondent handled at least 2,626 cartons of peaches that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 917.45.

13. During the 2001/02 fiscal period, and continuing to the present, Respondent handled at least 1,654 cartons of peaches that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 917.45.

14. Respondent handled at least 780 cartons of nectarines during the 2000/01 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($144.30) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

15. Respondent handled at least 2,207 cartons of nectarines during the 2001/02 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($441.40) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41.

Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

16. Respondent handled at least 1,181 cartons of nectarines during the 2002/03 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($357.39) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C. § 608c(14)(B).

17. Respondent handled at least 3,091 cartons of peaches during the 2000/01 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($587.29) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

18. Respondent handled at least 2,578 cartons of peaches during the 2001/02 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($489.82) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

19. Respondent handled at least 828 cartons of peaches during the 2002/03 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($157.32) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

20. Respondent violated sections 916.60(a) and 916.160(b) of the Nectarine Order (7 C.F.R. §§ 916.60(a) and 916.160(b)) by failing to file accurate reports for nectarines he handled during 2002. Respondent has failed to submit an amended report on nectarines he handled during 2002 and was 215 days late in submitting the amended report as of June 18, 2003.

21. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2000. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2000/01.

22. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2001. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2001/02.

23. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2002. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2002/03.

24. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2000. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2000/01.

25. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2001. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2001/02.

26. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2002. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2002/03.

## Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

**Order**

1.The Respondent is assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

2. Respondent, his 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 and issued thereunder, and in particular:

(a) from failing to file complete, accurate, and timely reports as required by the Nectarine and Peach Orders;

(b) from failing to have fruit inspected prior to shipment, as required by the Nectarine and Peach Orders;

(c) from failing to pay to the California Tree Fruit Agreement $943.09 in past due assessments under the Nectarine Order for fiscal periods 2000/01, 2001/02, and 2002/03; $1234.43 in past due assessments under the Peach Order for fiscal periods 2000/01, 2001/02, and 2002.03; and

(d) from failing to pay assessments under the Nectarine and Peach Orders in a timely manner, as required by the Orders.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

---

**In re: MEDHAT MAHMOUD, an individual d/b/a MEDHAT MAHMOUD PRODUCE, a soleproprietorship; JOSE LUIS TORRES, an individual; and FERNANDO TORRES, an individual d/b/a TORRES DATES, a sole proprietorship,**

**AMAA Docket No. 04-0003.**

**Decision and Order as to MEDHAT MAHMOUD, anindividual d/b/a MEDHAT MAHMOUD PRODUCE, a sole proprietorship.**

**Filed May 9, 2005.**

**AMAA - Default.**

Bernadette Juarez, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Order for Domestic Dates Produced or Packed in Riverside County, California, 7 C.F.R. §§ 987.1 - 987.84 ("Marketing Order"), and the Administrative Rules, 7 C.F.R. §§ 987.101-172 ("Rules"), by a complaint filed on July 21, 2004, by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Medhat Mahmoud violated the Marketing Order.

On November 15, 2004, the Hearing Clerk sent to respondent Medhat Mahmoud, by certified mail to his last known address, return receipt requested, a copy of the complaint and Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151).[1] The United States Postal Service marked said mailing "unclaimed" and returned it to the Hearing Clerk.

On January 4, 2005, in accordance with section 1.147(c)(1) of the rules of Practice, the Hearing Clerk served respondent Medhat Mahmoud, by regular mail, a copy of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). Respondent Medhat Mahmoud was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent Medhat Mahmoud has failed to file an answer. The material facts alleged in the complaint, which are admitted by respondent Medhat Mahmoud's failure to file an answer, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice.

---

[1] *See* Domestic Return Receipt for Article Number 7004 1160 0001 9221 3649.

## Findings of Fact

1. Respondent Medhat Mahmoud is an individual doing business as Medhat Mahmoud Produce, whose last known mailing address was The Green Connection, 746 Market Court, Unit B-243, Los Angeles California 90021; and whose previous address was 1314 W. Vine Avenue, West Covina, California 91790. Medhat Mahmoud Produce is a sole proprietorship located at the same address. At all times mentioned herein, respondent Medhat Mahmoud was engaged in business as a handler of dates grown in Riverside County, California, and was subject to the Act and Marketing Order and Rules.

2. On or about October 31, 2001, respondent Medhat Mahmoud handled approximately 8,400 pounds of dates without having them inspected, in violation of section 987.41(a) of the Marketing Order. 7 C.F.R. § 987.41(a).

## Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, respondent Medhat Mahmoud has violated section 987.41(a) of the Marketing Order. 7 C.F.R. § 987.41(a)).

3. The following Order is authorized by the Act and warranted under the circumstances.

## Order

1. Respondent Medhat Mahmoud, an individual doing business as Medhat Mahmoud Produce, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Marketing Order and Rules, and in particular, from handling dates without having them inspected.

2. Respondent Medhat Mahmoud is assessed a civil penalty of **$1,100**, in accordance with section 608c(14)(B) of the Act. 7 U.S.C. § 608c(14)(B). Respondent Medhat Mahmoud shall pay the $1,100 by cashier's check, certified check, or money order, made payable to the order of the **Treasurer of the United States** and forwarded within 30

days from the effective date of this Order by a commercial carrier such as FedEx or UPS to:

Bernadette R. Juarez, Esq.
United States Department of Agriculture
Office of the General Counsel, Marketing Division
South Building, Room 2343
1400 Independence Avenue SW
Washington DC 20250-1417

Respondent Medhat Mahmoud shall indicate that the payment is in reference to: AMAA Docket No. 04-0003.

3. This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, including counsel for the remaining respondents

_____

## ANIMAL QUARANTINE ACT

## DEFAULT DECISIONS

**In re: VIRGILIO VASQUEZ VARELA.**
**A.Q. Docket No. 03-0001.**
**PQ. Docket No. 04-0007.**
**Decision and Order.**
**Filed April 30, 2004.***

**AQ and PQ – Default.**

James Holt, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

[1] This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq.*); and the regulations promulgated under those Acts (9 C.F.R. § 94 *et seq.* and 7 C.F.R. § 319.56 *et seq.*); by a complaint filed on October 11, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was originally assigned A.Q. Docket No. 03-0001; I have added P.Q. Docket No. 04-0007.
[2] The respondent, Virgilio Vasquez Varela, was served with a copy of the complaint on October 21, 2002. Respondent Virgilio Vasquez Varela's answer was due no later than November 10, 2002, twenty days after service of the complaint (7 C.F.R. § 136(a)).
[3] Respondent Virgilio Vasquez Varela failed to file an answer within 20 days after service. To date, Respondent Virgilio Vasquez Varela has still not filed an answer to the complaint. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. [4] Respondent Virgilio Vasquez Varela was informed in the complaint, and in the

*Note: This case was inadvertently omitted from Vol. 63 Agric. Dec. Jan. - Jun. (2004). - Editor.

Hearing Clerk's letter accompanying the complaint, that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Hearing Clerk's Office mailed respondent Virgilio Vasquez Varela a "No Answer Letter" on November 22, 2002.

[5] Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. (7 C.F.R. § 1.139). *See* 7 C.F.R. §1.130 *et seq.*; *see also* 7 C.F.R. §380.1 *et seq.*

## Findings of Fact

[6] Respondent Virgilio Vasquez Varela is an individual with a mailing address of 5201 Camelback Road, Lot E 150, Phoenix, Arizona 85301.

[7] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately 472 pounds of bologna, which contained pork and poultry products, without a certificate, in violation of 9 C.F.R. § 94.6 and 9 C.F.R. § 94.9.

[8] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately one pound of oranges from Mexico without a phytosanitary certificate, in violation of 7 C.F.R. § 319.56-2t.

## Conclusion

[9] By reason of the Findings of Fact set forth above, respondent Virgilio Vasquez Varela has violated the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act, as amended (7 U.S.C. §§ 7701 *et seq.*); and the regulations issued under those Acts, specifically, 9 C.F.R. § 94.6, 9 C.F.R. § 94.9, and 7 C.F.R. § 319.56-2t. Therefore, the following Order is issued.

## Order

[10] Respondent Virgilio Vasquez Varela is hereby assessed a civil penalty of three thousand dollars ($3,000.00). Respondent Virgilio Vasquez Varela shall pay the $3,000.00 by cashier's check or money order, made payable to the order of the "**Treasurer of the United States**" and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent Virgilio Vasquez Varela shall indicate that payment is in reference to **A.Q. Docket No. 03-0001 and P.Q. Docket No. 04-0007**.

[11] This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon of this Default Decision and Order upon respondent Virgilio Vasquez Varela, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

[This Decision and Order became final June 9, 2004.-Editor]

---

## APPENDIX A

**7 C.F.R.**:

**TITLE 7—-AGRICULTURE**

**SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE**

## PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

## SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

## ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

## VARIOUS STATUTES

. . .

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or

recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

---

**SUVIT ASAWAPORNSNIT d/b/a VEGASRACE.COM.**
**A.Q. Docket No. 05-0001.**
**Decision and Order.**
**Filed January 31, 2005.**

**A.Q. – Default.**

Krishna Ramaraju, for Complainant.
Respondent, Pro Se.
*Decision filed by Administrative Law Judge Peter M. Davenport.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of birds in violation of a quarantine zone imposed due to an outbreak of Exotic Newcastle Disease (9 C.F.R. § 82.1 *et seq.*) (hereinafter referred

to as the regulations), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 9 C.F.R. §§ 99.1 *et seq.*.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.*)(Act), by an Amended complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on November 30, 2004, alleging that respondent Suvit Asawapornsnit d/b/a Vegasrace.com violated the Act and regulations promulgated under the Act (9 C.F.R. § 82.1 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 8313. This complaint specifically alleged that on or about the period between January 25 and February 1, 2003, respondent shipped approximately fifty-eight (58) pigeons to approximately thirty-nine (39) different individuals throughout the United States, knowingly in violation of a quarantine then imposed on the Clark County/Las Vegas Nevada area by the Secretary of Agriculture, in response to an outbreak of Exotic Newcastle Disease ("END").

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Suvit Asawapornsnit, herein referred to as the respondent, is an individual doing business as Vegasrace.com (an unincorporated business).
2. Respondent is a resident of the State of Nevada, whose business mailing address is 5411 S. Oakridge Avenue, Pahrump, NY 89048.
3. On or about the period between January 25 and February 1, 2003, the respondent transported approximately fifty-eight (58) pigeons from Nevada to approximately thirty-nine different addresses, in

commerce and through the United States Postal Service, in violation of a quarantine then imposed by the Secretary of Agriculture ("Secretary") in designated areas, including at all times relevant herein, the area of Clark County/Las Vegas, Nevada in response to an outbreak of Exotic Newcastle Disease ("END"), 9 C.F.R. § 82.3 (c). Respondent violated section 82.5(b) of the regulations (9 C.F.R. § 82.5(b)) by moving such pigeons out of an END quarantine area without complying with the requirements of 9 C.F.R. § 82.11. The respondent transported the subject pigeons, with knowledge of said END quarantine, to the numbered parties listed below, between January 25, 2003 and February 1, 2003, as follows:

| | | |
|---|---|---|
| 1) | Dennis Turk<br>1916 Sandpebble Street<br>Stockton, CA 95206 | 1 pigeon |
| 2) | S. David Plummer<br>877 Signal Fruit Heights,<br>UT 84037 | 1 pigeon |
| 3) | Bill Jeffers<br>7315 W. Union Hills<br>Glendale, AZ 85308 | 1 pigeon |
| 4) | Wally Sabell<br>2451 Kipling Street, #314<br>Lakewood, CO 80215 | 1 pigeon |
| 5) | Eric Houchin<br>4132 E. Regina Avenue<br>Mead, WA 99021 | 1 pigeon |
| 6) | Neil Migliore<br>20 Winchester Drive<br>Mottontown, NY 11545 | 1 pigeon |
| 7) | Barry Yu | 6 pigeons |

| | | |
|---|---|---|
| | 2112 Brenham Drive<br>McKinney, TX 75070 | |
| 8) | Reese Bishop<br>1143 Georgean Street<br>Hayward, CA 94541 | 5 pigeons |
| 9) | Jim Brennan<br>15 Julia Court<br>Tappan, NY 10983 | 3 pigeons |
| 10) | Daryl Phelps<br>38002 Parkmont Commons<br>Fremont, CA 94536 | 2 pigeons |
| 11) | Gayle Renfroe<br>10913 Jackson Road<br>Krum, TX 76249 | 3 pigeons |
| 12) | Allen Hughe<br>1110 Harrison Street<br>Bristol, PA 19007 | 1 pigeon |
| 13) | Dave Dudle<br>714 W. Grant Avenue<br>Pueblo, CO 81004 | 4 pigeons |
| 14) | J.W. Page<br>8581 Locust Road<br>Elverta, CA 95626 | 1 pigeon |
| 15) | Jim Benne<br>16339 Connemara Lane<br>Spring Hill, FL 34610 | 1 pigeon |
| | Ray Buyner | 2 pigeons |

| | | |
|---|---|---|
| 16) | 1010 Prater Way<br>Sparks, NV 89431 | |
| 17) | Jack Blazier<br>1041 Tipperary Road<br>Oregon, WI 53575 | 1 pigeon |
| 18) | Ed Minnevelle<br>1721 Main Street<br>Jeanerette, LA 70544 | 1 pigeon |
| 19) | Fred Dickhaut<br>3733 Drybread Road<br>Cottenwood, CA 96022 | 1 pigeon |
| 20) | Chic and Judy Brooks<br>6772 S. Orange Avenue<br>Fresno, CA 93725 | 1 pigeon |
| 21) | Terry Kay<br>311 E. Pine Street<br>Roselle, IL 60172 | 1 pigeon |
| 22) | Sam Medeoros<br>1063 Daniel Drive<br>Petaluma, CA 94954 | 1 pigeon |
| 23) | Richard Callahan<br>Cole County Court House<br>301 E. High Street<br>Jefferson City, MO 65101 | 2 pigeons |
| 24) | John Palumbo<br>313 N. Jerome Street<br>Allentown, PA 18109 | 1 pigeon |

| | | |
|---|---|---|
| 25) | George So<br>178 Loneview Drive<br>Daly City, CA 94015 | 2 pigeons |
| 26) | Kevin Malley<br>8 Sunrise Drive<br>Stony Point, NY 10980 | 1 pigeon |
| 27) | John Belland<br>3196 Danville Boulevard<br>Alamo, CA 94507 | 1 pigeon |
| 28) | Bill Traw<br>16630 Crossandra Lane<br>Spring Hill, FL 34610 | 1 pigeon |
| 29) | Bill Hill<br>2930 E. 161st Street<br>Bixby, OK 74008 | 1 pigeon |
| 30) | Horst Thiel<br>1654 El Dorado Way<br>Redding, CA 96002 | 1 pigeon |
| 31) | Richard Colson<br>P.O. Box 13<br>Turner, MT 59542 | 1 pigeon |
| 32) | David Brotzler<br>4565 Wild Rice Drive, NE<br>Wyoming, MN 55092 | 1 pigeon |
| 33) | Joe Hanzich<br>18911 Angel Mountain Drive<br>Leander, TX 78641 | 1 pigeon |
| 34) | Ed Mills | 1 pigeon |

| | | |
|---|---|---|
| | 1217 E. 340th Street<br>Eastlake, OH 44095 | |
| 35) | Barry Venn<br>1211 Garden Creek Road<br>Casper, WY 82601 | 1 pigeon |
| 36) | Ron Allen<br>P.O. Box 558<br>Rutherford, CA 94573 | 1 pigeon |
| 37) | Dr. John Razmierzak<br>568 Gand Avenue<br>W. Trenton, NJ 08628 | 1 pigeon |
| 38) | Bill Kempkie<br>6094 Feather Lane<br>Sanford, FL 32771 | 1 pigeon |
| 39) | Robin Burdette<br>6509 Silver View Lane<br>Fort Worth, TX 76135 | 1 pigeon |

## Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 82.1 *et seq.*). Therefore, the following Order is issued.

## Order

Respondent is assessed a civil penalty of two hundred and fifty thousand dollars ($250,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and

shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

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

---

**In re: MARLA GARCIA GONZALEZ.**
**A.Q. Docket No. 05-0004.**
**Decision and Order.**
**Filed February 11, 2005**.

**A.Q. – Default.**

Krishna Ramarjau, for Complainant.
Respondent, Pro Se.
*Order filed by Administrative Law Judge Peter M. Davenport.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of certain restricted pork products from Spain into the United States (9 C.F.R. § 94.1 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 9 C.F.R. §§ 99.1 *et seq.*.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on November 17, 2004, alleging that respondent Marla Garcia Gonzalez violated the Act and regulations promulgated under the Acts (9 C.F.R. §' 94.1 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 8313. This complaint specifically alleged that on or about August 13, 2002 respondent imported into the United States from Spain, where classical swine fever is known to exist, approximately 1.5 kilograms of pork products, without the specified treatment, certificates, processing or inspection by a representative of the USDA.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Marla Garcia Gonzalez, hereinafter referred to as respondent, is an individual with a mailing address of 8600 SW 101st Avenue, Miami, FL 33173.

2 On August 13, 2002, the respondent violated 9 C.F.R. § 94.9(b) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist, without the specified treatment, certificates, processing or inspection by a representative of the USDA.

## Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (9 C.F.R. § 94.1 *et seq*). Therefore, the following Order is issued.

**Order**

Respondent Marla Garcia Gonzalez is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0004.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

---

**In re: DARIO CORTEZ.**
**A.Q. Docket No. 05-0002.**
**Decision and Order.**
**Filed March 9, 2005.**

**AQ - Default**.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the requirements for the importation of birds from Mexico into the United States (9 C.F.R. § 93.100 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 9 C.F.R. §§ 99.1 *et seq.*

This proceeding was instituted under the Act of February 2, 1903, amended, (21 U.S.C. § 111)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 29, 2004, alleging that respondent Dario Cortez violated the Act and regulations promulgated under the Act (9 C.F.R. § 93.100 *et seq.*).

