AGRICULTURE DECISIONS

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ADMINISTRATIVE WAGE GARNISHMENT

COURT DECISION

DAVIS v. USDA.
No. 11-3383.
Memorandum Opinion.
Filed December 31, 2013.

[Cite as: No. 11-3383, 2013 WL 6865425, at *1 (C.D. Ill. Dec. 31, 2013)].

AWG – Administrative procedure – Administrative offset – Financial hardship – Guarantee agreement.

United States District Court,
C.D. Illinois,
Springfield Division.

Court affirmed the Administrative Law Judge's Decision and Order, holding that the ALJ's decision was not arbitrary or capricious but rather consistent with the law and supported by the record. The Court denied Petitioner's motion for summary judgment and upheld the ALJ's finding that an enforceable guarantee agreement existed between Petitioner and USDA.

RICHARD MILLS, U.S. District Judge, delivered the opinion of the Court.

OPINION

This is a Petition for Review of a Decision and Order allowing the United States Department of Agriculture's issuance of an Administrative Wage Garnishment against the Petitioner under 31 C.F.R. § 285.11. Pending is the Motion of the Petitioner for Summary Judgment.

I. BACKGROUND

Petitioner Robyn Davis asks that the Decision and Order be held unlawful and set aside.

In 2005, Petitioner Davis and her then-husband, Nicholas Edwards,

along with Draper & Kramer Mortgage Corp., executed the Request for Single Family Housing Loan Guarantee, for RD 1980–21("the Guarantee Request"). This Guarantee Request is an application for a loan guarantee administered by the USDA Rural Development, Rural Housing Service's Single Family Housing Guaranteed Loan Program ("the Program"). The Program is governed by 7 C.F.R. § 1980.

On March 15, 2005, in connection with their application for the United States Department of Agriculture (USDA) guarantee of a single family home, the Petitioner, together with her now ex-husband, entered into an agreement with the USDA, under which the Petitioner agreed as follows:

> I (We) certify and acknowledge that if the Agency pays a loss on the requested loan to the lender, I(We) will reimburse the Agency for the amount. If I(We) do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me (us). The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my (our) obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender.

See Administrative Record (A.R.), Ex. 5.

The administrative record shows the USDA Rural Development paid to the lender $31,341.50 after deducting a penalty of $1,844.34 for the lender's failure to market the title on a timely basis, pursuant to 7 C.F.R. § 1980.376. This payment is reported by the USDA Rural Development as a loss claim resulting from foreclosure and liquidation of Petitioner Davis's and Mr. Edwards's mortgage loan.

In March of 2011, Petitioner Davis and her husband, Jacob Davis, experienced a Federal tax return offset in the amount of $1,948, of which $17 was applied as a "Fee Amount" and $1,931 applied towards the $31,341.50 being pursued by the USDA Rural Development against

Petitioner Davis.

II. DISCUSSION

The Petitioner asks the Court to set aside the Decision and Order, dated July 5, 2011, wherein Administrative Law Judge (ALJ) Jill S. Clifton determined that Petitioner owed a debt to the USDA because the Guarantee established an independent financial obligation distinct from that at issue in the partial release obtained by the Petitioner in the state court foreclosure proceeding. *See A.R.,* Ex. 12.

(A)

The Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* (APA), governs judicial review of an action taken by an administrative agency. A reviewing court will affirm the agency's legal determinations as long as they are not "arbitrary or capricious," and are consistent with the law. *See Israel v. U.S. Dep't of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002). "The arbitrary and capricious standard is highly deferential, and even if we disagree with an agency's action, we must uphold the action if the agency considered all of the relevant factors and we can discern a rational basis for the agency's choice." *Id.*

An agency's factual findings are reviewed under a substantial evidence standard. *See* 5 U.S.C. § 706(2)(E). This means the agency must "rely on such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." *Roadway Exp., Inc. v. U.S. Dep't of Labor*, 612 F.3d 660, 664 (7th Cir. 2010) (internal quotation marks and citation omitted). Because this is a deferential standard, an inference may not be set aside simply because the opposite conclusion is more reasonable.

In her Pro Se filing, the Petitioner argued the following before the ALJ: (1) the release she obtained in the state court proceeding rendered the debt unenforceable; (2) the lender conducted an illegal foreclosure, nullifying the lender-guarantor agreement; and (3) the lender has engaged in negligent servicing, which renders the lender-guarantor agreement unenforceable under 7 C.F.R. § 1908.308. *See A.R.*, Ex. 6, p. 3–5. In her Supplemental Narrative provided by Counsel, the Petitioner

alleged that the USDA was without right to pursue collection against her without a valid judgment. *See A.R.*, Ex. 7, 9.

(B)

The Petitioner now contends the lender failed to fulfill the program requirements that would allow a loss claim on the loan. Thus, any payment made by the USDA Rural Development to the lender is not a loss claim and, therefore, has not been promised for reimbursement by the Petitioner. Therefore, the Petitioner contends the amount in dispute is not a liability which the Petitioner is responsible to reimburse.

However, a review of the record establishes this argument that she did not agree to reimburse the USDA for payment made to the lender was not previously raised by the Petitioner. Accordingly, the Petitioner waived this argument because it was not presented to the agency. *See Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.").

Even if the argument had not been waived, the Court concludes it is not persuasive. The Petitioner asserts that the administrative record does not provide the statutorily required evidence that a Guarantee exists for the Petitioner's mortgage loan. She contends that the administrative record relied on by the ALJ in determining the Petitioner's liability does not provide any proof that her Guarantee Request application was approved, the statutory requirements of the Program had been met, or the official Loan Note Guarantee was ever executed for the Petitioner's mortgage loan. The Petitioner alleges there is no evidence of a Loan Note Guarantee in the administrative record. For these reasons, the Petitioner alleges that her Guarantee Request was not approved, an applicable Loan Guarantee does not exist and any payment to the USDA Rural Development to the lender was not in relation to a guarantee on the Petitioner's mortgage loan.

The ALJ specifically found that Petitioner had an independent

financial obligation arising out of an agreement between the borrowers and the USDA. *See* A.R., Ex. 12, ¶ 6. There is no dispute that Petitioner and her ex-husband acquired the loan, the loan was foreclosed, and the USDA paid the lender $31,341.50 following the foreclosure. The Petitioner agreed that the borrowers would reimburse any loss claim paid by the USDA. *See* A.R., Ex. 6. Accordingly, the ALJ's finding that the borrowers' agreement with the USDA created an independent financial obligation is supported by the evidence.

(C)

The ALJ determined that the release the Petitioner obtained in the state court proceeding did not make the current debt unenforceable because of the "independent nature" of the agreement between the Petitioner and the USDA. *See A.R.*, Ex. 12, ¶ 11. The ALJ considered the Petitioner's argument regarding problems with effecting service on the foreclosure. Upon considering 7 C.F.R. § 1980.308, the ALJ determined that negligent servicing by the lender would not have rendered the guarantee unenforceable in this case. *See A.R.*, Ex. 12, ¶ 12. The ALJ denied the request of the Petitioner to find that the USDA paid an entity not the holder of the note. *See id.*, ¶ 13. The ALJ further found that the USDA could administratively collect against the Petitioner, pursuant to the agreement between the borrowers and the USDA, even without a judgment or personal deficiency against the Petitioner—based on the Guarantee. *See id.* at ¶ 15.

The Petitioner's current argument that there was no guarantee agreement between the lender and the USDA is inconsistent with the argument made before the ALJ. The Petitioner's narrative provided, "The lender was Draper & Kramer Mortgage and the loan was guaranteed by the USDA Rural Development." *See A.R.*, Ex. 6, at 2. The Petitioner further argued that the lender's actions in connection with the foreclosure resulted in the breach of the lender-guarantor agreement, pursuant to 7 C.F.R. § 1980.308, meaning that USDA's guarantee to the lender was unenforceable. *See id.* at 4. Based on the foregoing, the Petitioner has waived any argument regarding the existence of a guarantee agreement between the lender and the USDA.

To the extent that Petitioner argues any guarantee that may exist

between the Petitioner and the USDA is unenforceable, the grounds asserted are not meritorious. As the ALJ determined, the release she obtained in the state court proceeding as to a deficiency judgment against the co-borrower did not render the current debt unenforceable. The USDA is not attempting to collect on that deficiency judgment. Rather, it is attempting to collect on a separate obligation which, as the ALJ found, was unrelated to the lender's action to obtain a personal deficiency.

The ALJ considered the Petitioner's financial circumstances and, in order to prevent hardship, held that no garnishment was authorized through August 2013, and the ALJ directed a review of the Petitioner's financial circumstances before any garnishment was authorized. *See id.* at ¶ 16, 17, 22, 23. The ALJ stated that the ruling as to financial hardship did not prevent the collection of the debt through the offset of the Petitioner's income tax refunds or other federal monies. *See id.* ¶ 24.

Pursuant to 31 C.F.R. § 285.11 and 31 U.S.C. § 3720D, a federal agency is authorized to collect money from a debtor's disposable pay by means of an administrative wage garnishment to satisfy a delinquent debt owed to the United States. Upon reviewing the record, the Court concludes that the ALJ's determination that a valid debt exists is not arbitrary or capricious, is supported by substantial evidence and is in accordance with all applicable law.

(D)

The Petitioner claims that when the applicable regulations are considered, there is no basis for liability of the debt at issue because the USDA Rural Development has not enforced the laws that apply to its program.

The Petitioner claims the lender did not notify her of the action by service of summons. Moreover, the Petitioner claims the lender failed to notify her that the account had become delinquent, which precluded her from bringing the account current prior to the foreclosure. The Petitioner contends that because the USDA failed to abide by its own regulations, she is not liable.

The Petitioner also asserts the lender committed fraud and the claim

should be denied under 7 C.F.R. § 1980.376(b)(1). Moreover, because she alleges the lender was negligent in loan servicing in failing to effect service on the Petitioner at the time of the foreclosure proceedings, the Petitioner contends the guarantee is unenforceable as to her and the claim should be denied under 7 C.F.R. § 1980.376(b)(6). The Petitioner further contends the USDA Rural Development Program is not entitled to recover any payments because the payment would not be pursuant to the regulations of the Guarantee Program.

In the Guarantee Request, the Petitioner agreed to reimburse the USDA Rural Development for a loss claim, specifically, if paid by the USDA Rural Development to the lender. The Petitioner notes the term "loss claim" is defined by the USDA Rural Development as "[t]he method by which the Agency provides reimbursement to a lender/servicer who has fulfilled all program requirements but who has incurred a loss on a guaranteed loan." Moreover, it defines "program requirements" as "[a]ny requirements set forth in any pertinent loan document, guarantee agreement, statute, regulation, handbook, or administrative notice."

The Petitioner claims the lender violated Illinois law and a number of federal regulations, including the statutory loan servicing requirement that includes "taking actions to offset the effects of liens ... and other legal actions." *See* 7 C.F.R. § 1980.370(b). The lender must assure that "[t]he borrower is not released of liability for the loan except as provided in Agency regulations." 7 C.F.R. § 1980.370(b)(3).

The Court is unable to conclude the ALJ unreasonably rejected the Petitioner's argument that she was prejudiced by flaws in the state court foreclosure proceeding. She claims that had she received proper notice the foreclosure would have been avoided. The ALJ recognized this was a possibility. *See A.R.*, Ex. 12 ¶ 9. However, it is not certain that this would have occurred. Additionally, once the Petitioner became aware of the foreclosure, she obtained counsel and sought to have the default judgment entered against her set aside. *See id.*, Ex. 1, at 8–10. Although her motion was denied, the Petitioner was released from personal liability on the deficiency judgment that had been entered. *See id.*, Ex. 1, at 6–7. The record establishes that the Petitioner chose her remedy in the foreclosure proceeding. The USDA was not a party to that proceeding,

which did not really relate to the agreement between the USDA and the Petitioner. There is nothing in the record tending to show that problems with the state foreclosure proceeding increased the amount of the loss claim that serves as the underlying basis of the collection efforts.

The Court is unable to conclude that the ALJ erred in rejecting the Petitioner's argument that alleged negligent servicing by the lender rendered the lender-guarantor agreement unenforceable under 7 C.F.R. § 1980.308. The regulation provides that a guarantee by the USDA of a loan constitutes an obligation supported by the full faith and credit of the United States. *See* 7 C.F.R. § 1980.308(a). The loan note guarantee will be unenforceable to the extent any loss is occasioned by "negligent servicing," which is defined in relevant part as "the failure to perform those services which a reasonably prudent lender would perform in servicing its own loan portfolio of loans that are not guaranteed." *Id.* The regulation further provides, "The term includes not only the concept of a failure to act, but also not acting in a timely manner or acting contrary to the manner in which a reasonably prudent lender would act up to the time of loan maturity or until a final loss is paid." *Id.*

The Petitioner maintains that the entire amount of loss is attributable to negligent servicing, in that the foreclosure could have been avoided had proper notice been provided. As the Court earlier noted, however, that is speculative on the part of the Petitioner. Additionally, negligent servicing does not render a USDA guarantee completely unenforceable. Rather, it mitigates a claim, making the claim unenforceable "to the extent" any part of the loss is caused by negligent servicing. *See* 7 C.F.R. § 1908.308(a). The record establishes that the USDA paid the loss amount of $31,341.50 to the lender on February 12, 2010. *See A.R.*, Ex. 5. There is nothing in the record tending to show that the USDA was aware of any negligent servicing at that time.

(E)

Pursuant to 31 C.F.R. § 285.11, a valid judgment was not necessary for the USDA to pursue a collection action against the Petitioner. An administrative wage garnishment requires only a "debt" to the United States, not a judgment. Moreover, the use of administrative offset also applies to a "past due, legally enforceable nontax debt [to a federal

agency] that is over 180 days delinquent." 31 U.S.C. § 3716(c)(6). Therefore, the ALJ's determination that administrative wage garnishment and administrative offset are appropriate remedies is consistent with applicable law.

III. CONCLUSION

Based on the foregoing, the Court concludes that the ALJ's decision was not arbitrary or capricious. Upon finding that a valid debt existed, the ALJ examined the Petitioner's financial situation and determined that although administrative wage garnishment was an available remedy, the USDA would not be permitted to garnish the Petitioner's wages before September 2013 because it would result in undue hardship to the Petitioner. The ALJ further determined that the USDA could not begin any garnishment until a review of the Petitioner's financial circumstances to determine an appropriate amount based on her finances. *See A.R.*, Ex. 12 ¶ 23.

Because the ALJ's decision is consistent with the law and is supported by the record, the decision of the agency will be affirmed.

Ergo, the Motion of Petitioner Robyn Davis for Summary Judgment [d/e 23] is DENIED.

The Decision and Order entered on July 5, 2011 is AFFIRMED. The Petitioner owes a valid debt to the United States Department of Agriculture.

Any other pending Motions are Denied as Moot.

This case is closed.

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AGRICULTURAL MARKETING ACT

COURT DECISION

AMERICAN MEAT INSTITUTE v. USDA.
No. 13-CV-1033.
Court Decision.
Filed September 11, 2013.

AMA – APA – *Chevron* deference – Country-of-origin labeling – Comingling – Final rule.

[Cite as: 968 F. Supp. 2d 38 (D.D.C. 2013).]

Court denied Plaintiffs' motion for preliminary injunction challenging a regulation regarding "country-of-origin labeling." The Court found that the regulation did not violate Plaintiffs' First Amendment rights, did not exceed the agency's authority under the implementing statute, and did not violate the Administrative Procedure Act.

United States District Court,
District of Columbia.

Judge KETANJI BROWN JACKSON, District Judge, delivered the opinion of the Court.

MEMORANDUM OPINION

I. INTRODUCTION

Before this Court is a motion for a preliminary injunction challenging a regulation that the Agricultural Marketing Service ("the AMS" or "the agency") promulgated in May of 2013, pursuant to a statute Congress first passed in 2002. The regulation implements a statutory scheme regarding "country-of-origin labeling" ("COOL") for certain commodities. *See* 78 Fed. Reg. 31,367 (May 24, 2013) ("Final Rule—Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm–Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts,") [hereinafter, "Final Rule"]. Plaintiffs are a group of meat industry trade associations who implore the Court to enjoin the Final Rule preliminarily, claiming that it violates their First Amendment rights,

exceeds the agency's authority under the implementing statute, and violates the Administrative Procedure Act, 5 U.S.C. § 706 (2012) *et seq*. (the "APA"), and that their members will be irreparably harmed absent a preliminary injunction. Defendants are the United States Department of Agriculture ("USDA"), its Secretary Tom Vilsack in his official capacity, the AMS—a division of the USDA with responsibility for promulgating the Final Rule and administering the COOL program—and AMS Administrator Anne Alonzo in her official capacity (collectively, "Defendants" or the "Government"). The Court has also permitted a group of intervenors ("Defendant–Intervenors") to join the case on the side of Defendants. The Defendant–Intervenors are several meat industry trade groups and a consumer advocacy group that support the Final Rule.

II. STATUTORY AND REGULATORY FRAMEWORK

A. *The Agricultural Marketing Act*

The legislation underlying the Final Rule was enacted initially in 2002 as an amendment to the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 *et seq*. (the "AMA"). *See* Pub. L. No. 110–171, 121 Stat. 2467 (2002). As originally written, the 2002 country-of-origin statute required retailers of "covered commodities" to inform consumers of the country of origin of such commodities. *Id.* at sec. 282(a)(1).[1] In addition, the statute provided criteria establishing when a retailer was permitted to designate a covered commodity as having a United States country of origin. *Id.* at sec. 282(a)(2). In the case of beef, lamb, and pork, the 2002 statute provided that retailers could use a U.S. designation only for meat derived from "an animal that is exclusively born, raised, and slaughtered in the United States." *Id.* The statute further instructed the Secretary of Agriculture (the "Secretary") to "promulgate such regulations as are necessary to implement" the statute no later than September 30, 2004. *Id.*

[1] The statutory definition of "covered commodity" includes, among other products not relevant here, muscle cuts of beef, lamb, and pork, as well as ground beef, ground lamb, and ground pork, but excludes such items if they are ingredients in a "processed food item." *See* 7 U.S.C. § 1638(2)(B) (2008). The term "processed food item" is not defined in the statute, but is defined in the implementing regulations as (in relevant part) "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component." 7 C.F.R. § 65.220 (2009).

sec. 284(b). After enacting the statute, however, Congress twice delayed its regulatory implementation, first until 2006 (Consolidated Appropriations Act, Pub.L. No. 108–199, 118 Stat. 3, sec. 749 (2004)), and then until 2008 (Agricultural & Related Agencies Appropriations Act, 2006, Pub.L. No. 109–97, 119 Stat. 2120 sec. 792 (2005)).

In 2008, the relevant provisions of the statute were amended as a part of The Food, Conservation, and Energy Act of 2008 (also known as "the 2008 Farm Bill"), Pub.L. No. 110–234, 122 Stat. 923, sec. 11002, and codified at 7 U.S.C. § 1638a (2008) (the "COOL statute"). As amended in 2008 (and as it exists today), the COOL statute requires retailers to provide consumers with country-of-origin information and also sets forth a detailed categorization system that pertains to the manner in which covered commodities derived from certain livestock are to be designated for COOL purposes. *See* 7 U.S.C. § 1638a (2010) (reprinted in the Appendix to this opinion) [hereinafter "Appendix"]. The statute first instructs that "a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity." *Id.* § 1638a(a)(1).[2] The statute then articulates different requirements for the designation of muscle cut meats that largely depend upon an animal's geographic history relative to its processing stages. *See id.* § 1638a(a)(2)(A)-(E). The first four designations relate to (A) an animal that has a United States country of origin (*e.g.,* an animal that was "born, raised, and slaughtered" in the U.S.); (B) an animal that has multiple countries of origin; (C) an animal that is imported into the United States for immediate slaughter; and (D) an animal that has a foreign country of origin.[3] As used in industry parlance and in this litigation, these four classifications for animals from which "muscle cut" meats are derived are referred to as

[2] This provision applies to all covered commodities except those that are sold or served in food service establishments. *See* 7 U.S.C. § 1638a(b). A "food service establishment" is defined in the statute as "a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public." 7 U.S.C. § 1638(4).