The complaint sought civil penalties as authorized by section 3 of the Act (21 U.S.C. § 122). This complaint specifically alleged that on or about December 15, 2000 respondent imported, failed to apply for an import permit for, failed to provide a Mexican government veterinary certificate for, and failed to provide for inspection by a port veterinarian at the Customs port of entry for twenty-five (25) Yellow Cheeked Amazon parrots at the Otay Mesa Border Crossing .

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Dario Cortez, respondent herein, is an individual with a mailing address of 921 Perrisito Street, Perris, California 92570.

2. On or about December 15, 2000, the respondent failed to apply for an import permit for approximately twenty-five (25) Yellow

Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing, in violation of 9 C.F.R. § 93.103(a).

3. On or about December 15, 2000, the respondent failed to provide a certificate issued by a veterinary officer of the national government of the exporting region, herein Mexico, for approximately twenty-five (25) Yellow Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing, in violation of 9 C.F.R. § 93.104(a).

4. On or about December 15, 2000, the respondent failed to have approximately twenty-five (25) Yellow Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing inspected by the port veterinarian at the Customs port of entry, in violation of 9 C.F.R. § 93.105.

## Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (9 C.F.R. § 93.100 *et seq*). Therefore, the following Order is issued.

## Order

Respondent Dario Cortez is assessed a civil penalty of three thousand dollars ($3,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0002.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final May 24, 2005.- Editor]

_____

## ANIMAL WELFARE ACT

## DEFAULT DECISIONS

**In re: LISA R. WHITEAKER, AN INDIVIDUAL d/b/a MONKEYS-N-MORE; MONKEYS-N-MORE, INC., A NEVADA DOMESTIC CORPORATION, AND; SHANE LOGAN, AN INDIVIDUAL.**
**AWA Docket No. 04-0026.**
**Decision and Order ast Lisa R. Whiteaker.**
**Filed January 4, 2005.**

**AWA - Default.**

Bernadette Juarez, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

### Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by an amended complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued thereunder (the "Regulations" and "Standards") (9 C.F.R. § 1.1 *et seq.*).

On September 17, 2004, the Hearing Clerk sent to respondent Lisa R. Whiteaker ("respondent"), by certified mail, return receipt requested, copies of the amended complaint and service letter. Respondent was informed in the accompanying letter of service that an answer to the amended complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the amended complaint would constitute an admission of that allegation. Respondent actually received the amended complaint on September 28, 2004.[1] Respondent failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the amended complaint, which are admitted by said respondent's default, are adopted and set forth herein as Findings

[1]*See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4387.

of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

## Findings of Fact

1. Respondent Lisa R. Whiteaker is an individual doing business as Monkeys-N-More, and whose address is 9031 Baysinger Drive, Las Vegas, Nevada 89129-7001. At all times mentioned herein respondent was operating as a dealer and/or exhibitor as those terms are defined in the Act and the Regulations. Between February 24, 2003, and February 24, 2004, respondent held Animal Welfare Act license number 88-B-0016, issued to "LISA R. WHITEAKER."

Between June 29, 2001, and July 1, 2002, respondent Whiteaker was also a principal, manager, officer and agent of respondent Monkeys-N-More, Inc., and the acts, omissions, and failures to act by respondent Whiteaker alleged herein were within the scope of said respondent's office, and are deemed to be the acts, omissions and failures of respondent Monkeys-N-More, Inc., as well as of respondent Whiteaker, for the purpose of construing or enforcing the provisions of the Act.

2. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondent's compliance with the Act, Regulations, and Standards on October 16, 2002, and December 4, 2002.

3. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause trauma.

4. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause behavioral stress.

5. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause physical harm.

6. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause unnecessary discomfort.

7. On or about June 16, 2002, respondent failed to meet the minimum standards for humane handling, care and treatment of nonhuman primates, by failing to employ adequately-trained personnel to handle and care for nonhuman primates, and specifically, allowed an inadequately-trained person to handle a Bolivian Squirrel Monkey ("Zackery"), contributing to the animal's death.

8. On or about June 26, 2002, respondent failed to notify APHIS officials, within ten days, of any change in the name, address, management, or ownership of business or of any additional sites, and specifically, failed to notify APHIS officials of additional sites housing animals.

9. On or about August 1, 2002, through on or about December 11, 2002, respondent held herself out as a facility licensed in accordance with the Animal Welfare Act and operated as an exhibitor without having a valid license.

10. On October 16, 2002, respondent failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically, failed to maintain accurate records concerning the acquisition and disposition of animals.

11. On or about October 28, 2002, respondent failed to meet the minimum facilities and operating standards for other animals, by failing to construct facilities so that they were structurally sound and to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically, two juvenile tigers escaped from their enclosure.

12. On December 4, 2002, respondent failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically, failed to maintain accurate records concerning the acquisition and disposition of animals.

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel

Monkey ("Zackery") as carefully as possible in a manner that does not cause trauma. 9 C.F.R. § 2.131(a)(1).

3. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause behavioral stress. 9 C.F.R. § 2.131(a)(1).

4. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause physical harm. 9 C.F.R. § 2.131(a)(1).

5. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause unnecessary discomfort. 9 C.F.R. § 2.131(a)(1).

6. On or about June 16, 2002, respondent willfully violated section 2.100(a) of the Regulations and section 3.85 of the Standards. 9 C.F.R. §§ 2.100(a), 3.85.

7. On or about June 26, 2002, respondent willfully violated section 2.8 of the Regulations. 9 C.F.R. § 2.8.

8. On or about August 1, 2002, through on or about December 11, 2002, respondent willfully violated sections 2.1(a)(1) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a)(1), 2.100(a).

9. On October 16, 2002, and December 4, 2002, respondent willfully violated section 2.75 of the Regulations. 9 C.F.R. § 2.75(b)(1).

10. On or about October 28, 2002, respondent willfully violated sections 2.100(a) of the Regulations and section 3.125(a) of the Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).

## Order

1. Respondent, her 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 and Standards.

2. Respondent is assessed a $ 3,025 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondent shall state on the certified check or money order that the payment is in reference to AWA Docket No. 04-0026.

3. Respondent Lisa R. Whiteaker's Animal Welfare Act license (Animal Welfare Act license number 88-B-0016) is revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 5, 2005. - Editor]

---

**In re: CHRIS McDONALD AND DONIA McDONALD AS TO CHRIS MCDONALD d/b/a MCDONALDS FARM, AND DONIA McDONALD.**
**AWA Docket No. 03-0012.**
**Decision and Order by Reason of Admission of Facts.**
**Filed January 4, 2005.**

**AWA – Default.**

*Decision filed by Chief Administrative Law Judge Marc Hillson.*

## Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by an amended complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents

willfully violated the Act and the regulations and standards issued thereunder (the "Regulations" and "Standards") (9 C.F.R. § 1.1 *et seq*.).

On September 3, 2004, the Hearing Clerk sent to each respondent, by certified mail to their last known residence, return receipt requested, a copies of the amended complaint, order granting complainant's motion to amend complaint, and service letter dated September 3. 2004.[1] The United States Postal Service marked each mailing "unclaimed" and returned the mailings to the Hearing Clerk. On October 5, 2004, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk remailed, by ordinary mail to the same address, the amended complaint, order granting complainant's motion to amend complaint, and service letter dated September 3. 2004. The Hearing Clerk informed each respondent in the accompanying September 3, 2004, service letter that an answer to the amended complaints must be filed pursuant the Rules of Practice and that failure to answer any allegation in the amended complaint would constitute an admission of that allegation. Respondents failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the amended complaint, which are admitted by said respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R.§ 1.139.

## Findings of Fact

1. Chris McDonald is an individual, doing business as McDonalds Farm, hereinafter referred to as respondent, whose mailing address is 2134 40th Street, Peabody, Kansas 66866.

2. Donia McDonald is an individual, doing business as McDonalds Farm, hereinafter referred to as respondent, whose mailing address is 2134 40th Street, Peabody, Kansas 66866.

---

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4295 (Chris McDonald); *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4301 (Donia McDonald).

3. At all times mentioned herein, said respondents were licensed and operating as exhibitors, as that term is defined in the Act and the Regulations, under Animal Welfare Act license number 48-C-0126, issued to Chris and Donia McDonald, doing business as "McDonalds Farm."

4. In August 2001, respondents received an official warning notice from complainant for alleged violations of the Regulations, documented in Animal Welfare investigation No. KS-01012-AC.

5. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondents' compliance with the Act, Regulations, and Standards on October 25, 2001, December 28, 2001, March 29, 2002 (unable to inspect), June 20, 2002, August 15, 2002, November 1, 2002, April 1, 2003, July 18, 2003, August 28, 2003, November 25, 2003, November 26, 2003, November 28, 2003, December 1, 2003, December 5, 2003, December 11, 2003, and December 30, 2003.

6. On the following dates, respondents failed to have an attending veterinarian provide adequate veterinary care to their animals:

a. November 26, 2003. Respondents failed to provide adequate veterinary treatment to three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and had hair loss, skin irritation and respiratory dysfunction.

b. December 5, 2003. Respondents failed to obtain treatment for three tigers that appeared emaciated, and suffered from hair loss and skin irritation.

7. On the following dates, respondents failed to employ a full-time attending veterinarian, or to employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care:

a. October 25, 2001. Respondents failed to arrange for regularly scheduled veterinary visits to the premises.

b. December 28, 2001. Respondents failed to arrange for regularly scheduled veterinary visits to the premises.

c. November 28, 2003. Respondents failed employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

d. December 30, 2003. Respondents failed employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

8. On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, and services to comply with the Regulations and Standards:

a. December 9, 2003. Respondents failed to provide an appropriate method to capture, contain, restrain, and ultimately euthanize an adult female tiger ("Shania").

b. December 9, 2003. Respondents failed to provide an appropriate method to capture, contain, and restrain a hybrid wolf.

c. December 12, 2003. Respondents failed to provide an appropriate method to contain, restrain, and euthanize an adult male tiger ("Tia-Tia").

9. On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care:

a. November 25, 2003. Respondents failed to obtain treatment for three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and suffered hair loss, skin irritation and respiratory dysfunction.

b. November 25, 2003. Respondents failed to obtain treatment a bobcat whose right ear was bent over.

c. November 26, 2003. Respondents failed to prevent, control, treat or diagnose the cause of the hair loss, skin irritation, apparent emaciation, and respiratory dysfunction suffered by three tigers.

d. December 5, 2003. Respondents failed to prevent, control, treat or diagnose the cause of the hair loss, skin irritation, apparent emaciation, and respiratory dysfunction suffered by three tigers.

e. December 9, 2003. Respondents failed prevent injury to an adult female tiger ("Shania"), and specifically, respondents killed the animal despite the fact that the animal was contained in its enclosure.

f. December 11, 2003. Respondents failed to control and treat, as directed by their attending veterinarian, the hair loss, skin irritation, and emaciation of three tigers.

g. December 12, 2003. Respondents failed prevent injury to an adult male tiger ("Tia-Tia"), and specifically, respondents killed the animal despite the fact that the animal was contained in its enclosure.

10.On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication:

a. On October 25, 2001. Respondents failed observe and assess the daily health of a hybrid wolf that was thin and not tracking in a straight line.

b. June 20, 2002. Respondents failed observe and assess the daily health of four juvenile hybrid wolves whose skeletal frames were protruding beneath their skin and were not tracking in a straight line, and were, therefore, unable to covey accurate information regarding the animals' health and well-being to the attending veterinarian.

c. June 20, 2002. Respondents failed observe, assess, and obtain veterinary treatment for a male tiger with open sores on its shoulders and tail head.

d. November 25, 2003. Respondents failed to observe and assess the daily health of three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and exhibited hair loss, skin irritation, and respiratory dysfunction, and a bobcat whose right ear was bent over, and were, therefore, unable to convey accurate information as to the animals' health, behavior and well-being to their attending veterinarian.

e. December 5, 2003. Respondents failed to observe and assess the daily health of three tigers suffering hair loss, skin irritation, and apparent emaciation, and were, therefore, unable to convey accurate information as to the animals' health, behavior and well-being to their attending veterinarian.

f. December 30, 2003. Respondents failed to observe and assess the daily health of a newly born leopard cub, and were, therefore, unable to convey accurate information as to the animal's health, behavior and well-being to their attending veterinarian and to obtain treatment, contributing to the animal's death.

11.On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included adequate

guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia:

a. December 9, 2003. Respondents failed to maintain an adequate program of veterinary care regarding euthanasia, and specifically, attempted to euthanize an adult female tiger ("Shania") by shooting the animal behind the front leg in its shoulder before finally directing a sheriff's officer to kill the animal.

b. December 12, 2003. Respondents failed to maintain an adequate program of veterinary care regarding euthanasia, and specifically, directed a sheriff's officer to shoot an adult male tiger ("Tia-Tia") because respondents feared the animal would escape its enclosure.

12. Respondents failed to comply with the record keeping regulations, as follows:

a. June 20, 2002. Respondents failed to maintain any records concerning the animals at their facility.

b. December 30, 2003. Respondents failed to maintain any records concerning the animals at their facility.

13. On March 29, 2002, respondents failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondent's animal facilities.

14. On the following dates, respondents failed to handle animals as expeditiously and carefully as possible in a manner that did not cause trauma, behavior stress, physical harm, and unnecessary discomfort:

a. December 9, 2003. Respondents handled an adult female tiger ("Shania") and a hybrid wolf in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

b. December 12, 2003. Respondents handled an adult male tiger ("Tia-Tia") in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

15. On the following dates, respondents failed during public exhibition, to handle animals so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the general viewing public so as to assure the safety of the animals and the public:

a. July 17, 2003. Respondents exhibited a fourteen month old tiger, to the general viewing public, without sufficient distance or barriers, resulting the animal pulling a three year old boy into its enclosure bars.
b. July 18, 2003. Respondents exhibited a seven month old tiger, to the general viewing public, by walking the animal on a leash without sufficient distance or a barrier.

16. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to ensure that the housing facilities for hybrid wolves were structurally sound and maintained in good repair to protect animals from injury:
a. December 1, 2003. Respondents failed to fill a hole under the structural fencing in the hybrid wolf's enclosure.
b. December 9, 2003. Respondents housed a hybrid wolf in an inadequately maintained enclosure that permitted the animal to escape.

17. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, and specifically, failed to remove excreta and food waste from primary enclosures daily, and from under the primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste:
a. December 28, 2001. Excessive excreta was present in the hybrid wolves' enclosure.
b. August 15, 2002. Excessive excreta and food waste was present in an enclosure housing two hybrid wolves.
c. April 1, 2003. Respondents housed a wolf hybrid in an enclosure with excessive amounts of accumulated waste.
d. August 28, 2003. Respondents housed a wolf hybrid in an enclosure with excessive amounts of accumulated waste.

18. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to provide potable water in water receptacles that are clean and sanitized:
a. October 25, 2001. Respondents provided a hybrid wolf with water and a water receptacle that contained green algae.
b. August 28, 2003. Respondents provided a hybrid wolf with water and a water receptacle that contained green algae.

19. On August 15, 2002, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to provide sufficient space to allow each dog to turn about freely, to stand, sit, and

lie in a comfortable, normal position, and to walk in a normal manner, and specifically, respondent's six hybrid wolves were unable to turn about freely, stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner in their enclosure.

20. On April 1, 2003, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to feed dogs, at least one each day, food that is uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the normal condition and weight of the animal, and specifically, fed a hybrid wolf deteriorated calf carcass that had been in the animal's enclosure for three days.

21. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to construct indoor and outdoor housing facilities so that they were structurally sound and to maintain them in good repair to protect the animals from injury and contain them therein:

a. December 28, 2001. Respondents failed to repair exposed nails on top of the wood shelter box used by a Canadian Lynx.

b. April 1, 2003. Respondents failed to repair the chewed, jagged plywood in a leopard's enclosure.

c. November 25, 2003. Respondents housed a leopard in an enclosure with rusted, jagged metal, and two tigers in an enclosure (west) that lacked sufficient structural strength to contain the tigers.

d. November 28, 2003. Respondents failed to repair the broken, torn, and protruding wire mesh attached to the cattle panel in the enclosure housing six juvenile tigers.

e. November 28, 2003 through December 5, 2003. Respondents failed to repair the jagged and protruding plywood ceiling in the enclosure (transport trailer used as primary enclosure) housing five tigers and a black leopard.

f. December 9, 2003. Respondents housed an adult female tiger ("Shania") in an inadequately maintained enclosure that permitted the animal to escape.

g. December 11, 2003. Respondents housed numerous animals in structurally unsound enclosures, risking escape and injury, to wit:

(i) The guillotine door in the leopard's enclosure was secured by weaving wire around broken cattle panel fencing.

(ii) The side panels of the enclosure housing four tigers and a lioness curled, bowed, and were not secured to the ground.
(iii) The wire mesh side panels in the enclosure housing two juvenile leopards (one male and one female) were detached from the top rail bar, and there was a hole in the fencing's south-side, upper corner.
(iv) The wire mesh on the north entrance gate in an adult male tiger's ("Tia-Tia") enclosure was detached and curled, and the fencing, in general, lacked structurally integrity.
h. December 12, 2003. Respondents housed adult male tiger ("Tia-Tia") in an inadequately maintained enclosure that permitted the animal to escape.
i. December 30, 2003. Respondents housed numerous animals in structurally unsound enclosures, risking escape and injury, to wit:

(i) A black leopard's enclosure ("Rocky") had a 3" gap between the fencing and unstable tin top that shifted in the wind, the metal shelter box was rusted on the lower left hand side, and the fencing was detached from the metal frame in the double entry.
(ii) Housed three tigers, a lioness, and a black leopard in an enclosure (far southeast) with loose fencing that bowed and was not secured to the metal frame, the animals' metal shelter box was torn and jagged on the east side, and there was a hole, approximately 9" in diameter, in the fencing on the east side.
(iii) Housed a black leopard ("Kera") in an enclosure with broken and rusted cattle panel strands, cattle panels that were not secured to the metal frame, and old wire held the front gate together.

22. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to store supplies of food in facilities that adequately protected them from deterioration, molding or contamination by vermin:
a. December 28, 2001. Respondents failed to store cattle carcasses in a manner that prevented contamination, deterioration, or consumption by vermin.
b. June 20, 2002. Respondents stored chicken in a manner that resulted in deterioration and fly infestation.
c. November 25, 2003. Thawing chicken wings were contaminated with rodent feces.

23. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to remove and dispose of animal and food wastes, bedding, dead animals, trash and debris:

a. December 28, 2001. Respondents allowed excessive amounts of waste to accumulate in a tiger's enclosure.

b. June 20, 2002. Respondent allowed excessive amounts of waste to accumulate in five exotic felids' enclosures.

24. On August 28, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to provide sufficient shade by natural or artificial means to animals kept outdoors to protect themselves from direct sunlight, and specifically, failed to provide two tigers with adequate over-head shade to protect themselves from direct sunlight.

25. On the following dates, respondents failed failing to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide adequate natural or artificial shelter to animals kept outdoors:

a. November 25, 2003. Respondents failed to provide any bedding to six exotic felids.

b. November 25, 2003. Respondents provided inadequate shelter to four adult tigers and one adult lioness; the animals shared two, open front shelter boxes measuring approximately 2.5' by 3'.

c. November 28, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) Two adult tigers and one adult lioness shared one, open front shelter box measuring approximately 2.5' by 3'.

(ii) Six juvenile tigers (weighting approximately 85 to 110 pounds) shared one, open front shelter box measuring approximately 2.5' by 3'.

(iii) Five tigers and a black leopard shared an over-turned, inaccessible shelter box.

d. December 5, 2003. Respondents failed to provide any shelter to five tigers and a black leopard housed in the transport trailer.

e. December 11, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) Five tigers and a leopard had no shelter from climatic conditions.

(ii) The open front, uninsulated metal shelter boxes provided to the other animals failed to restrict air flow, rain, snow, or help maintain body head, and the available bedding was old and soiled.

f. December 30, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) The only source of shelter to many animals consisted of open front, uninsulated shelter boxes that failed to restrict air flow, rain, snow, or help maintain body head.

(ii) Two tigers and a lioness (far southeast enclosure) shared a decrepit, make-shift shelter box.

(iii) Six felids had no bedding at all.

26. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide a suitable method to rapidly eliminate excess water:

a. June 20, 2002. Housed two tigers in an enclosure with standing water and mud, such that the animals were unable to remain clean and dry.

b. August 15, 2002. Standing water and mud covered approximately thirty-percent of the floor area in an enclosure housing two tigers.

c. April 1, 2003. Respondents housed two tigers in a muddy enclosure, such that the animals were unable to remain clean and dry.

d. December 5, 2003. Standing water and mud covered approximately ninety-percent of the floor area in the far southeast enclosure housing two tigers and a lioness.

e. December 30, 2003. Housed a female tiger ("Rasha") in an enclosure with standing water that covered an area approximately three feet.

27. On or about April 1, 2003, through on or about December 30, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to construct a perimeter fence to keep animals and unauthorized persons out, and to function as a secondary containment system for the animals in the facility.

28. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments with adequate freedom of movement:

a. December 28, 2001. Respondents' leopards were unable to make normal postural and social adjustments with adequate freedom of movement in their enclosure.

b. June 20, 2002. Respondents' leopards were unable make normal postural and social adjustments with adequate freedom of movement in their enclosure.

29. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide animals with food of sufficient quantity and nutritive value to maintain good animal health, that was prepared with consideration for the age, species, condition, size, and type of animal:

a. November 25, 2003. At least three of respondents tigers were malnourished, with the spinous processes and the pin bones of the hips protruding out from under their skin.

b. November 26, 2003. Respondents failed to provide a diet of sufficient quantity and nutritive value to maintain all animals in good health, to wit:

(i) At least three of respondents tigers appeared malnourished with the spinous processes and the pin bones of the hips protruding out from under their skin.

(ii) The adult tigers, aside from those in the travel trailer, had faded coats and poor body condition.

(iii) The tiger cubs (northwest enclosure) lacked fat, were thin over the top, with faded coats and rounded bellies.

c. December 11, 2003. Respondents fed 22 large felids, 2 bob cats, and 2 leopard cubs a diet that consisted solely of chicken, and failed to adequately dispense a nutritional supplement (calcium phosphorous), as directed by their attending veterinarian.

30. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to make potable water accessible to the animals at all

times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary:

a. October 25, 2001. Respondents' water receptacle (metal water tank) used by a tiger contained green algae and needed to be sanitized.

b. June 20, 2002. Respondents' water receptacle used by the bobcats contained green algae and needed to be sanitized.

c. August 15, 2002. Respondents' water receptacle used by two tigers contained green algae and needed to be sanitized.

d. November 25, 2003. Respondents failed to provide any water to four tigers and a lioness (far east enclosure) and the black leopard's water receptacle was caked with mud.

e. November 28, 2003. Respondents provided water receptacles and water to two tigers (far southeast enclosure) that contained mud and dry leaves.

f. December 11, 2003. Respondents provided frozen water receptacles and water to 22 large felids, 2 bobcats, and 2 leopard cubs.

g. December 30, 2003. Respondents' water receptacle and water, if any, contained dirt, caked mud, and, in one instance, feces (bobcat enclosure).

31. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odors:

a. April 1, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.

b. August 28, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.

c. November 25, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.

d. December 11, 2003. Respondents failed to remove accumulated excreta from all animal enclosures.

32. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to keep premises clean and in good repair:

a. June 20, 2002. Respondents failed to remove weeds that were two to four feet tall, from around the outdoor housing facilities and premises.

b. August 15, 2002. Respondents failed to remove weeds that were two to four feet tall, from around the outdoor housing facilities and premises.
c. April 1, 2003. Respondents failed to remove dozens of old bones, a wood pile, broken barrels, a kitchen appliance, and tires from around the outdoor housing facilities and premises.
d. August 28, 2003. Respondents failed to remove weeds that were three to five feet tall, dozens of empty card board boxes, and other trash from around the outdoor housing facilities and premises.
e. November 25, 2003. Respondents failed to remove weeds that were three to five feet tall, dozens of empty card board boxes, and other trash (old car battery, tires, plastic, papers, clothes, sheet metal, pipes, carcasses) from around the outdoor housing facilities and premises.
f. December 1, 2003. Respondents failed to remove a dead rabbit and old bones from around the outdoor housing facilities and premises.
g. December 11, 2003. Respondents failed to remove dead weeds that were three to five feet tall, a dozen old carcases, fencing, sheet metal, pipes, and other house trash from around the outdoor housing facilities and premises.
h. December 30, 2003. Respondents failed to remove dead weeds that were three to five feet tall, and animal and house trash from around the outdoor housing facilities and premises.

33. On December 30, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to establish and maintain an adequate program of pest control, and specifically, failed to take minimally-adequate steps to eradicate respondents' rodent infestation.

34. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to employ a sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices, under a supervisor with a background in animal care:
a. December 9, 2003. Respondents failed to have a sufficient number of adequately-trained employees to comply with the Regulation and Standards, and, therefore, required the assistance of a sheriff's officer to capture and kill an adult female tiger ("Shania").
b. December 12, 2003. Respondents failed to have a sufficient number of adequately-trained employees to comply with the Regulation and

Standards, and, therefore, required the assistance of a sheriff's officer to kill an adult male tiger ("Tia-Tia").

35. On July 18, 2003, respondents failed to construct primary enclosures, such as transport cages used to transport animals, of structural strength sufficient to contain the live animals and to withstand the rigors of travel, and specifically, transported six tigers in a transport trailer with deteriorating doors and floors, and an unsecured portable outdoor exercise area.

36. On July 18, 2003, respondents allowed live animals to travel with any material, substance, or device which may reasonably expected to be injurious to the health and well-being of the animals, and specifically, housed a tiger in a travel compartment with cleaning materials.

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On November 26, 2003 and December 5, 2003, respondents willfully violated section 2.40(a) of the Regulations. 9 C.F.R. § 2.40(a).

3. On October 25, 2001, December 28, 2001, November 28, 2003, and December 30, 2003, respondents willfully violated section 2.40(a)(1) the Regulations. 9 C.F.R. § 2.40(a)(1).

4. On December 9, 2003 and December 12, 2003, respondents willfully violated section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

5. On November 25, 2003, November 26, 2003, December 5, 2003, December 9, 2003, December 11, 2003, and December 12, 2003, respondents willfully violated section 2.40(b)(2) of the Regulations. 9 C.F.R. § 2.40(b)(2).

6. On October 25, 2001, June 20, 2002, November 25, 2003, December 5, 2003, and December 30, 2003, respondents willfully violated section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

7. On December 9, 2003, and December 12, 2003, respondents willfully violated section 2.40(b)(4) of the Regulations. 9 C.F.R. § 2.40(b)(4).

8. On June 20, 2002, and December 30, 2003, respondents willfully violated section 2.75 of the Regulations. 9 C.F.R. § 2.75.

9. On March 29, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 2.126(a) of the Standards. 9 C.F.R. §§ 2.100(a), 2.126(a).

10. On December 9, 2003 and December 12, 2003, respondents willfully violated section 2.131(a)(1) of the Regulations. 9 C.F.R. § 2.131(a)(1).

11. On July 17, 2003, and July 18, 2003, respondents willfully violated section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1).

12. On December 1, 2003, and December 9, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.1(a) of the Standards. 9 C.F.R. § 2.100(a), 3.1(a).

13. On December 28, 2001, August 15, 2002, April 1, 2003, and August 28, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.11(a) Standards. 9 C.F.R. § 2.100(a), 3.11(a).

14. On October 25, 2001, and August 28, 2003, respondents willfully section 2.100(a) of the Regulations and section 3.10 of the Standards. 9 C.F.R. § 2.100(a), 3.10.

15. On August 15, 2002, respondents willfully section 2.100(a) of the Regulations and section 3.6(a)(2)(xi) of the Standards. 9 C.F.R. § 2.100(a), 3.6(a)(2)(xi).

16. On April 1, 2003, respondents willfully section 2.100(a) of the Regulations and section 3.9(a) Standards. 9 C.F.R. § 2.100(a), 3.9(a).

17. On December 28, 2001, April 1, 2003, November 25, 2003, November 28, 2003 through December 5, 2003, December 9, 2003, December 11, 2003, December 12, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(a) of the Standards. 9 C.F.R. § 2.100(a), 3.125(a)).

18. On December 28, 2001, June 20, 2002, and November 25, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(c) of the Standards. 9 C.F.R. § 2.100(a), 3.125(c).

19. On December 28, 2001, and June 20, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(d) of the Standards. 9 C.F.R. § 2.100(a), 3.125(d).

20. On August 28, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(a) of the Standards. 9 C.F.R. § 2.100(a), 3.127(a).

21.On November 25, 2003, November 28, 2003, December 5, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(b) of the Standards. 9 C.F.R. § 2.100(a), 3.127(b).

22.On June 20, 2002, August 15, 2002, April 1, 2003, December 5, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(c) of the Standards. 9 C.F.R. § 2.100(a), æ.127(c).

23.On or about April 1, 2003, through on or about December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and 3.127(d) of the Standards. 9 C.F.R. § 2.100(a), 3.127(d).

24.On December 28, 2001, and June 20, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 3.128 of the Standards. 9 C.F.R. § 2.100(a), 3.128.

25.On November 25, 2003, November 26, 2003, and December 11, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.129(a) of the Standards. 9 C.F.R. § 2.100(a), 3.129(a).

26.On October 25, 2001, June 20, 2002, August 15, 2002, November 25, 2003, November 28, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section' 3.130 of the Standards. 9 C.F.R. § 2.100(a), 3.130.

27.On April 1, 2003, August 28, 2003, November 25, 2003, December 11, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(a) of the Standards. 9 C.F.R. § 2.100(a), 3.131(a).

28.On June 20, 2002, August 15, 2002, April 1, 2003, August 28, 2003, November 25, 2003, December 1, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(c) of the Standards. 9 C.F.R. § 2.100(a), 3.131(c).

29.On December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(d) of the Standards. 9 C.F.R. § 2.100(a), 3.131(d).

30.On December 9, 2003, and December 12, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.132 of the Standards. 9 C.F.R. § 2.100(a), 3.132.

31. On July 18, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.137(a)(1) of the Standards. 9 C.F.R. § 2.100(a), 3.137(a)(1).

32. On July 18, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.138(f) of the Standards. 9 C.F.R. § 2.100(a), 3.138(f).

## 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 Act and the Regulations and Standards.

2. Respondents are jointly and severally assessed a $ 14,905 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:
Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 03-0012.

3. Respondent Donia McDonald's Animal Welfare Act license (Animal Welfare Act license number 48-C-0126) is revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

———————

**In re: BODIE S. KNAPP, AN INDIVIDUAL d/b/a WAYNE'S WORLD SAFARI.**
**AWA Docket No. 04-0029.**
**Decision and Order.**
**Filed January 4, 2005.**

**AWA- Default**.

Colleen Carroll, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent Bodie S. Knapp, an individual doing business as Wayne's World Safari, willfully violated the Act and the Regulations and Standards promulgated thereunder (9 C.F.R. § 1.1 *et seq.*)(the "Regulations" and "Standards").

On August 31, 2004, the Hearing Clerk sent to respondent Bodie S. Knapp, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which respondent had provided to complainant. Respondent Knapp was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent Knapp actually received the complaint on September 4, 2004. Said respondent has failed to file an answer to the complaint.

Pursuant to sections 1.136 and 1.139 of the Rules of Practice, the material facts alleged in the complaint, are all admitted by said respondent's failure to file an answer or to deny. They are adopted and set forth herein as Findings of Fact and Conclusions of Law, and this decision and order is issued pursuant to section 1.139 of the Rules of Practice.

## Findings of Fact

1. Respondent Bodie Knapp is an individual doing business as "Wayne's World Safari" and whose address is 11212 Highway 359, Mathis, Texas 78368. At all times mentioned herein, said respondent was operating as a dealer and as an exhibitor, as those terms are defined in the Regulations, and held Animal Welfare Act license number 74-C-0533.

2. Respondent exhibits approximately 200 wild and exotic animals to the public. Respondent's exhibition business is significant. Respondent has many customers each year, and also solicits and accepts donations from the public. The gravity of the violations alleged in this complaint is great, and involve willful, deliberate violations of the handling and veterinary care regulations, and repeated failures to comply with the facilities standards. The violations themselves demonstrate a lack of good faith on the part of the respondent. Respondent Bodie Knapp has also exhibited bad faith by lying to APHIS officials about the circumstances surrounding the death of two adult tigers in December 2003, and specifically, by telling APHIS officials that the animals died in a fight, when in fact both animals had died at the hand of respondent Bodie Knapp. Respondent Bodie Knapp is a respondent in another enforcement proceeding under the Animal Welfare Act: *In re Corpus Christi Zoological Association; Robert Brock; Michelle Brock; Bodie Knapp; and Charles Knapp*, AWA Docket No. 04-0015.

3. On or about the following dates, respondent willfully violated the veterinary care Regulations (9 C.F.R. § 2.40), as follows:

a. March 13, 2002. Respondent failed to have an attending veterinarian provide adequate veterinary care to animals as required, and specifically, failed to have an attending veterinarian provide care to a porcupine (Scarface) that needed veterinary medical attention for her left eye. 9 C.F.R. § 2.40(a).

b. September 5, 2003. Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the provisions of the Regulations, and specifically, lacked facilities to prevent the escape of the brown bears. 9 C.F.R. § 2.40(b)(1).