[3] Ground meat products are governed by a fifth designation that is not directly at issue in these proceedings. *See* 7 U.S.C. § 1638a(2)(E) ("The notice of country of origin for ground beef, ground pork, ground lamb, ground chicken, or ground goat shall include—**(i)** a list of all countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat; or **(ii)** a list of all reasonably possible countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat.").

Categories A, B, C, and D, corresponding to the subheadings under which they appear in 7 U.S.C. § 1638a(a)(2). *See* Appendix at A–1–2.[4]

B. *Regulations Implementing the COOL Statute*

The 2002 amendments to the AMA directed the Secretary to promulgate "such regulations as are necessary to implement" the provisions of the COOL statute. Pub.L. No. 107–171 sec. 284(b). In 2009, after Congress enacted the 2008 version of the statute, the Secretary, acting through the AMS, published a final rule setting forth four possible COOL designations for retailers to use when marketing muscle cut meats. *See* 74 Fed.Reg. 2658–01 (Jan. 15, 2009) (the "2009 COOL Rule"). The 2009 COOL Rule provided examples of approved labels that corresponded to the four designation categories laid out in the statute: for Category A, "Product of the United States"; for Category B, "Product of the United States, Country X, and (as applicable) Country Y"; for Category C, "Product of Country X and the United States"; and for Category D, "Product of Country X." *Id.* The 2009 COOL Rule also explicitly acknowledged that meat processors sometimes engage in "commingling"—the practice of processing multiple animals with varying countries of origin together during a single production day for slaughter and packaging—and directed that muscle cuts produced through this process should be labeled in the same way as Category B covered commodities, regardless of whether the commingled animals would each otherwise fall into Category A, B, or C. *Id.*[5] Finally, the 2009 Rule permitted muscle cuts produced through commingling to list in any order the various countries of origin present in the commingled products. *Id.*

C. *The WTO Proceedings*

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[4] The COOL statute's Categories A through D specifically relate to what is referred to in the statute as "muscle cut" meat products. *See* 7 U.S.C. § 1638(2)(A) (categorizing beef, pork, and lamb as either "muscle cut" or "ground"). As noted, the statute treats ground meats differently. *See supra* n. 3. In addition, the statute provides an express exemption from the COOL requirements for covered commodities sold at food service establishments, *see supra* n. 2, and for covered commodities that are an ingredient in processed food items, *see supra* n. 1.

[5] Commingling would never involve Category D animals because Category D refers only to finished muscle cut meat products imported from other countries.

In October of 2009, Canada (later joined by Mexico) requested the formation of a panel of the World Trade Organization's ("WTO") Dispute Settlement Body ("DSB") to consider Canada's claims that the 2009 COOL Rule discriminated against foreign livestock in violation of the United States's obligations under the WTO Agreement on Technical Barriers to Trade ("TBT").[6] The DSB panel, which issued findings in December of 2011, concluded that the 2009 COOL Rule accorded less favorable treatment to foreign livestock and therefore violated the TBT agreement. *See* Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements,* WT/DS386/R (Nov. 18, 2011) ¶ 7.546 [hereinafter WTO Panel Report]. Both sides appealed certain aspects of the decision, and in June of 2012, the WTO Appellate Body issued a decision substantially confirming the panel's findings. *See* Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements,* WDT/AB/R/WT/DS386/R (June 29, 2012) [hereinafter Appellate Body Report]. The case was then transferred to a WTO arbitrator to determine the amount of time that the United States would be given to comply with the findings in the Appellate Body Report. The arbitrator issued a separate 58–page opinion ordering the United States to bring its COOL program into compliance with TBT by May 23, 2013. *See* Award of the Arbitrator, *United States—Certain Country of Origin Labeling (COOL) Requirements,* WDT/AB/R/WT/DS386/23 (Dec. 4, 2012) [hereinafter WTO Arbitrator's Report].

D. *The 2013 Proposed and Final Rules*

As a result of the Appellate Body Report, the AMS undertook a comprehensive review of the then-existing COOL program. On March 12, 2013, the agency issued a notice of proposed rulemaking outlining changes to the COOL program. *See* Proposed COOL Rule, 78 Fed.Reg. 15,645 (Mar. 12, 2013). This notice explained that the proposed changes were designed both to provide consumers with additional country-of-origin information and also to bring the United States into compliance

[6] TBT was one of the agreements entered into by WTO members upon the official establishment of the WTO in 1994.

with the Appellate Body Report. *Id.* The notice also provided for a 30–day public comment period. *Id.* At the end of the comment period, the AMS published the Final Rule. *See* Final Rule, 78 Fed.Reg. 31,367 (May 24, 2013).

The Final Rule generally modifies the 2009 COOL Rule in two respects. First, the Final Rule requires COOL labels for muscle cut meats to specify where the "production steps" for each such product took place—that is, where the animal from which the commodity was derived was born, raised, and slaughtered.[7] As with the 2009 COOL Rule, the Final Rule provides examples of acceptable labels: for Category A, "Born, raised, and slaughtered in the United States"; for Category B, "Born in Country X, raised and slaughtered in the United States"; for Category C, "Born and raised in Country X, slaughtered in the United States"; and for Category D, "Product of Country X." *Id.* at 31,385. Second, the Final Rule states that "this final rule eliminates the allowance for commingling of muscle cut covered commodities of different origins" in order to "let[ ] consumers benefit from more specific labels." *Id.* at 31,369.

The Final Rule also recognizes that, because of the new labeling requirements and the commingling ban, "it may not be possible for all of the affected entities to achieve 100% compliance immediately." *Id.* The Final Rule therefore provides that, during a six-month period following the effective date of the Rule, the agency will "conduct an industry outreach and education program concerning the provisions and requirements of this rule." *Id.* That grace period remains ongoing as of the writing of this opinion.

E. *The Instant Litigation*

Plaintiffs filed the original complaint in this action on July 8, 2013. (ECF No. 1.) On July 23, 2013, an amended complaint followed. ("Compl.," ECF No. 15.) The complaint contains three separate counts that challenge the Final Rule as violating the First Amendment (Count I), the

[7] This new labeling system applies to covered commodities from each Category A–C. Category D, which applies to muscle cuts from an animal slaughtered outside of the United States, requires a label that only identifies the country from which the meat was imported.

AMA (Count II), and the APA (Count III). On July 25, 2013, Plaintiff filed a motion for a preliminary injunction along with a memorandum of law in support of the motion. ("Pl. Br.," ECF No. 24.)

On August 9, 2013, pursuant to a Court-ordered briefing schedule, the agency filed an opposition to Plaintiffs' preliminary injunction motion. ("Def. Br.," ECF No. 30.) On that same day, Defendant–Intervenors filed a motion to intervene (ECF No. 28), along with a brief in opposition to Plaintiffs' Motion ("Int. Br.," ECF No. 28–12).[8] Plaintiffs filed their reply to the agency's opposition on August 19, 2013 ("Pl. Reply," ECF No. 33), and a supplemental reply responding to Defendant–Intervenors on August 22, 2013 ("Pl. Supp. Reply," ECF No. 42). The Court held oral argument on the preliminary injunction motion on August 27, 2013.

Upon consideration of the arguments presented in the briefs and at oral argument, and for the reasons explained below, the Court concludes that Plaintiffs' motion for a preliminary injunction must be DENIED. A separate order consistent with this memorandum opinion will issue.

III. LEGAL STANDARD FOR PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A party seeking a preliminary injunction "must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365. In conducting an inquiry into these factors, "[a] district court must 'balance the strengths of the requesting party's arguments in each of the four required areas.' ... If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Chaplaincy of Full Gospel Churches v. England* ("*CFGC*"), 454 F.3d 290, 297 (D.C.Cir.2006) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C.Cir.1995)). However, "a movant must demonstrate 'at least some injury' for a preliminary injunction to

[8] The Court granted the Defendant–Intervenors' motion to intervene on August 19, 2013.

issue." *Id.* (citation omitted).[9]

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

A. *Plaintiffs' First Amendment Claim*

Count I of Plaintiffs' Complaint alleges that the Final Rule violates Plaintiffs' First Amendment rights by compelling them to speak when they would rather not. (Compl. ¶¶ 72–80; *see also* Pl. Br. at 12.) It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,* —— U.S. ——, 133 S.Ct. 2321, 2327, 186 L.Ed.2d 398 (2013) (internal quotation marks and citations omitted); *see also Nat'l Ass'n of Mfrs. v. NLRB,* 717 F.3d 947, 957 (D.C.Cir.2013) ("[T]he First Amendment freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." (internal quotation marks and citation omitted)). Compelled speech, no less than restricted speech, is subject to strict scrutiny in most circumstances. *See, e.g., Riley v. Nat'l Fed'n of the*

[9] This approach to analyzing the preliminary injunction factors, which is traditionally used in this circuit, is often referred to as a "sliding scale." The D.C. Circuit has recently suggested that the sliding scale approach may no longer be applicable after the Supreme Court's decision in *Winter. See Sherley v. Sebelius,* 644 F.3d 388, 393 (D.C.Cir.2011) (likelihood of success on the merits and irreparable harm may be "independent, free-standing requirement[s] for a preliminary injunction" (internal quotations marks and citation omitted)); *see also Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1296 (D.C.Cir.2009) ("[U]nder the Supreme Court's precedents, a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm, among other things." (emphasis in original)) (Kavanaugh & Henderson, JJ., concurring). However, the D.C. Circuit has not yet held that the sliding scale analysis is no longer applicable; therefore, this Court will apply that standard to the injunction at issue here. This Court need not delve into the question of whether the sliding scale analysis retains its viability in this circuit, because Plaintiffs have failed to demonstrate that a preliminary injunction should issue even under the more lenient sliding scale analysis. *Cf. Kingman Park Civic Ass'n v. Gray,* 956 F.Supp.2d 230, 241, 13–cv–990(CKK), 2013 WL 3871444, at *3 (D.D.C. July 29, 2013) ("[A]bsent ... clear guidance from the Court of Appeals, the Court considers the most prudent course to bypass this unresolved issue and proceed to explain why a preliminary injunction is not appropriate under the 'sliding scale' framework. If a plaintiff cannot meet the less demanding 'sliding scale' standard, then it cannot satisfy the more stringent standard alluded to by the Court of Appeals.").

Blind of No. Carolina, Inc., 487 U.S. 781, 798, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (applying "exacting First Amendment scrutiny" to a state-law disclosure requirement applicable to professional fundraisers); *see also Nat'l Ass'n of Mfrs. v. Taylor,* 582 F.3d 1, 11 (D.C.Cir.2009) (applying strict scrutiny to a disclosure provision that applied to professional lobbyists).[10] The focus in this case, however, is on compelled *commercial* speech, which all parties agree is subject to less exacting constitutional standards.

Compelled commercial speech is generally evaluated under the intermediate scrutiny test that the Supreme Court first articulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). To withstand scrutiny under *Central Hudson,* the government regulation of speech must "directly advance" a "substantial" government interest "and be 'n [o] more extensive than is necessary to serve that interest.'" *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 249, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010) (alteration in original) (citation omitted). Accordingly, the D.C. Circuit has explained that, for a government restriction on commercial speech to pass constitutional muster under *Central Hudson,* "the governmental interest must be substantial; the regulation must directly advance the governmental interest asserted; and the regulation must not be more extensive than is necessary to serve that interest." *Nat'l Cable & Telecommc'ns Ass'n v. FCC,* 555 F.3d 996, 1000 (D.C.Cir.2009) (internal quotation marks and citations omitted).

There is, however, an exception to the prevailing *Central Hudson* rule. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* the Supreme Court held that, where a law compels disclosure of "purely factual and uncontroversial information," the law need only be

[10] In the *Taylor* case, the D.C. Circuit considered a 2007 law that required registered lobbyists to make certain disclosures about their financial backers. The court explained that strict scrutiny applied, and that "[t]o satisfy strict scrutiny, the government must establish three elements: (1) the interests the government proffers in support of the statute must be ... compelling; (2) the statute must effectively advance those interests; and (3) the statute must be narrowly tailored to advance the compelling interests asserted." 582 F.3d at 11 (internal quotation marks and citations omitted).

"reasonably related to the [government's] interest in preventing deception of consumers" to pass muster under the First Amendment. 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).[11]

The parties in the instant case differ sharply as to whether the *Central Hudson* (intermediate scrutiny) or the *Zauderer* (reasonableness) standard applies to the Final Rule's compelled disclosure of production step information, and they largely rely on two recent decisions from the D.C. Circuit that illuminate the question of which test should be applied here. In *R.J. Reynolds Tobacco Co. v. Food and Drug Administration* ("*RJR* "), several tobacco companies challenged on First Amendment grounds an FDA regulation requiring graphic images to be displayed along with warnings on cigarette packs. 696 F.3d 1205 (D.C.Cir.2012). A divided panel of the D.C. Circuit ruled that intermediate scrutiny, not the *Zauderer* standard, applied for two main reasons: first, because the government had not shown that there is a "danger" that the tobacco companies' advertisements "mislead consumers" without a warning that includes graphic images, *id.* at 1214; and second, because "the graphic warnings d[id] not constitute the type of purely factual and uncontroversial information or accurate statements to which the *Zauderer* standard applied." *Id.* at 1216 (citing *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265, and *Milavetz,* 559 U.S. at 250, 130 S.Ct. 1324). Applying intermediate scrutiny per *Central Hudson,* the panel majority struck down the regulation on the second prong of the *Central Hudson* test, finding that the FDA had not provided enough evidence that the rule requiring graphic images along with warning labels would directly and materially further the government's substantial interest in reducing smoking. *RJR,* 696 F.3d at 1221–22.

[11] *Zauderer* involved a rule that required attorneys who sought to advertise that they worked for contingency fees to disclose in their advertisements that their clients might be responsible for some litigation fees and costs regardless of the outcome of their case. 471 U.S. at 631–34, 105 S.Ct. 2265. In these circumstances, as noted, the Supreme Court held that a reasonableness test applied, rather than the intermediate scrutiny of *Central Hudson. Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265. In so holding, the Court reasoned that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [a party's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.*

Conversely, in *Spirit Airlines, Inc. v. United States Department of Transportation,* the D.C. Circuit considered a First Amendment challenge to a Department of Transportation ("DOT") rule requiring that the total cost of airfare, inclusive of tax, be the most prominent price displayed on airline advertisements and travel websites. 687 F.3d 403 (D.C.Cir.2012). The panel majority in *Spirit Airlines* determined that *Zauderer's* reasonableness standard, not Central Hudson's intermediate scrutiny, governed the compelled commercial speech regulation at issue. *Id.* at 412–14. Specifically, the *Spirit Airlines* court noted that, where the rule in question is "directed at *misleading* commercial speech, and where [it] impose[s] a disclosure requirement rather than an affirmative limitation on speech, *Zauderer,* not *Central Hudson,* applies." *Id.* at 412 (internal quotation marks omitted). The panel in *Spirit Airlines* also noted that the *Zauderer* standard could be applied even where an agency had not made an affirmative showing that the public had previously been deceived and thus the compelled disclosure was necessary, as long as " 'the *possibility* of deception ... was self-evident.' " *Id.* at 413 (quoting *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265). The *Spirit Airlines* majority found that these conditions were easily satisfied under the circumstance presented because the DOT rule required disclosure of factual information, and "based on common sense and ... experience," the disclosure of such facts would likely address consumer confusion in the marketplace. *Id.* at 413. Accordingly, the panel applied *Zauderer* and ultimately held that the DOT rule did not violate the First Amendment. *Id.* at 413–14.

The First Amendment arguments that the parties seek to advance in this case are largely based on the D.C. Circuit's analyses in *RJR* and *Spirit Airlines.* Plaintiffs urge the Court to rely on language from *RJR,* and accordingly, they maintain that *Central Hudson's* intermediate scrutiny applies. While Plaintiffs apparently do not dispute that the Final Rule's production step labeling requirement is purely factual and noncontroversial, Plaintiffs vigorously assert that the Final Rule does not target "deceptive speech" and that, therefore, *Zauderer* does not apply. (Pl. Reply at 3–9.) To this end, Plaintiffs argue that the agency never said anything about prevention of consumer deception during the rule-making process, so its attempt to do so now qualifies as the type of classic "post hoc rationalization" that the Court should not accept. (*Id.* at 4.) In addition, Plaintiffs maintain that *RJR's* statement that "the government

[cannot] seek review under the lenient *Zauderer* standard absent a showing that the advertisement at issue would likely mislead consumers," *RJR,* 696 F.3d at 1214, must be taken at face value, and that the agency has not made the requisite "showing" of deception. (Pl. Reply at 7; *see also* Hr'g Tr. at 8:1–20, Aug 27, 2013, ECF No. 46.)

Defendants, on the other hand, rely largely on *Spirit Airlines* to argue that the ambit of the "consumer deception" required to invoke *Zauderer* is not nearly as narrow as Plaintiffs claim. The agency essentially maintains that common sense demonstrates that compelled disclosure of production steps targets misleading speech and consumer confusion insofar as it corrects aspects of the 2009 COOL Rule that led retailers to use misleading labels, such as the allowance for commingling. (*See* Def. Br. at 32–34 (noting that "the Secretary promulgated the 2013 Final Rule to correct discrepancies under the prior regulation that led to potentially misleading labels").) Similarly, Defendant–Intervenors contend that "[l]ike the DOT rule [at issue in *Spirit Airlines*], the Final Rule was targeted at preventing consumer confusion in the marketplace," and that "the legislative history of the COOL statute and the voluminous public comments on the 2003 and 2009 rulemaking demonstrate that consumers were being confused." (Int. Br. at 11.)

Against the backdrop of *RJR* and *Spirit Airlines,* the Court concludes that the production step labeling mandated by the Final Rule is the type of disclosure requirement subject to review under *Zauderer's* "reasonableness" standard. As a preliminary matter, it is undisputed, and the Court agrees, that the Final Rule mandates "purely factual and uncontroversial" disclosures about where an animal was born, raised, and slaughtered, *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265, and thus satisfies this prerequisite to *Zauderer's* application.[12] Furthermore, with respect to

[12] The Second Circuit has cogently described one (persuasive though not binding) rationale for the less exacting level of scrutiny applicable to factual and uncontroversial compelled disclosures per *Zauderer.* In *National Electrical Manufacturers Association v. Sorrell,* the court explained that "[c]ommercial speech is subject to less stringent constitutional requirements than are other forms of speech [;] [f]urthermore, within the class of regulations affecting commercial speech, there are material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions on speech." 272 F.3d 104, 113 (2d Cir.2001) (quoting *Zauderer* (internal quotation marks omitted)). The court continued:

the "consumer deception" aspect of *Zauderer's* applicability, *Spirit Airlines* clearly indicates that Plaintiffs are wrong to insist that the agency was required to articulate specifically that the Final Rule was targeting consumer deception in order to invoke review under the *Zauderer* standard. Rather, under *Spirit Airlines,* the likelihood of deception need only be based on "experience" and "common sense."[13] And here, just as in *Spirit Airlines,* the "likelihood of deception is hardly ... speculative." *See id.* at 413 (internal quotation marks and citation omitted). Prior to the enactment of the Final Rule, the allowance for commingling all but ensured that certain muscle cut commodities would carry misleading labels. As the agency points out, under the 2009 COOL program, if ninety-nine cows that were born, raised, and slaughtered in the U.S. were commingled with one cow that was born in Mexico and raised and slaughtered in the U.S., all resulting muscle cuts would be labeled "Product of the United States and Mexico." (Def. Br. at 33.) Moreover, retailers had no obligation to provide any of the details regarding which steps of the production process happened where, and for muscle cuts from animals with multiple countries of origin, retailers were permitted to list the countries in any order. (*Id.* at 17–18.) Under these circumstances, the Court has no trouble concluding that experience and

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> Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas. Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.