4. On or about the following dates, respondent willfully violated section 2.131 of the Regulations (9 C.F.R. § 2.131), as follows:

a. March 13, 2002. Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animals and the public, and specifically, there was no barrier between the rhinoceros and the public. 9 C.F.R. § 2.131(b)(1).

b. March 13, 2002. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

c. January 9, 2003. Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animals and the public, and specifically, the barrier at the gate at the front of respondent's rhinoceros exhibit was only 18 inches high, and was constructed of cattle paneling. 9 C.F.R. § 2.131(b)(1).

d. April 11, 2003. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

e. April 11, 2003. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

f. September 5, 2003. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed,

broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

g. September 5, 2003. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

h. March 11, 2004. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

i. March 11, 2004. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

5. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. §§ 3.75-92), as follows:

a. March 13, 2002. Respondent failed to provide sufficient water to nonhuman primates continually or as often as necessary for the health and comfort of the animals, and specifically, respondent provided no drinking water to the spider monkeys. 9 C.F.R. § 3.83.

b. September 5, 2002. Respondent failed to remove excreta from primary enclosures daily, and specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. 9 C.F.R. § 3.84(a).

c. January 9, 2003. Respondent failed to remove excreta from primary enclosures daily, and specifically, there was a build-up of

excreta in the muntjac and spot-nosed monkey enclosure. 9 C.F.R. § 3.84(a).

d. April 11, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

e. April 11, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

f. September 5, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

g. September 5, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

h. December 18, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

i. December 18, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

j. March 11, 2004. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

k. March 11, 2004. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

6. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125), as follows:

a. March 13, 2002. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored meat in a freezer without any wrapping, leaving it susceptible to freezer burn. 9 C.F.R. § 3.125(c).

b. September 5, 2002. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury, and specifically, respondent's coatimundi enclosure had wires protruding from the concrete base, which wires posed a danger to the animals housed inside. 9 C.F.R. § 3.125(a).

c. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's bear enclosure were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

d. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for lions were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

e. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for tigers were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

f. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for lions was rusted and structurally compromised. 9 C.F.R. § 3.125(a).

g. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, one side of the giraffe barn had been kicked is loose, and its metal portions structurally compromised. 9 C.F.R. § 3.125(a).

h. April 11, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, one side of the caracal enclosure was badly rusted, had holes, and was structurally compromised. 9 C.F.R. § 3.125(a).

i. April 11, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored animal food with chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.125(c).

j. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and

specifically, the front fence of the brown bear enclosure is not secure, and has been structurally compromised to the extent that the male bear can lift the fence up, and could easily escape. 9 C.F.R. § 3.125(a).

k. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

l. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

m. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the white tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

n. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the other tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

o. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

p. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and

specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

q. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the wood of the back wall of the bobcat enclosure was badly rotted and has fallen off of the wall. 9 C.F.R. § 3.125(a).

r. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, there is a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. 9 C.F.R. § 3.125(a).

s. September 5, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored food in a filthy freezer that had blood and food residue on the freezer's walls and floor. 9 C.F.R. § 3.125(c).

t. September 5, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored food in a chest freezer with a door that was broken, and allowed warm air to enter. 9 C.F.R. § 3.125(c).

u. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

v. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

w. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the white tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

x. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the other tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

y. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

z. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

aa. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

bb. March 11, 2004. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored animal food with chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.125(c).

cc. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good

repair to protect the animals from injury and contain them, and specifically, the back wall of the caracal enclosure was badly rusted and its structural strength compromised o the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

dd. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the front fence of the brown bear enclosure is not secure, and has been structurally compromised to the extent that the male bear can lift the fence up, and could easily escape. 9 C.F.R. § 3.125(a).

ee. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

ff. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the wood of the back wall of the bobcat enclosure was badly rotted and has fallen off of the wall. 9 C.F.R. § 3.125(a).

gg. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, there is a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. 9 C.F.R. § 3.125(a).

hh. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

ii. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the back wall of the serval enclosure was badly rusted and

its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

jj. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

kk. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

7. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127), as follows:

a. March 13, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed Patagonian cavies in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

b. March 13, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed reindeer in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

c. September 5, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed bears in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

d. April 11, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed an adult male caracal in

an enclosure with a single shelter that could not accommodate him, and had no floor. 9 C.F.R. § 3.127(b).

e. September 5, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed five African crested porcupines in an enclosure with two dog-house shelters that could not accommodate all of the animals. 9 C.F.R. § 3.127(b).

f. September 5, 2003. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

g. September 5, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed a sable, an eland, a fallow deer, and a bongo in an enclosure with a single shelter that did not protect all of these animals from mud. 9 C.F.R. § 3.127(b).

h. September 5, 2003. Respondent failed to provide a suitable method to rapidly eliminate excess water for animals housed outdoors, and specifically, a sable, an eland, a fallow deer, and a bongo were housed in an enclosure where the animals were required to stand in mud up to their knees. 9 C.F.R. § 3.127(c).

i. March 11, 2005. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed five African crested porcupines in an enclosure with two dog-house shelters that could not accommodate all of the animals. 9 C.F.R. § 3.127(b).

j. March 11, 2004. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

k. March 11, 2005. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and

to prevent discomfort, and specifically, housed a caracal in an enclosure that could not accommodate him, and had no floor. 9 C.F.R. § 3.127(b).

8. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for feeding in section 3.129 of the Standards (9 C.F.R. § 3.129), as follows:

a. March 13, 2002. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals meat that had been stored in a freezer without any wrapping, leaving it susceptible to freezer burn. 9 C.F.R. § 3.129(a).

b. April 11, 2003. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.129(a).

c. September 5, 2003. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, fruit intended to be offered to animals had been thawed and re-frozen into a large block. 9 C.F.R. § 3.129(a).

d. March 11, 2004. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.129(a).

9. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for sanitation in section 3.131 of the Standards (9 C.F.R. § 3.131), as follows:

a. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the Patagonian cavy enclosure. 9 C.F.R. § 3.131(a).

b. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the

animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

c. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

d. January 9, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the capybara enclosure. 9 C.F.R. § 3.131(a).

e. January 9, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the Patagonian cavy enclosure. 9 C.F.R. § 3.131(a).

f.. April 11, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

g. September 5, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

h. September 5, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

i. December 18, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors,

and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

j.. March 11, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

k. March 11, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

l. March 13, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

## Conclusions of Law

1. By reason of the Findings of Fact set forth above, respondent has willfully violated the Act and the Regulations as set forth in paragraphs 2 through 14 of these Conclusions of Law.

2. On March 13, 2002, respondent willfully violated section 2.40(a) of the Regulations. 9 C.F.R. § 2.40(a).

3. On September 5, 2003, respondent willfully violated section 2.40(b) of the Regulations. 9 C.F.R. § 2.40(b)(1).

4. On March 13, 2002, January 9, 2003, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1) [now 2.131(c)(1)].

5. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.131(c)(2) of the Regulations. 9 C.F.R. § 2.131(c)(2) [now 2.131(d)(2)].

6. On March 13, 2002, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.83).

7. On September 5, 2002, and January 9, 2003, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.84(a)).

8. On April 11, 2003 (two instances), September 5, 2003 (two instances), December 18, 2003 (two instances), March 11, 2004 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.75(c)(1)(i)).

9. On September 5, 2002, January 9, 2003 (five instances), April 11, 2003, September 5, 2003 (nine instances), December 18, 2003, (eight instances), and March 11, 2004 (nine instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125)(a).

10. On March 13, 2002, April 11, 2003, and September 5, 2003 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125)(c).

11. On March 13, 2002 (two instances), September 5, 2002, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(a)).

12. On April 11, 2003, September 5, 2003 (two instances), and March 11, 2004 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(b)).

12. On September 5, 2003, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(c)).

13.On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for feeding in section 3.129 of the Standards (9 C.F.R. § 3.129(a)).

14.On September 5, 2002 (three instances), January 9, 2003 (two instances), April 11, 2003, September 5, 2003 (two instances), December 18, 2003, March 11, 2004 (two instances), and March 13, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for sanitation in section 3.131 of the Standards (9 C.F.R. § 3.131(a)).

## Order

1. Respondent Bodie S. Knapp, his 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 and Standards.
2. Animal Welfare Act license No. 74-C-0533 is hereby revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

---

**In re: PATRICIA MORRIS d/b/a PATS PETS KENNEL.**
**AWA Docket No. 04-0006.**
**Decision and Order.**
**Filed January 26, 2005.**

**AWA - Default.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

## Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent by certified mail sent on February 12, 2004. Respondent signed for the certified letter on February 17, 2004. The letter informed respondent that she must file an answer pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Patricia Morris has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

## Findings of Fact and Conclusions of Law

I

A. Patricia Morris, hereinafter referred to as respondent, is an individual doing business as Pats Pets Kennel, whose address is Rt. 33, Box 36, Woodward, Oklahoma 73801.

B. The respondent, at all times material herein, was licensed and operating as dealers as defined in the Act and the regulations.

C. When the respondent became licensed and annually thereafter, she received a copy of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

II

A. On March 24, 1998, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 24, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));
2. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1)); and
3. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

III

A. On October 7, 1998, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On October 7, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily

cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1));

2. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii)); and

3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)).

IV

On January 13, 1999, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Primary enclosures for dogs were not constructed and maintained so that they enable all surfaces in contact with the animals to be readily cleaned and sanitized, or be replaceable when worn or soiled (9 C.F.R. § 3.6(a)(2)(ix)); and

2. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1)).

V

On May 12, 1999, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)); and

2. Primary enclosures for dogs were not structurally sound and maintained in good repair so that they contain the animals securely and keep other animals from entering the enclosure (9 C.F.R. § 3.6(a)(2)(iii)).

VI

On November 18, 1999, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii));
2. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and
3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)).

VII

A. On June 15, 2000, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On June 15, 2000, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii));
2. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f));
3. Primary enclosures for dogs were not constructed and maintained so that they enable all surfaces in contact with the animals to be readily cleaned and sanitized, or be replaceable when worn or soiled (9 C.F.R. § 3.6(a)(2)(ix)); and

3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)); and

4. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

VIII

A. On March 8, 2001, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 8, 2001, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

2. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of excessive rust that prevents the required cleaning and sanitization and that affects the structural strength of the surface (9 C.F.R. § 3.1(c)(1)(i));

3. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

4. The surfaces of indoor floor areas of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture (9 C.F.R. § 3.3(e)(1)(I));

5. Dogs in outdoor housing facilities were not provided with adequate protection from the elements and were not provided with clean, dry, bedding material when the ambient temperature was below 50 degrees Fahrenheit (9 C.F.R. § 3.4(b)); and
6. Watering receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.10).

IX

On October 4, 2001, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));
2. The surfaces of indoor floor areas of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture (9 C.F.R. § 3.3(e)(1)(I));
3. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and
4. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

## Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

## Order

1. Respondent, her 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 and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury;

(b) Failing to provide sufficient space for animals in primary enclosures;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(e) Failing to provide a suitable method for the rapid elimination of excess food and animal wastes from housing facilities for animals;

(f) Failing to maintain primary enclosures for animals in a clean and sanitary condition; and

(g) Failing to provide for adequate running potable water for the animals' drinking needs, for cleaning, and for carrying out other husbandry requirements.

2. The determination of the amount of the civil penalty to be assessed is reserved, pending receipt of evidence of reasonableness of the amount requested, considering the size of the business, gravity of the violations, the good faith of the licensee, history of prior violations, if any and any other factors material to the amount which should be imposed. Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 1, 2005. - Editor]

---

**In re: MICHAEL PITTMAN, AN INDIVIDUAL, a/k/a "SLICK" PITTMAN, WAYNE PITTMAN and ROGER TRENT PITTMAN.**
**AWA Docket No. 04-0022.**
**Decision and Order as to Michael Pittman.**
**Filed March 11, 2005.**

**AWA - Default.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act.

On August 24, 2004, the Hearing Clerk served respondent Michael Pittman with copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), by certified mail, return receipt requested. The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are all admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

## Findings of Fact

1. Respondent Michael Pittman (also known as "Slick" Pittman, Wayne Pittman, and Roger Trent Pittman) is an individual whose addresses are 510 Sassafras Trail, Ravenden Springs, Arkansas 72460, and 101 Pierce Road, Ravenden, Arkansas 72459. At all times mentioned herein, said respondent was operating as a dealer as that term is defined in the Act, without holding an Animal Welfare Act license.

2. Respondent operates a moderately-sized business, wherein he obtains dogs (including random-source dogs) for sale to other dealers. The violations alleged in this complaint include serious instances of noncompliance with the licensing regulations. Respondent has not shown good faith, in that he has ignored the licensing regulations. Respondent does not have a history of previous violations.

Respondent's violations alleged herein strike at the very heart of the Animal Welfare Act: the regulation of dealers and the protection of pet owners.

3. Between approximately May 2002 and March 2003, respondent operated as a dealer, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so, as follows:

a. May 8, 2001. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of eight dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer, as that term is defined in the Act and the Regulations. Mr. Baird resold one of the eight dogs, a male black Labrador retriever (No. 34362) to East Tennessee State University, Johnson City, Tennessee, for use in research. On or about May 25, 2001, researchers at East Tennessee State University determined that the dog was likely someone's pet (as it had received an expensive medical procedure), and notified the U.S. Department of Agriculture.

b. January 15, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of nine dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

c. January 31, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of four dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

d. March 1, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of one dog, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

## Conclusions of Law

1. Between approximately May 2002 and March 2003, respondent operated as a dealer, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)), as follows:

a. May 8, 2001. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of eight dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer, as that term is defined in the Act and the Regulations. Mr. Baird resold one of the eight dogs, a male black Labrador retriever (No. 34362) to East Tennessee State University, Johnson City, Tennessee, for use in research. On or about May 25, 2001, researchers at East Tennessee State University determined that the dog was likely someone's pet (as it had received an expensive medical procedure), and notified the U.S. Department of Agriculture.

b. January 15, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of nine dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

c. January 31, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of four dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

d. March 1, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of one dog, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

## Order

1. Respondent, his 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 and Standards.

2. Respondent Michael Pittman is assessed a civil penalty of $6,050, to be paid by certified check or money order made payable to the Treasurer of the United States within 60 days of the entry of this order.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142

and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 25, 2005. - Editor]

---

**In re: SUSAN DEFRANCESCO and EAST COAST EXOTICS, INC., a CONNECTICUT CORPORATION.**
**AWA Docket No. 04-0010.**
**Decision and Order.**
**Filed February 8, 2005.**

**AWA - Default**.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

## Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by U.S. Mail on April 8, 2004. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, are admitted as set forth herein by respondents' failure to file an answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions of Law**

I

A. Susan DeFrancesco is an individual whose mailing address is P.O. Box 364, Monroe, Connecticut 06468. Ms. DeFrancesco owns a trailer which is located at 29 Park Street, Milford, Connecticut 06460. Ms. DeFrancesco also operates under the business name of Wildlife Adventures Parties.

B. East Coast Exotics, Inc. is a Connecticut corporation. East Coast Exotics, Inc. has the same mailing address as Ms. DeFrancesco which is P.O. Box 364, Monroe, Connecticut 06468.

C. Ms. DeFrancesco as the owner, directed, managed and controlled the actions of East Coast Exotics. At all material times, Ms. DeFrancesco doing business as Wildlife Adventure Parties and East Coast Exotics (hereafter "Respondents") operated as an exhibitor as defined in the Act and the regulations.

D. The Respondents were previously licensed under the Animal Welfare Act. While the respondents were licensed they received annually copies of the Act, the regulations and standards issued thereunder and agreed in writing to comply with them. The Respondents were the subject of a previous complaint regarding their violations of the Act, regulations and standards. On or about July 1, 2000, the Respondents' license was suspended for 70 days and continuing thereafter until the Respondents comply with the order which required them to pay $20,000 and to cease and desist from violating the Act and regulations. See 59 *Agric. Dec.* 97 (2000). The Respondents have failed to pay the civil penalty so the license suspension has continued.

II

A. Since at least July 10, 2001, the Respondents have operated as an exhibitor as defined in the Act and the regulations, without having

obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The Respondents' violated the Act and regulations by exhibiting animals as listed below.

1. On or about July 10, 2001, the Respondents exhibited animals at the Landmark Academy Early Learning Center in Redding, Connecticut.

2. On or about August 16, 2001, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

3. On or about October 11, 2001, the Respondents exhibited animals at the Bright Horizons Family Solutions in Sheldon, Connecticut.

4. On or about June 17, 2002, the Respondents exhibited animals at Kindercare in Glastonbury, Connecticut.

5. On or about June 25, 2002, the Respondents exhibited animals at the Bright Horizons Family Solutions in Sheldon, Connecticut.

6. On or about July 2, 2002, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

7. On or about July 2, 2002, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

8. On or about April 7, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

9. On or about April 14, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

10. On or about April 28, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

11. On or about May 5, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

12. On or about May 12, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

13. On or about May 12, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

14. On or about July 23, 2003, the Respondents exhibited animals at Camp Totokot in Branford, Connecticut.

15. On or about January 21, 2004, the Respondents exhibited animals at the Greenwich Catholic School in Greenwich, Connecticut.

## Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondents have violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

## 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 Act and the regulations issued thereunder, and in particular, shall cease and desist from exhibiting animals without a licence.

2. The respondents are jointly and severally assessed a civil penalty of $17,600, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondents are disqualified from obtaining a license for five years from the effective date of this order. The Respondents' disqualification from obtaining a license shall continue until the respondents pay the civil penalty that was assessed in *In re Susan DeFrancesco and East Coast Exotics, Inc.*, 59 *Agric. Dec.* 97 (2000) and the civil penalty assessed in this case in full and any court costs that incurred in trying to collect the civil penalties from the respondents.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 9, 2005. - Editor]

_____

**In re: ERICA NICOLE deHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE d/b/a BUNDLE OF JOY KENNEL AND RICKY deHAAN, AN INDIVIDUAL, ERICA NICOLE AVERY, AN INDIVIDUAL.**
**AWA Docket No. 04-0004**
**Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, d/b/a Bundle of Joy Kennel.**
**March 25, 2005.**

**AWA – Default.**

Bernadette Juarez, for Complainant.
Respondent, Pro Se.
*Decision and Order filed by Administrative Law Judge Jill S. Clifton.*

## Procedural History

[1] This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by the Complaint filed on December 5, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Animal Welfare Act and the Regulations and Standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).
[2] The Hearing Clerk sent to respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, on December 9, 2003, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The accompanying letter of service advised respondents that they would have 20 days from receipt in which to file an answer to the Complaint.

[3] Respondent Erica Nicole deHaan, also known as Nicole deHaan, was served with the Complaint and accompanying documents on December 13, 2003, when she signed to receive the certified mailing addressed to her.

[4] For this type of case, the only response to a Complaint authorized by the Rules of Practice is an ***answer***. Respondent Erica Nicole deHaan failed to file an ***answer*** to the Complaint as required; to this day, she still has not filed an ***answer*** to the Complaint.

[5] On December 22, 2003, according to respondent Erica Nicole deHaan, she sent a Motion to Dismiss to the Hearing Clerk. No such Motion was filed in the record until January 26, 2004, when respondent Erica Nicole deHaan filed a Motion to Dismiss, enclosing a copy of the Motion to Dismiss which she states she had already filed, together with color copies of United States Postal Service documents showing deliveries to the Hearing Clerk on December 29, 2003 and on December 31, 2003. She states that she sent 3 items for the 2 cases, "for this case and another case that I am forced to deal with." The other case may be AWA Docket No. 03-0010. The record file of AWA Docket No. 03-0010 also does not contain the Motion to Dismiss which she states she had already filed.