Id. at 113–14 (citations, internal quotation marks, and footnote omitted).

[13] Even *RJR* suggests that *Zauderer's* "deception" requirement is not as stringent as Plaintiffs maintain. The *RJR* court cited regulations targeting "incomplete commercial messages" as an example of the type of regulations subject to review under *Zauderer,* and also recognized that a "self-evident—or at least potentially real" risk of misleading consumers is sufficient to warrant scrutiny under *Zauderer.* 696 F.3d at 1214 (internal quotes and citations omitted).

common sense dictates that there was a likelihood of consumer confusion under the prior COOL program.

Moreover, even if Plaintiffs are correct that *Zauderer* requires an affirmative showing of consumer confusion as the basis for the disclosure requirement, the agency appears likely to be able to satisfy that burden here. When it issued the Final Rule, the agency explicitly stated that it was requiring the disclosure of production step information to provide consumers with "more specific information on which to base their purchasing decisions," and also to "ensure [that] label information more accurately reflects the origin of muscle cut covered commodities." *See* Final Rule, 78 Fed.Reg. at 31,375. Public comments that the agency relied on in crafting the Final Rule indicated that the disclosure requirement "makes labels more informative for consumers," *id.* at 31,369, and the Final Rule also specifically dictates how production step information is to be presented to consumers using language that indicates that consumer confusion was the major driver behind the rule's promulgation. *See, e.g., id.* ("Therefore, under this final rule, abbreviations for the production steps are permitted as long as the information can be clearly understood by consumers.").[14] Thus, although the agency may not have used the specific words "deceive" or "mislead" when explaining the purpose of the production step disclosure requirement, the Final Rule sufficiently establishes that the regulation was intended to address the possibility of consumer confusion regarding the origin of covered commodities. Consequently, this Court concludes that the Final Rule should be reviewed under the *Zauderer* standard.

Having concluded that *Zauderer,* and not *Central Hudson,* applies, the Court now turns to an assessment of Plaintiffs' likelihood of success on the merits of their First Amendment claim. Under *Zauderer,* the government need only show that the compelled disclosure at issue is "reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265. This standard of review is unquestionably lenient; indeed, the D.C.

[14] Notably, the United States also specifically argued that the country-of-origin labeling program was implemented to "help prevent consumers from being misled about the origin of meat" during the WTO proceedings surrounding the 2009 COOL Final Rule. WTO Panel Report ¶ 7.665.

Circuit has explained that the *Zauderer* standard is "akin to rational-basis review." *RJR,* 696 F.3d at 1212.

Not surprisingly, the parties differ as to whether the Final Rule passes muster even under the *Zauderer* standard. While Defendants maintain that the Final Rule easily satisfies *Zauderer* (Def. Br. at 34–35), Plaintiffs argue that the Final Rule's production step disclosure requirement fails this lenient test primarily because, in Plaintiffs' view, compelled disclosure of production step information imposes burdens far in excess of any marginal possibility of consumer confusion that is alleviated by the rule. (Pl. Reply. at 11–12.) In other words, from Plaintiffs' perspective, the harm (*i.e.,* the confusion that the rule is supposedly designed to address) is not adequately defined (*id.* at 11), and the production step disclosure requirement is not only too costly relative to that ill-defined problem, it purportedly *causes* as many labeling inaccuracies as it cures (*id.* at 11–12).

Plaintiffs' arguments in this regard are not likely to be persuasive. First, to the extent that Plaintiffs' argument rests on the proposition that the production step disclosure requirement is too "burdensome" to be reasonably related to the government's interest in preventing consumer confusion, Plaintiffs appear to conflate the burden that they claim the Final Rule places on their *finances* with the burden it places on their speech. (*See id.; see also* Pl. Br. at 2 (asserting that the agency's interest in compelling disclosure of production step information "is far outweighed by the onerous burdens imposed by the Final Rule").) In the First Amendment context, it is the burden on speech, not pocketbook, that matters. *See Milavetz,* 559 U.S. at 250, 130 S.Ct. 1324 ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech."). Moreover, it is well established that, when the compelled speech is commercial and purely factual in nature, the speaker's First Amendment rights are not unduly burdened "'as long as [the] disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers.' " *Milavetz,* 559 U.S. at 250, 130 S.Ct. 1324 (quoting *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265); *see also supra* n. 14.

Second, Plaintiffs' excess-burden argument essentially attempts to graft a "tailoring" requirement onto the reasonableness standard the Supreme

Court has articulated. But *Zauderer's* reasonableness inquiry contains no tailoring requirement; rather, it requires only that a regulation such as the one at issue here be reasonably related to the government's interest in preventing consumer deception. *See RJR,* 696 F.3d at 1212. Here, there is clearly a reasonable relationship between the government's interest in preventing consumer confusion about the origins of muscle cut meat, on the one hand, and the required disclosure of specific production step information, on the other. Accordingly, the Final Rule satisfies the reasonableness standard articulated in *Zauderer,* and the Court finds that Plaintiffs' First Amendment challenge is unlikely to be successful.

B. *Plaintiffs' AMA Claim*

As a second basis for challenging the Final Rule, Plaintiffs argue that the rule contravenes the will of Congress in two respects. First, Plaintiffs maintain that the Final Rule exceeds the authority that the COOL statute grants to the AMS with respect to the country-of-origin labeling program because it requires retailers to specify where an animal was "born, raised, and slaughtered," which, according to Plaintiffs, "the COOL statute does not permit." (Compl. ¶ 82.) Second, Plaintiffs argue that the Final Rule impermissibly bans commingling practices—a ban that, according to Plaintiffs, clearly exceeds the bounds of the agency's limited statutory authority to regulate labels. (*See* Pl. Br. at 32 ("Congress did not give AMS authority to dictate how to produce and package meat.").) In defense of the Final Rule, the AMS and Defendant–Intervenors argue that the agency's action is entitled to deference because the COOL statute does not clearly prohibit regulations that require the more detailed label information required under the Final Rule. (Def. Br. at 10–15; Int. Br. at 13–17.) Moreover, Defendants maintain that Congress specifically authorized the agency to promulgate regulations that are consistent with the legislature's intent to provide consumers with more specific country-of-origin information, and in the absence of any express prohibition, the commingling ban permissibly furthers that intention. (Def. Br. at 18.)

Plaintiffs' statutory authority arguments implicate the familiar two-step *Chevron* standard. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Supreme Court has long held that "if the statute speaks clearly 'to the precise question at issue,' we 'must give effect to the unambiguously

expressed intent of Congress.' " *Barnhart v. Walton,* 535 U.S. 212, 217–18, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) (quoting *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778). If, however, "the statute 'is silent or ambiguous with respect to the specific issue,' we must sustain the Agency's interpretation if it is 'based on a permissible construction' of the [statute]." *Id.* at 218, 122 S.Ct. 1265 (citations omitted). The Court's task here, then, is to examine the COOL statute for indicia of congressional intent in light of Plaintiffs' contentions and to determine whether Plaintiffs are likely to succeed in claiming that the agency lacked statutory authority to promulgate the Final Rule.

1. *Point–of–Processing Labeling*

The first aspect of Plaintiffs' statutory challenge is their assertion that the COOL statute unambiguously prevents the AMS from requiring muscle cut retailers to affix what Plaintiffs call "point-of-processing" labels (Pl. Br. at 25–30)—*i.e.,* labels that identify the specific geographic locations where the animal that was the source of the muscle cuts was "born, raised, and slaughtered." (*Id.*)[15] Although Plaintiffs struggle valiantly to persuade the Court that they will be able to surmount the first *Chevron* hurdle with respect to this statutory contention, the text and structure of the COOL statute present obstacles that appear to be too great for Plaintiffs to overcome.

First and foremost, Plaintiffs can point to no statutory provision that expressly prohibits the AMS from enacting regulations that mandate the disclosure of "born, raised, and slaughtered" information. This omission is significant because the COOL statute does expressly require the Secretary of Agriculture, who heads the AMS, to "promulgate such regulations as are necessary to implement" the law. 7 U.S.C. § 1638c(b). (*See also* Def. Br. at 18 (arguing that the Secretary has broad discretion to promulgate rules "necessary to implement" the COOL statute).)

[15] The parties use the terms "point-of-processing" information and "production step" information interchangeably when referring to the Final Rule's requirement that a retailer disclose to consumers the places where the animal from which muscle cut commodities are derived was born, raised, and slaughtered. This opinion uses these phrases interchangeably as well.

In the absence of any statutory prohibition limiting the agency's power to dictate the disclosure of production step information, Plaintiffs maintain that the statute's text nevertheless clearly establishes Congress's intent to leave no room for the agency to do so. Plaintiffs' argument in this regard focuses on the statute's prescriptions regarding which country constitutes the "country of origin" for certain covered commodities under specified circumstances. For example, Plaintiffs read the language of 7 U.S.C. § 1638a(a)(2)(C) to mandate that the country of origin for meats that fit into Category C will be "two places only—the country from which it was imported and the United States" (Pl. Br. at 26), and thus, Plaintiffs argue that Congress could not have intended for the production steps to be revealed because, in the Category C instance, "the animal's 'country of origin' has nothing to do with where it was born or raised." (*Id.*) Plaintiffs perceive a similar disconnect between what the statute says about the country of origin and a point-of-processing label requirement when they interpret the statutory provision pertaining to Category A muscle cuts. Plaintiffs argue that the fact that Congress permits the Category A designation to be made with respect to muscle cuts derived from animals "present in the United States on or before July 15, 2008"—without regard for where such animals were born, raised, or slaughtered—means that Congress "could not have intended origin information to be conveyed through production-step details." (*Id.* at 26–27 (analyzing § 1638a(a)(2)(A)).) And Plaintiffs make the same point-of-processing prohibition point with respect to Category D muscle cuts, because § 1638a(a)(2)(D) states that the country of origin is "a" country that is "other than the United States," and, in Plaintiffs' view, this prescription is "incompatible with a point-of-processing scheme, since an animal may not be born, raised, and slaughtered all in one place." (Pl. Br. at 27.)

Plaintiffs' statutory arguments are likely to be unavailing for several reasons. First of all, Plaintiffs rely heavily on, and seek to advance, the notion that when Congress speaks to a matter in any respect, an agency is thereby prohibited from building upon what the statute requires even in the absence of an express prohibition. In this regard, Plaintiffs ardently maintain that Congress's decision to determine the acceptable "country of origin" designation for animals of different backgrounds unambiguously evidences its intent to prevent the AMS from requiring that retailers inform consumers of any additional origin-related

information. (*See* Pl. Br. at 29 (reasoning that "COOL labels must not specify each point of processing, from birth to raising to slaughter, because not every animal's statutorily defined 'country of origin' includes those production steps"); *see also id.* at 28 ("[W]hile Congress defined 'country of origin' differently for separate categories of meat, with some categories encompassing an animal's country of birth or raising ... the statute's language and structure make clear that labels must not list this information by detailing each production step.").) But such extrapolation—*i.e.,* that because Congress mandated that the country of origin be disclosed, and went further to define the country of origin in particular (and sometimes inconsistent) circumstances, such information is obviously the *only* permissible disclosure—is rarely successful. *See, e.g., Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 219, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (finding that, where Congress mandated the exact level of discharge of pollutants in one provision of a regulatory scheme, the agency retained discretion to determine discharge amounts in other contexts); *see also Catawba Cnty., N.C. v. EPA,* 571 F.3d 20, 36 (D.C.Cir.2009) ("When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.' " (quoting *Cheney R.R. Co. v. ICC,* 902 F.2d 66, 69 (D.C.Cir.1990) (emphasis omitted))).

Moreover, and perhaps even more to the point, in each textual instance that Plaintiffs point to, rather than indicating that the statutorily-defined country of origin is the sole bit of information that may properly appear on the labels of muscle cut commodities, Congress appears to be engaged in the more fundamental task of developing a uniform system for determining which geographic location qualifies as the "country of origin" for designation purposes in any given case. For example, Congress tells retailers that in order to designate a muscle cut commodity as a United States product exclusively (Category A), the retailer must ensure that the animal from which the cuts were derived was "exclusively born, raised, and slaughtered in the United States." 7 U.S.C. § 1638a(a)(2)(A)(i).[16] This says nothing about the *content* of the required

[16] The statute establishes only two other circumstances in which it is permissible for the country of origin to be designated as the U.S. exclusively: where the animal at issue was "born and raised in Alaska or Hawaii and transported for a period of not more than 60

disclosure with respect to such an animal.[17] And it certainly does not preclude the AMS from determining that, in order to best inform consumers about the origins of a Category A muscle cut commodity pursuant to the statute, the label affixed to any such muscle cuts package must convey something to the effect of "Born, Raised, and Slaughtered in the USA."

The same is true of Categories C and D, and Plaintiffs' reading of those provisions is similarly unpersuasive. Plaintiffs insist that Congress intended its requirements about country-of-origin designations in these circumstances to serve as a prohibition against point-of-processing labeling. (*See* Pl. Br. at 27.) But nowhere in those statutory provisions does Congress purport to address the content of the disclosure that a retailer is required to make to consumers with respect to the muscle cut categories that the statute creates. Instead, just as with Congress's clearly stated intention to establish which types of animals are properly designated as Category A, the language of subparagraphs (C) and (D) reads much more like Congress is sorting livestock-explaining which animals fall into which categories based on factors such as where they were born, raised, or slaughtered; whether they have been imported into the U.S. for immediate slaughter; or whether they were processed before they were imported—and *not* like Congress is making pronouncements about what information retailers can be required to disclose to consumers, as Plaintiffs strenuously maintain.[18]

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days through Canada to the United States and slaughtered in the United States," and where the animal was "present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States." 7 U.S.C. § 1638a(a)(A)(ii)-(iii).

[17] Indeed, the farthest that the statute goes in addressing the form or appearance of the mandatory notice to consumers is to state that "[t]he information required ... may be provided to consumers by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers." 7 U.S.C. § 1638a(c)(1).

[18] In this regard, Plaintiffs' assertion that "Congress could not have wanted the specificity of COOL labels to vary based on the happenstance of whether an animal was imported for immediate slaughter or imported and then raised briefly in the United States" (Pl. Br. at 28) is probably true, but the conclusion that the Plaintiffs draw from that contention—that AMS is thereby prohibited from requiring point-of-processing labels—does not follow. Congress clearly considered criteria *other than* where an animal was born, raised, and slaughtered to be important to the determination of the country-of-origin designation, such as, for example, when an animal is imported into the United States for immediate

In pressing for the likely viability of their interpretation of the COOL statute, Plaintiffs also cannot escape the fact that the North Star of any exercise of statutory interpretation is the intent of Congress, as expressed in the words it uses. *Cf. Am. Fed'n of Labor & Congress of Indus. Orgs. v. FEC,* 333 F.3d 168, 180 (D.C.Cir.2003) ("[I]nquiry into ... Congress's intent proceeds, as it must, from 'the fundamental canon that statutory interpretation begins with the language of the statute itself.' " (quoting *Butler v. West,* 164 F.3d 634, 639 (D.C.Cir.1999))). In this respect, too, Plaintiffs textual argument withers when exposed to the guiding light of standard legislative drafting experience. That is, if Congress truly had intended that a retailer with muscle cuts from an animal properly designated as Category A, B, C, or D could *only* be required to inform consumers of the covered commodity's statutorily-established country of origin designation—and nothing more—surely it would have found a clearer way to express that intention. Indeed, Congress does precisely that elsewhere in this same statute, by inserting specific provisions that speak directly to the information that a retailer can, and cannot, be required to gather and to disclose. *See, e.g.,* § 1638a(c)(2) (stating, in regard to covered commodities "already individually labeled for retail sale regarding country of origin," that "the retailer *shall not be required to provide any additional information* to comply with this section" (emphasis added)); *id.* § 1638a(d)(2)(B) ("The Secretary *may not require* a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of the country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person." (emphasis added)). These textual reminders that Congress typically says what it means when it seeks to limit an agency's regulatory authority undermine Plaintiffs' argument that Congress intended to—but somehow neglected to—include like language regarding the disclosure obligation at issue here.[19]

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slaughter. *See* 7 U.S.C. § 1638a(a)(2)(C). The fact that a rational legislature probably would not have wanted the content of the required labels to turn on such matters as whether an animal was imported for immediate slaughter or "whether an animal was present in the United States on July 15, 2008" (Pl. Br. at 28) merely underscores the likelihood that subsection (a)(2), which relies on such distinctions, is not really addressing the content of COOL labels at all.

[19] Plaintiffs' argument that Congress considered and affirmatively rejected the agency's point-of-processing label scheme when COOL regulations were first proposed in 2003 (Pl. Br. at 28–29) is not convincing. As Defendant–Intervenors point out (Int. Br. at 16), the COOL statute adopts the point-of-processing framework in many respects; therefore,

The best Plaintiffs can do to support their contention that the statute prohibits the AMS from requiring point-of-processing labels is to maintain that Congress's selective use of the word "shall" in the COOL statute evidences its intention that the prescribed country-of-origin designations be the only information that is disclosed to consumers pursuant to the statute. (Pl. Br. at 29–30.) This argument homes in on the statutory text as follows. In subparagraph (C), Congress says that a retailer whose muscle cuts will be derived from an animal that has been imported into the United States for immediate slaughter "*shall* designate the origin of such covered commodity as—(i) the country from which the animal was imported; and (ii) the United States," 7 U.S.C. § 1638a(a)(2)(C)(emphasis added), so who is the AMS to require retailers of Category C meats to inform consumers of the places where the animal was born, raised, and slaughtered? (*See* Pl. Br. at 26.) Of course, this reading assumes, without good reason, that a retailer's duty to "inform consumers ... of the country of origin" in subsection (a)(1) of the statute is equivalent to subsection (a)(2)'s duty to "designate" the country of origin; and, indeed, Plaintiffs' entire argument appears to be based on conflating what Congress permits (or requires) in regard to designating the country of origin, on the one hand, with the particular statement that a retailer can (or must) make when informing consumers about the origin of the muscle cuts package, on the other. (*See, e.g.,* Pl. Br. at 26 (asserting that the requirement to "inform" consumers of the country of origin cannot mean "the 'countries of birth, raising, and slaughter' " because, in regard to Category C meat, for example, Congress mandated that "the retailer 'shall designate the origin ... as (i) the country from which the animal was imported; and (ii) the United States'—period").) It is perfectly reasonable, however, to interpret the COOL statute as creating a retailer obligation that has two different aspects: the duty to *inform* consumers of the covered commodity's country of origin, which

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it is not at all clear that Congress actually rejected the agency's proposed focus on production steps. In any event, it is well-established that the text of a statute, and not the legislative process that engendered it, is conclusive of Congress's intent. *See United States v. Barnes,* 295 F.3d 1354, 1365 (D.C.Cir.2002) ("We do not resort to legislative history to cloud a statutory text that is clear." (internal quotation marks and citation omitted)); *see also United States v. Braxtonbrown–Smith,* 278 F.3d 1348, 1353 (D.C.Cir.2002) (noting that statutory construction begins with the plain language of the statute, and where the text is clear, the inquiry ends without proceeding into legislative history).

is preceded by the distinct, threshold responsibility of *designating* (*i.e.,* determining) which country qualifies as the country of origin with respect to a given commodity.