[6] Assuming respondent Erica Nicole deHaan did send a Motion to Dismiss to the Hearing Clerk on December 22, 2003, her timely response avails nothing, because she does not deny the allegations of the Complaint. Further, both of her Motions to Dismiss must be and hereby are denied. Under the Rules of Practice, any motion will be entertained ***other than a motion to dismiss*** on the pleading. *See* 7 C.F.R. § 1.143(b)(1).

[7] On January 8, 2004, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), moved for adoption of a decision and order by reason of admission of facts against Respondent Erica Nicole deHaan. [8] The Hearing Clerk sent to Respondent Erica Nicole deHaan, on January 9, 2004, by certified mail, return receipt requested, a copy of APHIS's motion, together with a copy of the proposed decision and order by reason of admission of facts against respondent Erica Nicole deHaan,

and an accompanying letter of service that advised her that she would have 20 days from receipt in which to file objections.

[9] Respondent Erica Nicole deHaan was served with APHIS's motion for a decision and order against her, together with the proposed decision and order by reason of admission of facts, on January 21, 2004, when she signed to receive the certified mailing addressed to her.

[10] Respondent Erica Nicole deHaan failed to file ***objections*** to the proposed decision and order within 20 days after service, as required; to this day, she still has not filed ***objections*** to the proposed decision and order. *See* 7 C.F.R. §1.139. Her Motion to Dismiss filed January 26, 2004, does not constitute meritorious ***objections***; furthermore, both of her Motions to Dismiss have been denied. *See* paragraph [6].

[11] On February 6, 2004, this case was reassigned, to me.

[12] The Rules of Practice provide that the failure to file an answer within 20 days after service *(see* 7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

## Findings of Fact

[13] Respondent Erica Nicole deHann, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, doing business as Bundle of Joy Kennel, hereinafter referred to as respondent Erica Nicole deHann, is an individual.

[14] Respondent Erica Nicole deHaan's address is Rt. 3 Box 209-A, Ava, Missouri 65608.

[15] APHIS officials have determined that, at all material times mentioned herein, respondent Er ica Nicole deHaan was operating as a dealer, as defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (Act), and the Regulations (9 C.F.R. § 1.1 *et seq.*) (Regulations).

[16] On June 3, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 4 Boston Terriers, to Puppy Love of Virginia, Inc.

[17] On June 10, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Pug, 1 Eskimo, 4 Chihuahuas, and 2 Bichon Frise, to Puppy Love of Virginia, Inc.

[18] On July 1, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Golden Retrievers and 2 Maltese, to Puppy Love of Virginia, Inc.

[19] On July 8, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 6 Eskimos, to Puppy Love of Virginia, Inc.

[20] On July 29, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Basset Hound, 1 Bichon Frise, and 2 Boston Terriers, to National Breeders Association, Inc.

[21] On August 5, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed and sold dogs in commerce, for resale for use as pets, specifically, 1 Chihuahua, 3 Pekingese, and 1 Cocker Spaniel, to Puppy Love of Virginia, Inc.

[22] On August 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Doberman Pinscher, 1 Wheaten Terrier, 1 Old English Sheepdog, 1 Shiba Inu, 1 Schnauzer, 1 Chihuahua, 2 Bichon Frise, 4 Labradors, 1 Cocker Spaniel, and 1 Wheaten Terrier, to National Breeders Association, Inc.

[23] On August 12, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 4 ShihTzus, 2 Golden Retrievers, 1 Pomeranian, 1 Poodle, 1 Dachshund, and 2 West Highland White Terriers, to Puppy Love of Virginia, Inc.

[24] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Golden Retriever, 1 Pug, 2 Cocker Spaniels, 2 Boxers, 1 Sheltie, 1 Pomeranian, 2 ShihTzus (Shitzu), 2 Labradors, and 1 Poodle, to National Breeders Association, Inc.

[25] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Basset Hound to Bahuaka, Inc.

[26] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 5 ShihTzus, to Stillwell Pets & Quality Pups.

[27] On August 19, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Poodles and 2 Dachshunds, to Puppy Love of Virginia, Inc.

[28] On August 20, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Basset Hound, 3 Labradors, 2 Bichon Frise, 1 Poodle, 2 Chihuahuas, 2 ShihTzus (Shitzus), 2 Golden Retrievers, and 1 Cocker Spaniel, to National Breeders Association, Inc.

[29] On August 21, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 ShihTzu, to Stillwell Pets & Quality Pups.

[30] On August 26, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Yorkshire Terriers, 1 Sheltie, and 2 Chi, to National Breeders Association, Inc.

[31] On or about September 30, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Rat Terrier, to Pets and the City, Inc.

[32] On or about October 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold 6 dogs in commerce, for resale for use as pets, including 1 Sky Terrier, to Pets and the City, Inc.

[33] On October 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Rat Terrier and 1 American Eskimo, to United Pet Supply, Inc.

[34] On October 7, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Dachshunds and 1 Jack Russell Terrier, to Precious Pet Cottage, Inc.

[35] On October 7, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Rat Terrier, to PetLand, Inc., Orlando East.

[36] On October 14, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Dachshunds, to Precious Pet Cottage, Inc.

## Conclusions

[37] The Secretary of Agriculture has jurisdiction.

[38] During the approximately 4-month period from June 3, 2003 through October 14, 2003, as shown in the Findings of Fact, respondent Erica Nicole deHaan was operating as a dealer without being licensed, in willful violation of the Animal Welfare Act, as amended, particularly 7 U.S.C. §§ 2131-2134, and the Regulations, particularly 9 C.F.R. § 2.1(a)(1).

[39] During that time, as shown in the Findings of Fact, Respondent Erica Nicole deHaan sold 116 dogs in commerce, for resale for use as pets, while operating as a dealer without being licensed.

[40] The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

[41] Under these circumstances, $3,480.00 is a reasonable and appropriate civil penalty for these 116 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

**Order**

[42] Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

[43] Respondent Erica Nicole deHaan is assessed a civil penalty of $3,480.00, which she shall pay by cashier's check or money order, made payable to the order of "**Treasurer of the United States**", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent shall indicate that payment is in reference to **AWA Docket No. 04-0004**.

[44] This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order as to respondent Erica Nicole deHaan by reason of admission of facts shall be served by the Hearing Clerk upon each of the parties.

* * *

## APPENDIX A

**7 C.F.R.**:

### TITLE 7—-AGRICULTURE

### SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

### PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

### SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

### ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

### VARIOUS STATUTES

. . .

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing

a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a

petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995]

7 C.F.R. § 1.145

---

**In re: ERICA NICOLE deHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; and RICKY deHAAN, AN INDIVIDUAL.**
**AWA Docket No. 04-0004.**
**Second Decision and Order as to Erica Nicole Dehaan, F/k/a Erica Nicole Mashburn, f/k/a Erica Nicole Avery, an Individual, d/b/a Bundle of Joy Kennel.**
**Filed April 5, 2005.**

**AWA - Default**.

Bernadette Juarez, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

## Procedural History

[1] The parties participated in a teleconference with me on April 5, 2004. The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, was represented by Bernadette R. Juarez, Esq. Respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, represented herself. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, took responsibility for the alleged violations that were not addressed in my Decision and Order issued on March 25, 2004.

[2] This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by the Complaint filed on December 5, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Animal Welfare Act and the Regulations and Standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

[3] The Hearing Clerk sent to respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, on December 9, 2003, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The accompanying letter of service advised respondents that they would have 20 days from receipt in which to file an answer to the Complaint.

[4] Respondent Erica Nicole deHaan, also known as Nicole deHaan, was served with the Complaint and accompanying documents on December 13, 2003, when she signed to receive the certified mailing addressed to her.

[5] For this type of case, the only response to a Complaint authorized by the Rules of Practice is an ***answer***. Respondent Erica Nicole deHaan failed to file an ***answer*** to the Complaint as required; to this day, she still has not filed an ***answer*** to the Complaint.

[6] On December 22, 2003, according to respondent Erica Nicole deHaan, she sent a Motion to Dismiss to the Hearing Clerk. No such Motion was filed in the record until January 26, 2004, when respondent Erica Nicole deHaan filed a Motion to Dismiss, enclosing a copy of the Motion to Dismiss which she states she had already filed, together with color copies of United States Postal Service documents showing deliveries to the Hearing Clerk on December 29, 2003 and on December 31, 2003. She states that she sent 3 items for the 2 cases, "for this case and another case that I am forced to deal with." The other case may be AWA Docket No. 03-0010. The record file of AWA Docket No. 03-0010 also does not contain the Motion to Dismiss which she states she had already filed.

[7] Assuming respondent Erica Nicole deHaan did send a Motion to Dismiss to the Hearing Clerk on December 22, 2003, her timely response avails nothing, because she does not deny the allegations of the Complaint. Further, both of her Motions to Dismiss must be and hereby are denied. Under the Rules of Practice, any motion will be entertained ***other than a motion to dismiss*** on the pleading. *See* 7 C.F.R. § 1.143(b)(1).

[8] On January 8, 2004, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), moved for adoption of a decision and order by reason of admission of facts against Respondent Erica Nicole deHaan.

[9] The Hearing Clerk sent to Respondent Erica Nicole deHaan, on January 9, 2004, by certified mail, return receipt requested, a copy of APHIS's motion, together with a copy of the proposed decision and order by reason of admission of facts against respondent Erica Nicole deHaan, and an accompanying letter of service that advised her that she would have 20 days from receipt in which to file objections.

[10] Respondent Erica Nicole deHaan was served with APHIS's motion for a decision and order against her, together with the proposed decision and order by reason of admission of facts, on January 21, 2004, when she signed to receive the certified mailing addressed to her.

[11] Respondent Erica Nicole deHaan failed to file ***objections*** to the proposed decision and order within 20 days after service, as required; to this day, she still has not filed ***objections*** to the proposed decision and order. *See* 7 C.F.R. §1.139. Her Motion to Dismiss filed January 26, 2004, does not constitute meritorious ***objections***; furthermore, both of her Motions to Dismiss have been denied. *See* paragraph [6].

[12] On February 6, 2004, this case was reassigned, to me.

[13] The Rules of Practice provide that the failure to file an answer within 20 days after service *(see* 7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

## Findings of Fact

[14] Respondent Erica Nicole deHann, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, doing business as Bundle of Joy Kennel, hereinafter referred to as respondent Erica Nicole deHann, is an individual.

[15] Respondent Erica Nicole deHaan's address is Rt. 3 Box 209-A, Ava, Missouri 65608.

[16] APHIS officials have determined that, at all material times mentioned herein, respondent Erica Nicole deHaan was operating as a dealer, as defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (Act), and the Regulations (9 C.F.R. § 1.1 *et seq.*) (Regulations).

[17] On April 1, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Labradors, 4 Pugs, and 3 Eskimos, to Puppy Love of Virginia, Inc.

[18] On April 8, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Pug, and 1 Golden Retriever, to Puppy Love of Virginia, Inc.

[19] Ricky deHaan, an individual, is the minor child of respondent Erica Nicole deHaan.

## Conclusions

[20] The Secretary of Agriculture has jurisdiction.

[21] During the approximately 1-week period from April 1-8, 2003, as shown in the Findings of Fact, respondent Erica Nicole deHaan was operating as a dealer without being licensed, in willful violation of the Animal Welfare Act, as amended, particularly 7 U.S.C. §§ 2131-2134, and the Regulations, particularly 9 C.F.R. § 2.1(a)(1).

[22] During that time, as shown in the Findings of Fact, respondent Erica Nicole deHaan sold 12 dogs in commerce, for resale for use as pets, while operating as a dealer without being licensed.

[23] The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

[24] Under these circumstances, $360.00 is a reasonable and appropriate civil penalty for these 12 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

[25] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, should be dismissed.

## Order

[26] Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

[27] Respondent Erica Nicole deHaan is assessed a civil penalty of $360.00, which she shall pay by cashier's check or money order, made payable to the order of "**Treasurer of the United States**", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent shall indicate that payment is in reference to **AWA Docket No. 04-0004**.

[28] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, are hereby dismissed.

[29] This Second Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Second Decision and Order as to respondent Erica Nicole deHaan by reason of admission of facts shall be served by the Hearing Clerk upon each of the parties.

---

**In re: LARRY DARRELL WINSLOW d/b/a BEAR BREEDERS, INC. and BETH THOMPSON-WINSLOW d/b/a BEAR BREEDERS, INC.**
**AWA Docket No. 04-0035.**
**Decision and Order.**
**Filed April 27, 2005.**

**AWA - Default**.

Bernadette Juarez, for Complainant.
Respondents, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq.*).

On October 29, 2004, the Hearing Clerk sent to respondents Larry Darrell Winslow and Beth Thompson-Winslow ("respondents"), by regular mail, copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted

by the Secretary (7 C.F.R.§ 1.130 *et seq.*).[1] Respondents were informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Neither respondent filed an answer within the time prescribed in the Rules of Practice; however, the Respondent Larry Darrell Winslow telephonically requested leave to file his answer out of time, advising that he was without knowledge of the proceedings against him and that he is a blind, disabled and indigent veteran now separated and estranged from his wife. By Order dated March 23, 2005, he was given leave to file his answer out of time. He has since filed an answer. No response has been received from the Respondent Beth Thompson-Winslow.

Thus, the material facts alleged in the complaint are admitted by the said respondent Beth Thompson-Winslow's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

## Findings of Fact

1. Respondent Beth Thompson-Winslow is an individual, doing business as Bear Breeders, Inc., a partnership or unincorporated association, and whose mailing address 24 Lawrence 236, Black Rock, Arkansas 72415. At all times herein said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 71-A-0778, issued to "Larry Winslow & Beth Thomspon-Winslow DBA: Bear Breeders Inc." On October 3, 2004, Animal Welfare Act license number 71-A-0778 expired because it was not renewed.

---

[1]On September 29, 2004, the Hearing Clerk sent respondents, by certified mail, return receipt requested, copies of the complaint and Rules of Practice. The United States Postal Service marked each mailing "refused" and returned the mailings to the Hearing Clerk on October 12, 2004. See Domestic Return Receipt for Article Number 7003 2260 0005 5721 3212 (respondent Larry Darrell Winslow); Domestic Return Receipt for Article Number 7003 2260 0005 5721 3205 (respondent Beth Thompson-Winslow).

2. APHIS personnel conducted inspections of respondents' facilities, records and animals for the purpose of determining respondents' compliance with the Act and the Regulations and Standards on January 24, 2003, July 25, 2003 (attempted inspection), and January 26, 2004 (attempted inspection).

3. On November 20, 2002, respondent Beth Thompson Winslow ("respondent") received an official warning notice from complainant for alleged violations of the Regulations, documented in Animal Welfare investigation No. AR03002-AC.

4. On January 24, 2003, respondent failed to identify all live dogs and cats on the premises, and specifically, failed to identify, by any means, at least six cats. (9 C.F.R. § 2.50(a)).

5. On January 24, 2003, respondent failed to maintain records that fully and accurately disclose information concerning cats and dogs, and specifically, failed to maintain, and make available for inspection, records concerning respondents' nine adult dogs and nine adult cats. (9 C.F.R. § 2.75(a)(1)).

6. On January 24, 2003, respondent failed to maintain records that fully and accurately disclose information concerning the disposition of cats and dogs, and specifically, the disposition records for seven puppies and five kittens were incomplete; all of the records lacked the animals' official USDA number and five records lacked the buyers' or receivers' complete address or USDA Animal Welfare Act license or registration number. (9 C.F.R. § 2.75(a)(1)(iv)).

7. On July 25, 2003, respondent failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondents' animal facilities. (9 C.F.R. § 2.126(a)).

8. On January 26, 2004, respondent failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondents' animal facilities. (9 C.F.R. § 2.126(a)).

9. On January 24, 2003, respondent failed to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. Respondent failed to store food supplies in a manner that protects the food from spoilage, contamination, and vermin infestation by failing to keep food supplies in containers with tightly fitting lids, and specifically, the plastic food container used to store food for the animals lacked a lid. (9 C.F.R. §§ 2.100(a), 3.1(d)).

b. Respondent failed to maintain indoor housing facilities and any other surfaces in contact with the animals that are impervious to moisture, and specifically, housed an adult Miniature Pinscher in two rooms of respondents' home that had floors, walls and furniture that were not impervious to moisture. (9 C.F.R. §§ 2.100(a), 3.2(d)).

c. Respondent failed to house breeds of dogs that are not acclimated to the temperatures prevalent in the area or that cannot tolerate the prevalent temperature without stress or discomfort (such as short-haired breeds in cold climates) in outdoor facilities as specifically approved by the attending veterinarian, and specifically, housed seven adult, short-haired Miniature Pinschers in outdoor facilities without an auxiliary heat source when the ambient temperature was approximately 15 degrees Fahrenheit, contrary to respondents' attending veterinarian's approved outdoor housing for these animals. (9 C.F.R. §§ 2.100(a), 3.4(a)).

d. Respondent failed to provide dogs and cats housed outdoors with adequate shelter from the elements, and specifically, housed nine adult dogs and nine adult cats in outdoor enclosures that contained shelters with little or no bedding when the ambient temperature was approximately 15 degrees Fahrenheit; the shelters provided to nine adult dogs also lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(1), (3), (4)).

e. Respondent failed to construct surfaces in contact with animals housed outdoors that are impervious to moisture, and specifically, housed nine adult cats in an outdoor enclosure that allowed access to respondents' home, thereby placing the animals in contact with surfaces, such as a floor, walls, and other items, that were not impervious to moisture. (9 C.F.R. §§ 2.100(a), 3.4(c)).

f. Respondent failed to construct and maintain primary enclosures that protect dogs and cats from injury, and specifically, housed nine adult dogs and nine adult cats in primary enclosures that contained,

at least one of the following: unprotected electrical cords, light receptacles, and/or an extraneous glass light bulb. (9 C.F.R. §§ 2.100(a), 3.1(a), 3.6(a)(2)(ii)).

g. Respondent failed to use food receptacles for dogs and cats, and specifically, fed adult Miniature Pinschers by scattering dog food on the concrete in front of the shelters. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondent failed to remove excreta and food waste from primary enclosures daily to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosure and to reduce disease hazards, insects, pests, and odors, and specifically, the litter pans used by nine adult cats had excessive excreta that had accumulated over, at least, two days and the exercise pen used by nine adult Miniature Pinschers had several months worth of accumulated excreta. (9 C.F.R. §§ 2.100(a), 3.11(a)).

## Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. On January 24, 2003, respondent willfully violated section 2.50(a) of the Regulations. (9 C.F.R. § 2.50(a)).

3. On January 24, 2003, respondent willfully violated section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)).

4. On January 24, 2003, respondent willfully violated section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)(iv)).

5. On July 25, 2003, respondent willfully violated section 2.126(a) of the Regulations. (9 C.F.R. § 2.126(a)).

6. On January 26, 2004, respondent willfully violated section 2.126(a) of the Regulations. (9 C.F.R. § 2.126(a)).

7. On January 24, 2003, respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 3.1-3.19), as follows:

a. Respondent failed to comply with section 3.1(d) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(d)).

b. Respondent failed to comply with section 3.2(d) of the Standards. (9 C.F.R. §§ 2.100(a), 3.2(d)).

c. Respondent failed to comply with section 3.4(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(a)).

d. Respondent failed to comply with sections 3.4(b)(1), (3), and (4) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(1), (3), (4)).

e. Respondent failed to comply with section 3.4(c) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(c)).

f. Respondent failed to comply with sections 3.1(a), 3.6(a)(2)(ii) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(a), 3.6(a)(2)(ii)).

g. Respondent failed to comply with section 3.9(b) of the Standards. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondent failed to comply with section 3.11(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.11(a)).

## Order

1. Respondent, her 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 and Standards.

2. Respondent Beth Thompson-Winslow is assessed a civil penalty of $3,052. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 04-0035.

3. Respondent's Animal Welfare Act license (Animal Welfare Act license number 71-A-0778) is revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final June 29, 2005-Editor]

---

**In re: MARY JEAN WILLIAMS, AN INDIVIDUAL;**
**JOHN BRYAN WILLIAMS, AN INDIVIDUAL**
**and DEBORAH ANN MILETTE, AN INDIVIDUAL**
**AWA Docket No. 04-0023.**
**Filed April 28, 2005.**

**AWA - Default.**

Colleen Carroll, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This action was commenced on August 19, 2004 by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, under the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq.*, hereafter the "Act"), by a complaint alleging that the Respondents willfully violated the Act.

Service was effected upon The Respondent John Bryan Williams by certified mail on August 25, 2004. Service upon the Respondent Mary Jean Williams was attempted by certified mail, but was returned marked "unclaimed" after which she was served by remailing by regular mail on October 7, 2004. The original attempt at serving the Respondent Deborah Ann Milette by certified mail was unsuccessful and was returned as "undeliverable". After securing a new address, service was effected by certified mail on February 18, 2005.

Each of the Respondents were advised in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would

constitute an admission of that allegation. None of the Respondents answered within the time prescribed by the Rules of Practice[1], and the material facts alleged in the complaint are admitted by reason of the Respondent's failure to answer in a timely fashion and are adopted and set forth herein as Findings of Fact.

## Findings of Fact

1. Respondent Mary Jean Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447 and who at all times mentioned herein was a dealer as that term is defined in the Act and the Regulations.
2. Respondent John Bryan Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447 and who at all time mentioned herein as a dealer as that term is defined in the Act and the Regulations.
3. Respondent Deborah Ann Milette is an individual whose mailing address is 14 County Home Bridge Road, Warrensburg, New York 12885. At all times mentioned herein, the said respondent was a licensed exhibitor as that term is defined in the Act and the Regulations and held Animal Welfare Act License Number 21-C-2018.
4. The respondents have small businesses. The gravity of the violations alleged in the complaint is great and resulted in the death of a young tiger. The respondents have no record of prior violations.
5. On or about September 27 and 28, 2002, Respondents Mary Jean Williams and John Bryan Williams operated as dealers, as that term is defined in the Act and the Regulations, without obtaining a license from the Secretary to do so, and specifically, said respondents, while unlicensed, transported a young tiger for use in exhibition, from Hennepin, Illinois to Bloomington, Illinois.

---

[1] The Respondent Deborah Ann Milette did send a letter dated April 9, 2005 apparently after receiving a copy of the Complainant's Motion for Adoption of Proposed Decision in which she denies culpability; however, it was not received within the time prescribed for filing an answer. No good cause was advanced for its untimeliness and the facts alleged in the complaint will be deemed admitted pursuant to Rule 1.136(c).

6. On September 27, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger, and specifically, although none of the respondents is a veterinarian, the Respondent John Bryan Williams administered a sedative solution provided by the Respondent Deborah Ann Milette to the young tiger, with the approval and acquiescence of the Respondent Mary Jean Williams.
7. On September 27, 2002, Respondents Mary Jean Williams, John Bryan Williams and Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling a tiger safely.
8. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, specifically lacking any plan to insure that a young tiger could not escape from its travel enclosure or to provide a plan for the animal's safe recapture.
9. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically lacked the ability to adequately care for and handle a young tiger themselves and failed to employ other personnel capable of doing so.
10. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, specifically allowing a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the animal.

## Conclusions of Law

1. On September 27 and 28, 2002, Respondents Mary Jean Williams and John Bryan Williams operated as dealers as that term is defined in the Regulations, without obtaining a license from the Secretary to do so, in willful violation of 9 CFR §2.1(a)(1), specifically transporting a young tiger for use in exhibition from Hennepin, Illinois to Bloomington, Illinois.
2. On September 27, 2002, Respondents Mary Jean Williams, John Bryan Williams and Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals or to handle animals as expeditiously as possible in a manner that would not cause unnecessary discomfort, behavioral stress or physical harm, specifically, although none of the respondents is a veterinarian, John Bryan Williams administered a sedative solution provided by the Respondent Deborah Ann Milette to a young tiger with the approval and acquiescence of the Respondent Mary Jean Williams in willful violation of 9 CFR §2.131(a)(1) and 2.40(a).
3. On September 27, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel capable of safely handling a young tiger in willful violation of 9 CFR § 2.40(b).
4. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, specifically lacking plans to prevent a young tiger from escaping its travel enclosure, or plans to provide for the animals safe recapture in willful violation of 9 CFR § 2.40(b)(2).
5. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, specifically lacking the ability to adequately care for and handle a young tiger themselves and failing to employ other personnel capable of doing so, in willful violation of 9 CFR § 2.40(b)(4).
6. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to handle a young tiger as expeditiously and

carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress or physical harm, specifically allowing a young tiger to exit its transport enclosure and escape into a parking lot of a restaurant, resulting in local authorities shooting and killing the animal, in willful violation of 9 CFR § 2.131(a)(1).

## Order

1. The respondents, their 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 and Standards.
2. Respondent Mary Jean Williams is assessed a civil penalty of Five Thousand Five Hundred Dollars ($5,500.00), to be paid by certified check or money order made payable to the Treasurer of the United States within sixty (60) days of entry of this Order.
3. Respondent John Bryan Williams is assessed a civil penalty of Five Thousand Five Hundred Dollars ($5,500.00), to be paid by certified check or money order made payable to the Treasurer of the United States within sixty (60) days of entry of this Order.
4. Respondent Deborah Ann Milette's Animal Welfare Act License (No. 21-C-0218) is hereby revoked.

The provisions of this Order shall become effective on the first day after this Decision becomes final. The Decision becomes final without further proceedings 35 days after service as provided in § 1.142 and 1.145 of the Rules of Practice.

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

---

**In re: RICHARD MIELKE, AN INDIVIDUAL; KAYE MIELKE, AN INDIVIDUAL; AND MIELKE'S PEKE PATCH, AN UNINCORPORATED ASSOCIATION.**
**AWA Docket No. 05-0006.**
**Decision and Order as to Richard and Kaye Mielke.**
**Filed May 10, 2005.**

**AWA - Default.**

Bernadette Juarez, for Complainant.
Respondents, Pro se.
*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

[1] This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed on December 2, 2004, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards issued thereunder ("Regulations" and "Standards", 9 C.F.R. § 1.1 *et seq.*).

[2] On December 3, 2004, the Hearing Clerk sent to respondents, by certified mail, return receipt requested, copies of the complaint, Rules of Practice and a service letter. Respondents were informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

[3] Respondent Richard Mielke received the complaint on December 11, 2004,[1] and respondent Kaye Mielke received the complaint on December 10, 2004.[2] Respondents Richard Mielke and Kaye Mielke failed to file answers. Thus, the material facts alleged in the complaint, which are admitted by said respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

[4] APHIS filed a Motion for Adoption of Proposed Decision and Order as to Richard Mielke and Kaye Mielke on January 14, 2005, identifying APHIS's request for "the maximum possible civil penalty, $30,800."

---

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3472.

[2] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3489.

The Motion was served on Richard Mielke and on Kaye Mielke on January 24, 2005. Respondents Richard Mielke and Kaye Mielke failed to respond to APHIS's Motion.

[5] APHIS's Motion addresses the Act's guidance for appropriateness of the civil penalty amount. 7 U.S.C. § 2149(b). APHIS states that the size of the business of the person involved is small. APHIS states that the gravity of the violation is serious, because respondents have continued to operate as dealers after their Animal Welfare Act license was revoked. APHIS does not specifically address the good faith of respondents. APHIS shows the history of previous violations to have been those identified in the Consent Decision in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, and assessing a civil penalty of $6,875, of which $5,875 was held in abeyance).

[6] Respondent Kaye Mielke filed a letter, postmarked March 14, 2005 and received by the Hearing Clerk on March 22, 2205, which was too late to be an answer and too late to be a response to APHIS's Motion for a default decision. APHIS filed a Motion to Strike the letter, on March 30, 2005. The Motion is denied. Perhaps APHIS will respond to the questions respondent Kaye Mielke asks.

## Findings of Fact

[7] Respondent Richard Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[8] Respondent Kaye Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[9] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal

Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation.

[10] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation.

[11] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation.

[12] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation.

[13] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation.

[14] Respondents Richard Mielke and Kaye Mielke were respondents in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, assessing civil penalty of $6,875, of which $5,875 was held in abeyance provided that respondents complied with the provisions of the Act and the Regulations during an 18 month "probation period," and ordering respondents to cease and desist from future violations of the Act and Regulations and Standards).

[15] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order contained in the Consent Decision described above in paragraph [14].

## Conclusions

[16] The Secretary has jurisdiction in this matter.

[17] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[18] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[19] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[20] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male

Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[21] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[22] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in *In re Richard Mielke, and individual, Kaye Mielke, and individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision).

[23] The cease and desist order is paragraph one of the "Order" found on pages 10-11 of the Consent Decision and states: "Respondents, their 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 and Standards issued thereunder."

[24] The maximum civil penalty per offense for knowing failure to obey a cease and desist order is $1,650. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[25] The maximum civil penalty per violation of the Act is $2,750. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[26] 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. 7 U.S.C. § 2149(b).

[27] Maximum civil penalties are not warranted by the circumstances here. 7 U.S.C. § 2149(b).

[28] Adding the maximum civil penalty for each violation of the Act to the maximum civil penalty for failure to obey a cease and desist order

for the very same violation is not warranted by the circumstances here. 7 U.S.C. § 2149(b).

## Order

[29] Respondents Richard Mielke and Kaye Mielke, their 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 and Standards, and, in particular, shall cease and desist from engaged in activity for which an Animal Welfare Act license is required.

[30] Respondents Richard Mielke and Kaye Mielke are jointly and severally assessed the **$5,875** civil penalty that was held in abeyance in AWA Docket No. 03-0019 (see paragraph [14]), to be paid as described below in paragraph [33].

[31] Respondent Richard Mielke is assessed an **additional $500** civil penalty, for his sale of one dog on June 5, 2004, a male Pekingese, to be paid as described below in paragraph [33].

[32] Respondent Kaye Mielke is assessed an **additional $3,000** civil penalty, for her sale of six dogs on June 5, 2004, three male Pekingese and three female Pekingese, to be paid as described below in paragraph [33].

[33] The **$9,375 total** in civil penalty shall be paid by cashier's check(s) or certified check(s) or money order(s) made payable to order of the **Treasurer of the United States** and forwarded within 30 days from the effective date of this Order by a commercial carrier such as FedEx or

UPS to: Bernadette R. Juarez, Esq.
United States Department of Agriculture
Office of the General Counsel, Marketing Division
Room 2343-South Building
1400 Independence Avenue, SW
Washington, DC 20250-1417

Respondents shall state on their cashier's checks, certified checks or money orders that the payment is in reference to **AWA Docket No. 05-0006**.

[34] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

---

**In re: DEBRA D. TETER, AN INDIVIDUAL d/b/a LUV ME KENNEL; and, MELISSA D. ADAMS, a/k/a MELISSA TETER, AN INDIVIDUAL.**
**d/b/a LUV ME KENNEL.**
**AWA Docket No. 05-0008.**
**Decision and Order as to Debra D. Teter and Melissa D. Adams**
**By Reasons of Admission of Facts.**
**Filed May 18, 2005.**

**AWA – Default.**

Bernadette Juarez, for Complainant.
Respondent, Pro Se.
*Decision and Order by Administrative Law Judge Peter M. Davenport*.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq.*).

On January 11, 2005, the Hearing Clerk sent respondents, by certified

mail, return receipt, copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R.§ 1.130 *et seq.*). Respondents were informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondents actually received the complaint on January 31, 2005. [1]

Respondents failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the complaint, which are admitted by said respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

## Findings of Fact

1. Respondent Debra D. Teter is an individual, doing business as Luv Me Kennel, a partnership or unincorporated association, and whose mailing address Post Office Box 288, Shelbyville, Missouri 63469. At all times herein, said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 43-A-3780, issued to "Debra & Melissa Teter DBA: Luv Me Kennel" On October 29, 2003, said respondent voluntarily terminated Animal Welfare Act license number 43-A-3780.

2. Respondent Melissa D. Adams, also known as Melissa Teter, is an individual, doing business as Luv Me Kennel, a partnership or unincorporated association, and whose mailing address Post Office Box 288, Shelbyville, Missouri 63469. At all times herein, said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 43-A-3780, issued to "Debra & Melissa Teter DBA: Luv Me Kennel" On October

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3632 (respondent Debra Teter); Domestic Return Receipt for Article Number 7003 2260 0005 5721 3649 (respondent Melissa Adams).

29, 2003, said respondent voluntarily terminated Animal Welfare Act license number 43-A-3780.

3. APHIS personnel conducted inspections of respondents' facilities, records and animals for the purpose of determining respondents' compliance with the Act and the Regulations and Standards on June 4, 2003 (120 adult, 4 young animals inspected), June 6, 2003, June 9, 2003 (120 adult, 4 young animals inspected), July 21, 2003 (137 adult, 13 young animals inspected), August 26, 2003 (133 adult animals inspected), September 9, 2003 (125 adult, 17 young animals inspected), October 2, 2003.

4. Respondents violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), by failing have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically:

a. On or about June 4, 2003, through on or about October 2, 2003. Respondents failed to prevent, control, diagnose, and treat ectoparasites, blood parasites and intestinal parasites in dogs. (9 C.F.R.§ 2.40(a),(b)(2)).

b. June 4, 2003. Respondents failed to obtain veterinary treatment for thirty dogs, including: four dogs (Cocker Spaniels and Jack Russell Terriers) that had heavily matted that were nearly matted shut; twenty dogs that had extreme body matts that restricted the animals' normal movement; two dogs that exhibited severe hair loss over a third of their bodies; two dogs that had very loose, discolored stools; one dog that had a severed leg; and, one dog found dead during the inspection that was later diagnosed as suffering from, among other things, E. coli, Parvo virus, and bilateral conjunctivitis. (9 C.F.R. § 2.40(a),(b)(2)).

c. June 6, 2003. Respondents failed to obtain veterinary treatment for no fewer than sixteen dogs, including: seven dogs that had greenish, eye discharge; six dogs that had extreme body matts that restricted the animals' normal movement; two dogs that had severe hair loss over a third of their bodies; several dogs that had very loose, discolored stools; one dog that had a severed leg; and, one Cocker Spaniel that exhibited difficulty defecating or urinating. (9 C.F.R. § 2.40(a),(b)(2)).

d. June 9, 2003. Respondents failed to obtain veterinary treatment

for three dogs with heavily matted eyes such that the eyes were nearly matted shut, dogs with extreme body matts such that restricted normal movement, and one dog housed in the trailer (top run, west side) that appeared lethargic. (9 C.F.R. § 2.40(a),(b)(2)).

e. July 21, 2003. Respondents failed to obtain veterinary treatment for one dog (outdoor facility) that had a sore on its head and very cloudy eyes and one dog (trailer) that appeared to have a fractured leg. (9 C.F.R. § 2.40(a),(b)(2)).

f. On or about July 3, 2003, through on or about September 2, 2003. Respondents failed to obtain veterinary treatment for a Miniature Pinscher with a repeat, vaginal prolapse. (9 C.F.R. § 2.40(a),(b)(2)).

g. August 26, 2003. Respondents failed to obtain veterinary treatment for one small dog (#064053843) that had open wounds on its head and matted eyes, a Bichon Frise (#063631577) that had open wounds on both ears and shoulder area, and a very thin hair coat, and four Bichon Frise (pen #1, trailer) that had sores on their ears. (9 C.F.R. § 2.40(a),(b)(2)).

h. On or about July 3, 2003, through on or about September 4, 2003. Respondents failed to obtain veterinary treatment for Cocker Spaniel that had wounds on her ears, matted eyes, and an open, draining tumor on her belly that dragged on the ground. (9 C.F.R. § 2.40(a), (b)(2)).

i. On or about August 26, 2003, through on or about September 6, 2003. Respondents failed to obtain veterinary treatment for Cocker Spaniel (#063638559) that had open wounds on both ears and matted eyes. (9 C.F.R. § 2.40(a),(b)(2)).

j. September 9, 2003. Respondents failed to obtain veterinary treatment for a Shiba Inu (#051272082) that exhibited difficulty bearing weight on its right foreleg and an adult Bichon Frise (upper pen #15, indoor) that had exposed wounds on the right shoulder. (9 C.F.R. § 2.40(a),(b)(2)).

k. On or about September 9, 2003, through on or about October 2, 2003. Respondents failed to obtain veterinary treatment for: four adult Labrador Retrievers (second outdoor enclosure, westside) that had loose, tan-color stools; five adult Siberian Huskies (first outdoor enclosure, west side) that had loose, tan-color stools; a Bichon Frise (#063631577)

that had open wounds and tissue damage on both ears and hair loss on the right flank; an adult Bichon Frise (#063677262) that had hair loss on the left rear leg and caudal torso area; and a blond-color Cocker Spaniel (lower pen #15, indoor) that had a heavily matted left eye that were nearly swollen shut with cloudy exudate around and in the eye. (9 C.F.R.§ 2.40(a),(b)(2)).

l. October 2, 2003. Respondents failed to obtain veterinary treatment for a female Pug (garage) that appeared thin, weak, and was unstable on her right side and a Westie (trailer) with an open wound on its right front leg. (9 C.F.R. § 2.40(a),(b)(2)).