There are plenty of hints in the statutory language that this may be precisely how Congress intended for its subsection (a)(2) provisions to be read. The most prominent textual clue that the statute's instructions regarding designation in subsection (a)(2) do not necessarily limit the scope of the information that retailers are required to give consumers pursuant to subsection (a)(1) is, of course, the fact that Congress used two different terms—"inform" and "designate"—in these consecutive subsections of the statute. *See Sosa v. Alvarez–Machain,* 542 U.S. 692, 711 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (noting that the use of different words in a single statute presumably means that Congress intended that the different words had different meanings and effects); *Vonage Holdings Corp. v. FCC,* 489 F.3d 1232, 1240 (D.C.Cir.2007) ("[W]e have repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." (internal quotation marks and citations omitted)). And these two words can have very different meanings. Merriam–Webster's collegiate dictionary explains that to "inform" is to "impart information or knowledge," whereas to "designate" means to "to distinguish" or "to indicate and set apart for a specific purpose." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 313, 599 (10th ed.1999). That Congress used two terms that can mean different things in subsections (a)(1) and (2) is indicative of a lack of congressional intent that "inform" and "designate" be construed as one-and-the-same, as Plaintiffs suggest. Also seemingly relevant to a determination of what Congress intended when it used "inform" in subsection (a)(1) and "designate" in subsection (a)(2) is the fact that the concept of designating the country of origin of a commodity apart from labeling that commodity is employed elsewhere with respect to a similar regulatory and statutory framework.[20] Thus, it would be reasonable to

[20] *See Easterday Ranches Inc. v. Dep't of Ag.,* No. CV–08–5067–RHW, 2010 WL 457432, at *2–3 (E.D.Wash. Feb. 5, 2010) (explaining that the Treasury Department permits retailers that import livestock for immediate slaughter to represent that the animals are exclusively a product of the United States "in a customs setting, for the purposes of tariff designation," and differentiating such designation from the act of affixing a label to inform consumers of the country of origin). The *Easterday* court

conclude that, when Congress laid out in the COOL statute all of the circumstances under which retailers can properly "designate" the country of origin of an animal that will be processed for sale as a muscle cut commodity, it intended to make a statement about how to distinguish between countries for the purpose of determining which country constitutes the animal's country of origin under the specified circumstances, which says nothing at all about what information the retailer may be required to convey pursuant to the statutory obligation to inform consumers about the animal that originated from that country or countries.[21]

To be sure, it is also possible to construe the term "designate" to mean "specify" or "stipulate"—an alternative interpretation that would permit

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examined a series of regulations that the Department of the Treasury promulgated, 19 C.F.R. § 102 *et seq.,* to deal with country of origin designation and labeling in the context of a customs scheme governing tariffs on imported goods. *See* 19 U.S.C. § 1 *et seq.* (2012). This regulatory scheme—which, like 7 U.S.C. § 1638a(a)(2)(C), pertains to imported animals—creates a two-pronged approach that could be the functional equivalent of COOL's "designate" and "inform" structure. One section of the Treasury Department's rules pertains to "Rules of Origin," and establishes rules for determining the imported good's country of origin. 19 C.F.R. § 102.22; *see also id.* § 102.20 (identifying situations in which country of origin for the purposes of tariff classifications can be changed). Apart from this initial determination, the regulatory scheme has separate instructions that instruct when imported goods must be "marked"—*i.e.,* labeled—with the appropriate country of origin in order to inform the "ultimate purchaser" of the goods. *Id.* § 134.11 (referring to "labeling and marking" of imported goods). While certain goods are exempt from marking, their country of origin must still be determined. *See id.* § 134.35(b). Thus, these regulations clearly contemplate a process whereby determining the country of origin is different from putting that country on the label of the product itself.

[21] The text and structure of subparagraph (B) illustrate this very point. Subdivision (i) of that subparagraph establishes the designation rule for muscle cuts derived from an animal in which the production steps have taken place both in the United States and another country, so long as the animal has not been imported into the United States for immediate slaughter. With respect to such an animal, Congress states that "[a] retailer ... may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered." 7 U.S.C. § 1638a(a)(2)(B). But the very next subdivision takes care to dispel any notion that this designation requirement has any impact on the retailer's duty to *inform* consumers of the country of origin pursuant to section (a)(1). *See id.* § 1638a(a)(2)(B)(ii) ("Nothing in this subparagraph alters the mandatory requirement to inform consumers of the country of origin of covered commodities."). The language of subdivision (ii) could reasonably be read to clarify Congress's intent that designation and information are distinct statutory obligations, and that the former in no way restricts the latter, as Plaintiffs argue.

an inference that subsection (a)(1)'s duty to inform consumers is, in fact, the equivalent of a retailer's obligation to designate the country of origin for the purpose of subsection (a)(2). Indeed, if by "designate" Congress meant "specify," then the statutory terms "inform" and "designate" overlap, giving some credence to Plaintiffs' argument that Congress's pronouncements about what a retailer can (or must) do when designating the country of origin governs the scope of the information that can be provided to consumers under the terms of the COOL statute. Nevertheless, the reasonable possibility that Congress meant the two terms to be construed differently as explained above remains, so, at most, any conceivable overlap only manages to render the statute ambiguous. *See United States v. Villanueva–Sotelo,* 515 F.3d 1234, 1237 (D.C.Cir.2008) (finding a statute ambiguous because it was subject to different interpretations); *McCreary v. Offner,* 172 F.3d 76, 82 (D.C.Cir.1999) (finding a statute ambiguous because it was "reasonably susceptible to more than one meaning"). This is not good news for Plaintiffs: ambiguity in such a critical statutory term would require this Court to proceed to evaluate the permissibility of the agency's interpretation under *Chevron's* step two, and the arduousness of the second step of the well-worn *Chevron* trek is so well established that Plaintiffs are hard-pressed here to provide the necessary assurances of their likely success on the merits if such analysis is required. *Cf. Sherley v. Sebelius,* 644 F.3d 388, 389, 395–98 (D.C.Cir.2011) (vacating the district court's imposition of a preliminary injunction because plaintiffs were unlikely to prevail given the ambiguity of the statute and the agency's reasonable interpretation); *Cardinal Health, Inc. v. Holder,* 846 F.Supp.2d 203, 226–28, 230 (D.D.C.2012) (denying a preliminary injunction where plaintiff was unlikely to succeed on the merits in part because the statute was ambiguous and the agency's interpretation was not plainly erroneous).

Chevron's step two requires the Court to defer to an agency's interpretation of a statute unless that interpretation is impermissible. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778; *see also Coalition for Common Sense in Government Procurement v. United States,* 707 F.3d 311, 317 (D.C.Cir.2013) (noting that "[t]he *Chevron* step two question" is "whether the [agency's] rule reflects a reasonable interpretation of" the relevant statute). Here, the AMS stated in the Final Rule itself, and reiterated in its briefs, that it considers the changes that the rule makes to

the previous labeling requirements to be "consistent with the provisions of the statute." Final Rule, 78 Fed.Reg. at 31,368. Pointing out that the COOL statute expressly "provides authority for the Secretary to promulgate regulations necessary to implement the COOL program," *id.* at 31,370, the agency also explained the basis for this interpretation:

> [t]he statute contemplates four different labeling categories for meat, based on where the animal was born, raised, and/or slaughtered. This final rule preserves these four different labeling categories for meat and is consistent with the labeling criteria set forth in the statutory scheme.

Id. There is nothing plainly wrong or impermissible about this statutory interpretation; indeed, based on the analysis above, the agency's view of the statute as permitting the point-of-processing labeling structure set out in the Final Rule is entirely reasonable. In any event, on summary judgment or at trial, the Court would be required to give the agency's interpretation great deference at this point in the *Chevron* analysis, *see Vill. of Barrington, Ill. v. Surface Transp. Bd.,* 636 F.3d 650, 667 (D.C.Cir.2011), which means that Plaintiffs' contention that the COOL statute prohibits production step labeling would likely fail.

2. *Commingling*

Plaintiffs' second statutory challenge is their assertion that the AMS exceeded its statutory authority when it issued a Final Rule that prohibits the longstanding practice of commingling. (Compl. ¶ 84; *see also* Pl. Br. at 25 (arguing that "the Final Rule's bar on commingling extends beyond the limited authority Congress granted the AMS to regulate product labels by instead dictating how meat is processed and packaged in the first instance").) As noted in Section II.B above, commingling involves processing animals from different countries of origin together during a single production day and labeling the resulting muscle cuts commodity with all of the various countries where the animals originated. Plaintiffs maintain that the COOL statute expressly authorizes commingling (Pl. Reply at 17), and also that the AMS, which is an agency that regulates labeling and advertisements, went far beyond its mission when it promulgated a rule that brings commingling to an end and thereby forces

regulated entities to "restructure the[ir] production, distribution, and packaging systems" (Compl. ¶ 83; *see also* Pl. Br. at 30–32). For the following reasons, this argument lacks merit, and is therefore unlikely to succeed.