5. Respondents violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40) by failing to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically:

a. June 4, 2003. Respondents failed to observe and record accurate information related to thirty-four dogs, including four dogs (Cocker Spaniels and Jack Russell Terriers) that had heavily matted eyes, twenty dogs that had extreme body matts, two dogs that exhibited severe hair loss, two dogs that had very loose, discolored stools, one dog whose right rear foot became severed after being wrapped in wire, and, five dogs found dead during the inspection, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

b. June 6, 2003. Respondents failed to observe and record accurate information related to no fewer than sixteen dogs, including seven dogs that had greenish, eye discharge, six dogs that had extreme body matts that restricted the animals' normal movement, two dogs that exhibited severe hair loss over a third of their bodies, several dogs that had very loose, discolored stools, one dog with a severed leg, and, one Cocker Spaniel that exhibited difficulty defecating or urinating, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

c. June 9, 2003. Respondents failed to observe and record accurate information related to three dogs that had heavily matted eyes, dogs with

extreme body matts, and one dog that appeared lethargic, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

d. July 21, 2003. Respondents failed to observe and record accurate information related to one dog that had a sore on its head and very cloudy eyes, and one dog with a fractured leg and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

e. On or about July 21, 2003, through on or about September 2, 2003. Respondents failed to observe and record accurate information related to Miniature Pinscher that had a vaginal prolapse and were, therefore, unable to convey timely and accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

f. August 26, 2003. Respondents failed to observe and record accurate information related to one small dog (#064053843) that had open wounds on its head and matted eyes, a Bichon Frise (#063631577) that had open wounds on both ears and shoulder and a very thin hair coat, and four Bichon Frise (pen #1, trailer) that had sores on their ears, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

g. On or about August 26, 2003, through on or about September 4, 2003. Respondents failed to observe and record accurate information related to a Cocker Spaniel that had wounds on her ears, matted eyes, and an open, draining tumor on her belly that dragged on the ground, and were, therefore, unable to convey timely and accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

h. On or about August 26, 2003, through on or about September 6, 2003. Respondents failed to observe and record accurate information related to a Cocker Spaniel (#063638559) that had open wounds on both ears and matted eyes, and were, therefore, unable to convey timely and

accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

i. September 9, 2003. Respondents failed to observe and record accurate information related to a Shiba Inu (#051272082) that exhibited difficulty bearing weight on its right foreleg and an adult Bichon Frise (upper pen #15, indoor) that had exposed wounds on the right shoulder, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

j. On September 9, 2003, through on or about October 2, 2003. Respondents failed to observe and record accurate information related to four adult Labrador Retrievers (outdoor, westside) that had loose, tan-color stools, five adult Siberian Huskies (outdoor) that had loose, tan-color stools, a Bichon Frise (#063631577) that had open wounds and tissue damage on both ears and hair loss on the right flank, an adult Bichon Frise (#063677262) that had hair loss on the left rear leg an caudal torso area, a blond-color Cocker Spaniel (lower pen #15, indoor) that had a heavily matted left eye that was nearly swollen shut, with cloudy exudate around and in the eye, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

k. October 2, 2003. Respondents failed to observe and record accurate information related to a female Pug (garage) that appeared thin, weak, and was unstable on her right side and a Westie (trailer) that had an open wound on its right front leg, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

6. On or about June 4, 2003, through on or about August 26, 2003, respondents violated section 2.50(a) of the Regulations by failing to identify all live dogs and cats on the premises, and specifically, failed to identify adult dogs and weaned puppies. (9 C.F.R. § 2.50(a)).

7. On September 9, 2003, respondents failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically,

failed to maintain any records in connection with the disposition of a red Cocker Spaniel (#063638559), a blond Cocker Spaniel (with a ruptured tumor on her stomach), and a Miniature Pinscher (#225963560D). 9 C.F.R. § 2.75(a)(1).

8. On September 9, 2003, respondents failed to use Record of Acquisition of Dogs (APHIS Form 7005) and Record of Disposition of Dogs (APHIS Form 7006) to make keep, and maintain information required by the Regulations, and specifically, failed to maintain records in connection with the disposition of a red Cocker Spaniel (#063638559), a blond Cocker Spaniel (with a ruptured tumor on her stomach), and a Miniature Pinscher (#225963560D). 9 C.F.R. § 2.75(a)(2).

9. Respondents violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. On or about June 4, 2003, through on or about June 9, 2003, respondents failed to design and construction housing facilities for dogs so that they are structurally sound and kept in good repair to protect the animals from injury, and specifically, housed dogs in structurally unsound enclosures that previously collapsed injuring or killing several dogs. (9 C.F.R. §§ 2.100(a), 3.1(a)).

b. Respondents failed to provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water other fluids and wastes, and dead animals in a manner that minimizes contamination and disease risks and failed to equip housing facilities with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry, and specifically:

i. June 4, 2003. Respondents failed to remove decomposing dog carcasses including four carcasses in an open trash can and pet taxi and another carcass on the ground. (9 C.F.R. §§ 2.100(a), 3.1(f)).

ii. June 4, 2003. Respondents housed dogs in primary enclosures with excessive standing water, mud, or both, preventing the dogs from being clean and dry. (9 C.F.R. §§ 2.100(a), 3.1(f)).

iii. June 6, 2003. Respondents failed to remove three decaying dog

carcasses located approximately 10 yards from the animal area. (9 C.F.R. §§ 2.100(a), 3.1(f)).

iv. June 6, 2003. Respondents housed all outdoor dogs in primary enclosures with excessive standing water, mud, or both, preventing the dogs from being clean and dry. (9 C.F.R. §§ 2.100(a), 3.1(f)).

c. On October 2, 2003, respondents failed to sufficiently heat indoor housing facilities to protect dogs from temperature or humidity extremes and to provide for their health and well-being, and specifically, failed to provide heat or bedding to all dogs housed in the trailer and seven adult dogs and nine puppies housed in the garage when the overnight and early morning temperatures were in the thirties. (9 C.F.R. §§ 2.100(a), 3.2(a)).

d. Respondents failed to provide dogs housed outdoors with adequate protection from the elements, and specifically:

i. June 4, 2003. Respondents housed approximately forty dogs in outdoor enclosures with shelters that lacked wind and rain breaks and forty other dogs completely lacked shelter from the elements. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

ii. June 6, 2003. Respondents housed breeds of dogs, without express approval from the attending veterinarian, in outdoor facilities that could not tolerate the prevalent temperatures with out stress or discomfort (such as short-haired breeds in cold climates), and specifically, housed recently sheared dogs in outdoor enclosures with forecasted nighttime temperatures in the forties; the dogs appeared wet, cold, and shivered. (9 C.F.R. §§ 2.100(a), 3.4(a)(ii)).

iii. June 6, 2003. Respondents housed approximately thirty dogs in outdoor enclosures that lacked adequate shelter, and in some instances completely lacked shelter from the rain; the rain-soaked dogs shivered and appeared cold. (9 C.F.R. §§ 2.100(a), 3.4(b)).

iv. June 6, 2003. Respondents housed approximately forty dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

v. June 9, 2003. Respondents failed to provide eleven dogs, housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

vi. July 21, 2003. Respondents housed seven dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

vii. July 21, 2003. Respondents failed to provide ten dogs, housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

viii. August 26, 2003. Respondents housed seven dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

ix. On or about September 9, 2003, through on or about October 2, 2003. Respondents housed twelve dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R.§§ 2.100(a), 3.4(b)(3)).

x. On or about September 9, 2003, through on or about October 2, 2003. Respondents failed to provide five Siberian Huskies (outdoor) and eight adult Cocker Spaniels (third outdoor enclosure, westside), with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xi. September 9, 2003. Respondents failed to provide four adult dogs and eleven puppies (garage), housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xii. October 2, 2003. Respondents failed to provide seven adult dogs and nine puppies (garage), housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xiii. October 2, 2003. Respondents failed to provide any bedding to the dogs housed outdoors when the overnight and morning temperatures were in the thirties. (9 C.F.R. §§ 2.100(a), 3.4(b)(1),(4)).

e. On August 26, 2003, respondents failed to provide each dog housed in a primary enclosures with the minimal amount of floor space, and specifically, provided 12 square feet of floor space to four Bichon Frise (pen #1, indoors) that measured 26 inches from the tip of nose to the base of the tail and, therefore, required no fewer than 28.48 square

feet of floor space. (9 C.F.R. §§ 2.100(a), 3.6(c)(1)(i)).

f. Respondent failed to construct and maintain primary enclosures with floors that are constructed in a manner that protects the dogs' feet and legs from injury, and that if of mesh or slatted, construction, do not allow the dogs' feet to pass through any openings in the floor, and specifically:

i. September 9, 2003. Respondents housed eleven puppies in an outdoor enclosure with flooring constructed of 1" by 1" coated wire mesh; APHIS officials observed the feet of no fewer than seven puppies pass through the mesh floor. (9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x)).

ii. October 2, 2003. Respondents housed nine puppies in an outdoor enclosure with flooring constructed of 1" by 1" coated wire mesh; APHIS officials observed the feet of no fewer than three puppies pass through the mesh floor. (9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x)).

g. On June 6, 2003, respondents failed to use food receptacles for dogs that minimized contamination by excreta and pests and that protected the food from rain and snow, and specifically, forty dogs housed outdoors had food receptacles that were muddy, had rain-soaked food and, in some instances, contained soggy food floating in dirty water. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondents failed to offer potable water to dogs as often as necessary to ensure their health and well-being, if potable water is not continually available, in water receptacles that are kept clean and sanitized, and specifically:

i. June 4, 2003. All of the dogs had water contaminated with dirt, green algae, or both. (9 C.F.R. §§ 2.100(a), 3.10).

ii. June 6, 2003. All of the dogs had muddy water and water receptacles. (9 C.F.R. §§ 2.100(a), 3.10).

iii. July 21, 2003. Water receptacles provided to four dogs housed outdoors, were rusty, which prevented sanitization. (9 C.F.R. §§ 2.100(a), 3.10).

i. Respondents failed to remove excreta and food waste from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs contained in the primary enclosures, and to reduce disease hazards, insects, pests and orders, and failed, when

using stream or water to clean the primary enclosure, whether by hosing, flushing, or other methods, to remove dogs unless the enclosure is large enough to ensure the animal will not be harmed, wetted, or distressed in the process, and specifically:

i. June 4, 2003. Excessive feces and waste covered the ground in outdoor enclosures housing dogs and accumulated on grill-type floors and under the enclosures in the trailer housing dogs. (9 C.F.R. §§ 2.100(a), 3.11(a)).

ii. June 6, 2003. A soupy mixture of excessive feces and waste covered the ground in the outdoor enclosures housing dogs, and excessive feces, hair, and waste accumulated on grill-type floors and under the enclosures in the trailer housing dogs, which also smelled of ammonia and fecal matter. (9 C.F.R.§§ 2.100(a), 3.11(a)).

iii. September 9, 2003. Respondents housed four Beagles, eight Cocker Spaniels, four Labrador Retrievers, and five Siberian Huskies in enclosures with excessive accumulations of both formed and loose excreta. (9 C.F.R. §§ 2.100(a), 3.11(a)).

iv. September 9, 2003. Three adult Yorkies and one adult Poodle and her five puppies (indoor enclosures) had wet hair coats as a result of respondents= failure to remove the animals from their enclosures prior to cleaning by hosing, flushing or otherwise. (9 C.F.R. §§ 2.100(a), 3.11(a)).

v. October 2, 2003. Seven adult dogs and nine puppies (garage) had wet hair coats as a result of respondents' failure to remove the animals from their enclosures prior to cleaning by hosing, flushing or otherwise. (9 C.F.R. §§ 2.100(a), 3.11(a)).

vi. October 2, 2003. Respondents failed to remove excessive fecal build-up from the wire stack enclosures in the garage. (9 C.F.R. §§ 2.100(a), 3.11(a)).

j. On June 4, 2004, June 6, 2003, August 26, 2003, September 9, 2003, and October 2, 2003, respondents failed to have enough employees to carry out the level of husbandry practices and care required in the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.12.).

## Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. On or about June 4, 2003, through on or about October 2, 2003, June 4, 2003, June 6, 2003, June 9, 2003, July 21, 2003, on or about July 3, 2003, through on or about September 2, 2003, on or about July 3, 2003, through on or about September 4, 2003, August 26, 2003, on or about August 26, 2003, through on or about September 6, 2003, September 9, 2003, on or about September 9, 2003, through on or about October 2, 2003, and October 2, 2003, respondents willfully violation section 2.40(a) and (b)(2) of the Regulations. (9 C.F.R. § 2.40(a),(b)(2)).

3. On June 4, 2003, June 6, 2003, June 9, 2003, July 21, 2003, on or about July 21, 2003, through on or about September 2, 2003, August 26, 2003, on or about August 26, 2003, through on or about September 4, 2003, on or about August 26, 2003, through on or about September 6, 2003, September 9, 2003, and on September 9, 2003, through on or about October 2, 2003, and October 2, 2003, respondents willfully violated section 2.40(b)(3) of the Regulations. (9 C.F.R. § 2.40(b)(3)).

4. On or about June 4, 2003, through on or about August 26, 2003, respondents willfully violated section 2.50(a) of the Regulations. (9 C.F.R. § 2.50(a)).

5. On September 9, 2003, respondents failed comply with section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)).

6. On September 9, 2003, respondents failed to comply with section 2.275(a)(2) of the Regulations. (9 C.F.R. § 2.75(a)(2)).

7. Respondents willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. On or about June 4, 2003, through on or about June 9, 2003, respondents failed comply with section 3.1(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(a)).

b. On June 4, 2003, and June 6, 2003, respondents failed to comply with section 3.1(f) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(f)).

c. On October 2, 2003, respondents failed to comply with section 3.2(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.2(a)).

d. On June 4, 2003, June 6, 2003, July 21, 2003, August 26, 2003,

and on or about September 9, 2003, through on or about October 2, 2003, respondents failed to comply with section 3.4(b)(3) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

e. On June 6, 2003, respondents failed to comply with section 3.4(a)(ii) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(a)(ii)).

f. On June 6, 2003, June 9, 2003, July 21, 2003, on or about September 9, 2003, through on or about October 2, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.4(b) of the Standards. 9 C.F.R. §§ 2.100(a), 3.4(b).

g. On October 2, 2003, respondents failed to comply with section 3.4(b)(1) and (b)(4) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(1),(4)).

h. On August 26, 2003, respondents failed to comply with section 3.6(c)(1)(i) of the Standards. (9 C.F.R. §§ 2.100(a), 3.6(c)(1)(i)).

i. On September 9, 2003 and October 2, 2003, respondents failed to comply with section 3.6(a)(2)(x) of the Standards. 9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x).

j. On June 6, 2003, respondents failed to comply with section 3.9(b) of the Standards. 9 C.F.R. §§ 2.100(a), 3.9(b).

k. On June 4, 2003, June 6, 2003, and July 21, 2003, respondents failed to comply with section 3.10 of the Standards. (9 C.F.R. §§ 2.100(a), 3.10).

l. On June 4, 2003, June 6, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.11(a) of the Standards. (9 C.F.R.§§ 2.100(a), 3.11(a)).

m. On June 4, 2004, June 6, 2003, August 26, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.12 of the Standards. 9 C.F.R. §§ 2.100(a), 3.12.

## 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 Act and the Regulations and Standards.

2. Respondents Debra D. Teter and Melissa D. Adams are jointly

and severally assessed a civil penalty in the amount of $54,065. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 05-0008.

3. Respondents' Animal Welfare Act license (Animal Welfare Act license number 43-A-3780) is revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

## FEDERAL CROP INSURANCE ACT

## DEFAULT DECISION

**In re: DARRELL J. MEIDINGER.**
**FCIA Docket No. 05-0003.**
**Decision and Order.**
**Filed March 21, 2005.**

**FCIA – Default.**

Donald A. Brittenham, Jr., for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

## DECISION

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the failure of Respondent, Darrell J. Meidinger, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. 1515(h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of four years:

(i) The Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*).
(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).
(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*).
(v)_ The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*).
(vi)_Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*).
(vii)_The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*).
(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities;

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all of the programs listed above shall commence on March 21st, 2005 and shall end on March 21st, 2009. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), a civil fine of $2,000 will be imposed upon the Respondent. This civil fine shall be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner, Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133.

This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

[This Decision and Order became final May 24, 2005.-Editor]

———————

## FEDERAL MEAT INSPECTION ACT

## DEFAULT DECISION

**In re: KIRKLAND'S CUSTOM MEATS AND SLAUGHTER, INC.**
**PPIA Docket No. 05-0001.**
**FMIA Docket No. 05-0001.**
**Default Decision and Order.**
**Filed May 31, 2005**.

**FMIA – PPIA – Default.**

Tracey Manoff, for Complainant.
Respondent, Pro Se.
*Decision and Order filed by Chief Administrative Law Judge Marc.R. Hillson*

This is an administrative proceeding to indefinitely withdraw inspection services from Kirkland's Custom Meats and Slaughter, Inc., pursuant to Sections 8 and 21 of the FMIA (21 U.S.C. §§ 608, 621) and Sections 7 and 18 of the PPIA (21 U.S.C. §§ 456, 467(b)) and in accordance with the Rules of Practice in 7 C.F.R.§§ 1.130 *et seq.* and Part 500 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 500).

This proceeding was instituted by a complaint filed on November 2, 2004 by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. The complaint alleged the following:

I.

On June 9, 2004, the Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture, issued to respondent a Notice of Suspension to suspend federal inspection services and withhold the marks of inspection at respondent's establishment for the following reasons:

(a) Respondent failed to operate and maintain its facility in a manner sufficient to prevent the creation of insanitary conditions and to ensure

that the products were not adulterated, as required by Part 416 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 416). Inspectors observed gross insanitary conditions throughout the facility and in the surrounding area, including but not limited to rodent droppings, live and dead insects, dried blood and product residue present on pans, trays, tubs and barrels, and holes in the walls, doors and ceilings of the facility.

(b) Respondent failed to maintain Sanitation Standard Operating Procedures (SSOPs) in accordance with Part 416 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 416).

(c) Respondent failed to maintain Hazard Analysis Critical Control Point (HACCP) plans in accordance with Part 417 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 417).

(d) Respondent failed to complete *E. coli* performance standards testing and failed to maintain performance standards records in violation of 9 C.F.R. § 310.25(a)(2)(v)(A) and 9 C.F.R. § 310.25(a)(4).

(e) Respondent's action in response to the Notice of Suspension failed to adequately address or correct the violations identified in the Notice.

II.

Since 2001, FSIS inspectors have documented numerous instances of non-compliance with USDA regulatory requirements at respondent's establishment as follows:

(a) On August 13, 2001, FSIS issued a Notice of Intended Enforcement (NOIE) Action letter to respondent for its repeated failure to separate federally-inspected and custom-exempt (i.e., not for sale) product in its facility and for having meat product adulterated by fecal matter. On August 22, 2001, respondent submitted a letter to FSIS outlining corrective actions implemented to correct the problems. On September 7, 2001, FSIS issued a Notice of Warning withdrawing the NOIE after verifying that respondent had effectively implemented the corrective actions.

(b) On August 19, 2002, FSIS issued an NOIE to respondent for its failure to meet regulatory requirements in 9 C.F.R. Parts 416 and 417. On August 28, 2002, respondent submitted a response to FSIS that included revised SSOP and HACCP plans for the facility. On November

20, 2002, FSIS issued a Letter of Information to respondent after verifying that respondent had implemented the corrective actions outlined in respondent's response, and did not pursue further regulatory action.

(c) On July 29, 2003, FSIS issued a 30 day reassessment letter to respondent, stating that respondent's SSOP and HACCP plans were inadequate and violated regulatory requirements of 9 C.F.R. Parts 416 and 417. On September 9, 2003, FSIS conducted a reassessment and respondent had implemented the corrective actions to meet the regulatory requirements of 9 C.F.R. Parts 416 and 417.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136 of the Rules of Practice (7 C.F.R. § 136(c) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing pursuant to 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding pursuant to 7 C.F.R. § 1.139.

## Findings of Fact

1. Kirkland's Custom Meats and Slaughter, Inc., respondent herein, is a corporation organized and existing under the laws of Florida, operating as a very small meat and poultry slaughter and processing facility located at 1101 Bullsbay Highway, Jacksonville, Florida 32220.

2. Respondent Kirkland's Custom Meats and Slaughter, Inc., has been granted inspection services under the FMIA and PPIA under Establishment number 11156/P-11156.

## Conclusion

Respondent failed to maintain sanitary conditions or operate in a manner sufficient to prevent adulteration of meat and meat food products, as required by Title I of the Federal Meat Inspection Act

(FMIA) (21 U.S.C. § 601 *et seq.*) and poultry and poultry products, as required by the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*)and the regulations promulgated thereunder, and as alleged in sections I and II. By reasons of the facts contained in the Findings of Facts, respondent is unfit to engage in any business requiring inspection under the FMIA and PPIA.

## Order

Inspection services to Kirkland's Custom Meats and Slaughter, Inc., under the FMIA and PPIA are hereby indefinitely withdrawn.

_____

## PLANT QUARANTINE ACT

## DEFAULT DECISIONS

**In re: SHANTE MARIE NEWHOUSE.**
**P.Q. Docket No. 04-0012.**
**Decision and Order.**
**Filed March 11, 2005.**

**PQ - Default.**

Tracey Manoff, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*(Act) and the regulation promulgated thereunder (7 C.F.R. 319.15(a))(regulation), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 25, 2004 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged the following:

On or about March 13, 2002, Shante Marie Newhouse imported approximately six (6) pieces of sugarcane from Jamaica into the United States at Memphis, Tennessee, in violation of 7 C.F.R. § 319.15(a), because the importation of sugarcane is prohibited.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this

proceeding. 7 C.F.R. § 1.139.

## Findings of Fact

1. Shante Marie Newhouse, respondent herein, is an individual whose mailing address is 4821 San Vincente Blvd., No. 1, Los Angeles, California 90019.

2. On or about March 13, 2002, the respondent imported approximately six (6) pieces of sugarcane from Jamaica into the United States at Memphis, Tennessee, in violation of 7 C.F.R. § 319.15(a), because the importation of sugarcane is prohibited.

## Conclusion

By reasons of the facts contained in the Findings of Facts above, the respondent has violated 7 C.F.R. § 319.15(a). Therefore, the following Order is issued.

## Order

The respondent is hereby assessed a penalty five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 04-0012.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final April 25, 2005.-Editor]

———————

**In re: ALLIANCE AIRLINES.**
**P.Q. Docket No. 04-0009.**
**Decision and Order.**
**Filed May 2, 2005.**

**P.Q. - Default.**

Krishna Ramaraju, Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the notice and inspection requirements of the importation of certain types of restricted fruits and peppers from Jamaica into the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.* This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on May 11, 2004, alleging that Alliance Airlines violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq.*).

The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that on or about March 25, 2001 Respondent imported, failed to provide advance notice of, and failed to assemble for inspection boxes of restricted callaloo and peppers.

Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Alliance Airlines, respondent herein, is a business whose mailing

address is 1950 NW 66th Avenue, Bldg. 708, Suite 226, Miami, FL 33126.

2. On or about March 25, 2001, Respondent imported approximately one hundred and nineteen (119) boxes of restricted Callaloo and eighteen (18) boxes of restricted peppers from Jamaica into the United States at Miami, Florida and failed to provide advance notice of their arrival to APHIS, in violation of 7 C.F.R. § 319.56-5(a).

3. On or about March 25, 2001, Respondent, at Miami, Florida, failed to assemble for inspection approximately one hundred and nineteen (119) boxes of restricted Callaloo and eighteen (18) boxes of restricted peppers from Jamaica in their notice of arrival, in violation of 7 C.F.R. § 319.56-6(b).

## Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*). Therefore, the following Order is issued.

## Order

Respondent Alliance Airlines is assessed a civil penalty of twenty thousand dollars ($20,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 04-0009.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

———————

**In re: MELE TAUFA.**
**P.Q. Docket No. 05-0018.**
**Decision and Order.**
**Filed May 27, 2005.**

**P.Q. - Default.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

[1] This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq.*) (hereinafter frequently "the Act"), by a complaint filed on January 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS"), alleging that respondent Mele Taufa violated the Act and regulations promulgated under the Act.

[2] This is an administrative proceeding for the assessment of a civil penalty as authorized by 7 U.S.C. § 7734, for violations of the regulations governing the movement of fruits, vegetables, and flowers from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq.*, specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a)); and the movement of plant pests (7 C.F.R. § 330.200) (hereinafter frequently "the regulations").

[3] On January 13, 2005, the Hearing Clerk sent to respondent Mele Taufa, by certified mail, return receipt requested, a copy of the complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Mele Taufa was informed in the service letter that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

[4] Respondent Mele Taufa received the complaint, Rules of Practice, and service letter on January 28, 2005, and failed to respond. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[5] Accordingly, the material allegations in the complaint, which are admitted by respondent Mele Taufa's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*; *see also* 7 C.F.R. §380.1 *et seq.*

[6] APHIS filed a Motion for Adoption of Proposed Default Decision and Order on April 6, 2005, identifying APHIS's request for "a civil penalty of five hundred dollars ($500)". The Motion was sent to respondent Mele Taufa by the Hearing Clerk on April 7, 2005, by certified mail, return receipt requested, together with a cover letter.

[7] Respondent Mele Taufa received the Motion and cover letter identified in paragraph [6] on April 16, 2005. Respondent Mele Taufa failed to respond to APHIS's Motion. APHIS's Motion states, among other things, that respondent Mele Taufa's actions undermine the United States Department of Agriculture's efforts to prevent the introduction and/or spread of plant diseases and pests throughout the United States. The U.S. Department of Agriculture spends millions of dollars in efforts to control and eradicate these risks. Hawaii's unique ecosystem and environment contain plant pests and risks which are not present on the mainland and must be contained to avert serious plant pest and other plant health risks. In order to deter respondent and others similarly situated from committing violations of this nature in the future, Complainant (APHIS) believes that assessment of the requested civil penalty of five hundred dollars ($500) against respondent, is warranted and appropriate.

## Findings Of Fact

[8] Respondent Mele Taufa is an individual with a mailing address of P.O. Box 10087, Hilo, Hawaii 96721.

[9] On or about March 27, 2003, at Hilo, Hawaii, respondent Mele Taufa offered to a common carrier, specifically FEDEX, approximately 18 Noni fruits, 4 pieces of bark, and 3 root cuttings for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

[10] On or about March 27, 2003, respondent Mele Taufa knowingly attempted to move interstate from Hawaii to Utah via FEDEX a package of plumeria, tuberose, and gardenias, which were all infested with thrips, a plant pest, in violation of 7 C.F.R. § 330.200.

## Conclusions

[11] The Secretary of Agriculture has jurisdiction in this matter.

[12] On or about March 27, 2003, respondent Mele Taufa violated the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), and regulations issued under the Act (7 C.F.R. § 318.13 *et seq.*, specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a); and 7 C.F.R. § 330.200).

[13] A civil penalty in the amount of five hundred dollars ($500) is appropriate, and the following Order is issued.

**Order**

[14] Respondent Mele Taufa is hereby assessed a civil penalty of five hundred dollars ($500), as authorized by 7 U.S.C. § 7734. Respondent shall pay the $500 by cashier's check or money order or certified check, made payable to the order of the "**Treasurer of the United States**" and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 05-0018**.

[15] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

[This Decision and Order became final July 14, 2005.-Editor]

---

**In re: HECTOR PINTO.**
**P.Q. Docket No. 05-0017.**
**Decision and Order.**
**Filed May 31, 2005.**

**PQ - Default.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Marc R. Hillson, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation requirements for certain types of restricted fruits from Chile into the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.* .

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 12, 2005, alleging that respondent Hector Pinto violated the Act and regulations promulgated under the Act (7 C.F.R. § 319.56 *et seq.*).

The complaint sought civil penalties as authorized by the Act (7 U.S.C. § 7734) . This complaint specifically alleged that on or about June 7, 2003, at Miami International Airport, Respondent imported into the United States approximately three kilograms of cucurbit fruits and three granadilla fruits from Chile into the United States, in violation of 7 C.F.R. §§ 319.56(b).

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Hector Pinto, hereinafter referred to as respondent, is an individual with a mailing address of 342 East 4th Street, Clifton, New Jersey 07015.

2. On or about June 7, 2003, the respondent imported approximately three (3) kilograms of cucurbit fruits and three (3) granadilla fruits into the United States from Chile at Miami International Airport, in violation of 7 C.F.R. § 319.56.

## Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (7 C.F.R.

§ 319.56 *et seq*). Therefore, the following Order is issued.

**Order**

Respondent Hector Pinto is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0017.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final July 8, 2005-Editor]

---

**In re: ANA ASO.**
**P.Q. Docket No. 05-0016.**
**Decision and Order.**
**Filed June 2, 2005.**

**PQ - Default.**

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
*Decision and Order issued by Peter M. Davenport, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits from Hawaii into the Continental United States (7 C.F.R. 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the

Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § §7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 12, 2005, alleging that respondent Ana Aso violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about July 7, 2003, at Lahaina, Hawaii, the respondent offered to a common carrier, specifically United Parcel Service (UPS), approximately 6 mangoes, 75 lychees, and 3 cooked breadfruits for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § § 318.13(b) and 318.13-2(a).

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Ana Aso, hereinafter referred to as respondent, is an individual with a mailing address of 5152-D Kipulu Place, Lahaina, Hawaii 96761.

2. On or about July 7, 2003, at Lahaina, Hawaii, the respondent offered to a common carrier, specifically United Parcel Service (UPS), approximately 6 mangoes, 75 lychees, and 3 cooked breadfruits for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

## Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 318.13 *et seq*). Therefore, the following Order is issued.

## Order

Respondent Ana Aso is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0016.
This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final August 15, 2005.-Editor]

_____

## CONSENT DECISIONS

(Not published herein - Editor)

### AGRICULTURAL MARKETING AGREEMENT ACT

Schoenfield Melon Farms and Ted Schoenfield. AMA WRPA Docket No. 03-004. 3-23-05.

### ANIMAL QUARANTINE ACT

Susan Koch. A.Q. Docket No. 05-0006. 2/10/05.

Suvit Asawapornsnit d/b/a Vegasrace.com. A.Q. Docket No. 05-0001. 3/31/05.

Margi Ruth Foster. A.Q. Docket No. 05-0007. 4/4/05.

Rose Beyene Celin. A.Q. Docket No. 05-0008. 6/22/05.

### ANIMAL WELFARE ACT

Rachel Snider. AWA Docket No. 03-0022. 1/7/05.

George E. Kollar and Sandra K. Kollar d/b/a Mother Nature's Children. AWA Docket No. 04-0009. 1/13/05.

Dennis Hill, an individual, d/b/a White Tiger Foundation; and Willow Hill Center for Rare & Endangered Species, LLC, an Indiana domestic limited liability company, d/b/a Hill's Exotics. AWA Docket No. 04-0012. 1/27/05.

Chester C. Baird, a/k/a C.C. Baird, an individual, Jeanette Baird, an individual, Patsy Baird, an individual, and Patricia Baird, an individual, d/b/a Pat's Pine Tree Farms, and Martin Creek Kennels. AWA Docket No. 04-0013. 1/28/05.

The Johns Hopkins University, a private educational institution. AWA Docket No. 04-0008. 2/1/05.

Betty Gray. AWA Docket No. 05-0007. 3/21/05.

Beechdale Animal Supplies, Inc. AWA Docket No. 05-0017. 6/1/05.

## FEDERAL MEAT INSPECTION ACT

Rebhan R.& W Meat Company, Inc., Jeffrey G. Rebhan, and Edwin Rebhan. FMIA Docket No. 05-0004. 6/17/05.

Michael D. Pyle and Nor-AM Cold Storage, Inc., d/b/a Provisions Packing. FMIA Docket No. 05-0006. 6/28/05.

## HORSE PROTECTION ACT

Ronald Beltz, an individual; and Christopher Jerome Zahnd, an indvidual. HPA Docket No. 02-0001. 1/18/05.

Michael R. Floyd and Jada R. Flyod. HPA Docket No. 00-0014. 1/28/05.

Randall W. Dixon, Gloria Dixon, and Red Eagle Farms, a/k/a Red Eagle Farm. HPA Docket Nos. 01-0007 and 01-0009. 6/15/05.

## PLANT QUARANTINE ACT

Itzhak Lahiany and Orico International Export and Import, Inc. P.Q. Docket No. 05-0003.

Richard Wu. d/b/a Hip Wing Trading Company. P.Q. Docket No. 05-0004. 2/9/05.

Richard Andreski and Chilam Trading Associates, Inc. P.Q. Docket No. 05-0007. 3/3/05.

Swift Transportation Company, Inc. P.Q. Docket No. 03-0017. 3/9/05.

Wal-Mart Stores, Inc. P.Q. Docket No. 03-0017. 3/15/05.

Tony Tabujara. P.Q. Docket No. 05-0019. 3/31/05.

Carl L. Medeiros. P.Q. Docket No. 05-0014. 4/11/05.

Agencia Navemar de Puerto Rico, Inc. P.Q. Docket No. 04-0013. 4/18/05.

Stephen Ludlum d/b/a The Orchid Factory Dot Com, Inc. P.Q. Docket No. 04-0001. 5/9/05.

Gertrude Nelson. P.Q. Docket No. 05-0021. 5/13/05.

St. Johns Shipping Company, Inc. P.Q. Docket No. 03-0015. 6/3/05.

Michele Czara. P.Q. Docket No. 05-0008. 6/6/05.

## POULTRY PRODUCTS INSPECTION ACT

House of Raeford Farms of Louisiana, L.L.C. PPIA Docket No. 05-0002. 5/4/05.

Rebhan R.& W Meat Company, Inc., Jeffrey G. Rebhan, and Edwin Rebhan. PPIA Docket No. 05-0005. 6/17/05.