First, the term "commingling" does not appear anywhere in the text of the COOL statute. This omission in and of itself renders doubtful Plaintiffs' assertion that Congress clearly intended to address, and to protect, the practice. *Cf. Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply...."). Certainly, if Congress was as supportive of commingling as Plaintiffs insist, one would have expected the COOL statute's drafters to have inserted language to that effect.

Nor is even the *concept* of commingling unambiguously present in the statutory text, despite Plaintiff's arguments to the contrary. (*See* Pl. Reply at 16–17.) A straightforward reading of the statutory provision related to Category B muscle cut commodities makes this evident. That provision, which is entitled "Multiple Countries of Origin" (and is thus the most logical place to look for evidence that Congress intended to preserve commingling) states:

> **(B) Multiple countries of origin**
>
> **(i) In general**
>
> A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is—
>
> **(I)** not exclusively born, raised, and slaughtered in the United States,
>
> **(II)** born, raised, or slaughtered in the United States, and
>
> **(III)** not imported into the United States for immediate slaughter,

> may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered.

7 U.S.C. § 1638a(a)(2)(B)(i). Plaintiffs argue that this provision indicates Congress's intent to make allowances for the kind of multiple-country labels that result from the commingling practice (Pl. Reply at 17), but close examination reveals that this statutory provision expressly refers to the proper designation of "*an* " animal or "*the* animal," making clear that it relates solely to the threshold question of how to designate muscle cuts that derive from "an" animal that, itself, is of mixed origin.[22] And Congress's guidance on *that* point says nothing about the separate and entirely different question of which country-of-origin applies if a retailer wants to market a muscle cuts package that contains a mix of cuts derived from multiple animals, where the animals have different country-of-origin designations—*i.e.,* the commingling question. In other words, the statute's text plainly focuses on the appropriate designation for "an" animal that has multiple potential countries of origin; it does not, and presumably never intended to, address the different issue of how to discern the country of origin of a mixed muscle cut commodity; that is, a package of muscle cuts that are derived from more than one properly-designated animal, when the relevant animals have different countries of origin.

In the absence of any clear congressional guidance on the mixed muscle cuts situation, the AMS previously permitted retailers who had commingled animals with different country-of-origin designations into a mixed muscle cuts package to list all of the relevant countries on the

[22] In this regard, the language of subparagraph (B) plainly suggests that Congress is addressing what might otherwise be a difficult application issue for retailers, given the principal statutory duty to inform consumers of "*the* country of origin of a covered commodity." 7 U.S.C. § 1638a(a)(1) (emphasis added). One can imagine a retailer asking how to designate the country of origin of an animal that was, say, born in Argentina, raised in Mexico, and slaughtered in the United States—*which* country qualifies as "the" country-of-origin for the purpose of the statute? In subparagraph (B), Congress provides a reasonable answer: the retailer "may designate the country of origin of such covered commodity as *all* of the countries in which the animal may have been born, raised, or slaughtered." *Id.* § 1638a(a)(2)(B)(i) (emphasis added).

label of that commodity, and to list those countries in any order. *See* 2009 COOL Rule, 74 Fed.Reg. at 2659; *see also id.* at 2670 (recognizing that "[c]ommingling like products is a commercially viable practice that has been historically utilized by retailers"). This means, of course, that the much-heralded practice of commingling animals for slaughter and then affixing a multiple-country label to identify all of the applicable countries of origin is likely a creature of *regulation* from its inception, not a product of the statute, as Plaintiffs maintain. And what the agency once giveth, it can surely taketh away without running afoul of the authorizing statute. *Cf. FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 156–57, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (noting that "an agency's initial interpretation of a statute that it is charged with administering is not "carved in stone" " and that agencies "must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." (internal quotation marks and citations omitted)).

Undaunted, Plaintiffs insist that Congress's use of the word "may" in subparagraphs (A) and (B)—when contrasted with its use of the term "shall" in subparagraphs (C) and (D)—is the key to discerning a congressional intent to "preserve commingling flexibility." (Pl. Reply at 17; *see also* Hr'g Tr. at 14:7–10.) To this end, Plaintiffs assert that "may" means that Congress clearly intended to provide meat packers and retailers with a commingling-related *choice* in regard to making country-of-origin designations, and with respect to subparagraph (B) in particular, Plaintiffs highlight a Senate report that appears on first blush to confirm this conclusion. (*See* Pl. Reply at 17 (quoting S.Rep. No. 110–220, at 198 (2007) as stating that "the 'may' used in subsection (B) is to provide flexibility to packers when working with livestock from multiple countries of origin").) Plaintiffs are correct that the text of subsection (B) *does* appear to provide a choice, just not the one for which Plaintiffs advocate.

Focusing again on the statutory language quoted above, subparagraph (B) authorizes a retailer who has "an" animal that has multiple countries of origin—*e.g.,* born in Argentina, raised in Mexico, and slaughtered in the United States—to choose to designate "all of the countries of origin in which the animal may have been born, raised, or slaughtered." 7 U.S.C. § 1638a(2)(B)(i)(III). In the alternative (hence, the "may"), a

retailer can presumably opt to designate just *one* country of origin with respect to such an animal (so long as that one country is not the United States per § 1638a(a)(2)(A)). Given that the COOL statute authorizes the Secretary to conduct audits and also requires detailed recordkeeping to permit "verification of the country of origin of covered commodities," *see id.* § 1638a(d)(2), the choice to designate a single country of origin for an animal pursuant to subparagraph (B) is a meaningful one. But it is a choice that Plaintiffs' commingling arguments completely obscure. Indeed, contrary to Plaintiffs' assertions, subparagraph (B) refers to a *single* animal—it says nothing about the designation of "source animal*s* " (plural) (Pl. Reply at 17)—nor does it come anywhere near to conveying that "retailers 'may' use a multiple-country-of-origin label that designates all of the countries in which the source animals for commingled meat 'may have been born, raised, or slaughtered,' " as Plaintiffs maintain. (*Id.* (quoting 7 U.S.C. § 1638a(a)(2)(B)).) Yet the provision nevertheless provides "flexibility to packers when working with livestock from multiple countries of origin," S.Rep. No. 110–220 at 198, because a packer who is working with "an" animal from multiple countries of origin "may" choose to designate all of that animal's applicable countries as the country of origin or, presumably, may opt to designate only one of them.

The bottom line is this: even if Plaintiffs are correct that Congress secretly wished to preserve commingling and infused subparagraph (B) with that intention, the most plausible reading of what Congress actually wrote is that the statute gives retailers a choice when designating an animal that has mixed countries of origin—either designate all of the countries or select one of the non-U.S. jurisdictions as the country of origin. The provision neither expressly addresses commingling nor does it necessarily preserve any commingling related choice.

Plaintiffs' other commingling arguments relate to subparagraph (A) and are based on the same type of loose textual analysis. Here, Plaintiffs maintain that Congress deliberately uses "may" rather than "shall" in subparagraph (A) in order to convey that retailers who have livestock that would otherwise be entitled to be labeled "product of the USA" *may* choose to affix a mixed-country label to the muscle cuts of such livestock instead. (*See* Pl. Br. at 32; *see also* Hr'g Tr. at 14:7–15:8.) This labeling choice would occur, Plaintiffs argue, when a retailer opts to commingle

muscle cuts from pure U.S. animals (or animals born in Alaska or Hawaii, or animals present in the U.S. before July 15, 2008) with the cuts of animals that have a different country of origin. But to reach the conclusion that Congress intended to preserve commingling in this manner, Plaintiffs have to both construe the "may" in subparagraph (A) entirely out of context and also ignore the equally important statutory terms "only" and "exclusively." When the entire statutory framework and all of the words that Congress employed are taken into account, however, it seems far more likely that, rather than crafting such a convoluted bulwark to guard against the destruction of commingling, Congress was not addressing commingling in the text of the COOL statute at all.

To understand why this is so, one must begin at the beginning of section 1638a, with the general rule that Congress adopted in 2002, and that remained unchanged when Congress revisited the COOL statute in 2008. That provision reads:

> **§ 1638a. Notice of Country of Origin**
>
> **(a) In general**
>
> **(1) Requirement**
>
> Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.

7 U.S.C. § 1638a(a)(1). Subsection (a)(2) then proceeds to lay out a series of rules for retailers to follow when "[d]esignat[ing]" the country of origin if the covered commodity is muscle cuts of beef, lamb, pork, chicken or goat. *See id.* § 1638a(a)(2). Significantly, the first part of subsection (a)(2)—subparagraph (A)—states:

> **(A) United States country of origin**
>
> A retailer of a covered commodity that is beef, lamb,

> pork, chicken, or goat meat may designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was—
>
> **(i)** exclusively born, raised, and slaughtered in the United States;
>
> **(ii)** born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or
>
> **(iii)** present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.

Id. § 1638a(a)(2)(A). When subparagraph (A) is construed in light of the general rule at subsection (a)(1), a retailer who has muscle cuts that are derived from an animal that fits the first of the subparagraph (A) scenarios—born, raised, and slaughtered in the U.S.—has no choice at all: such retailer "*shall* inform consumers" of the country of origin (*id.* § 1638a(a)(1) (emphasis added)), and the only conceivable country of origin for an animal that is born, raised, and slaughtered in the United States is the United States. Consequently, Plaintiffs' insistence that the term "may" in subparagraph (A) must mean that Congress intended to provide a choice related to such livestock contravenes the clear mandate of subsection (a)(1) and for that reason alone is extremely doubtful. *See Brown & Williamson Tobacco Corp.,* 529 U.S. at 133, 120 S.Ct. 1291 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (internal quotation marks and citations omitted)); 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46:06, 230–44 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.").

But Plaintiffs go even further, doing serious damage to the statute's text, when they read "may" as standing alone in subparagraph (A), when that term is clearly working in conjunction with "only" and "exclusively" to establish the sole circumstances in which a retailer "may" (meaning can or is permitted to) designate a muscle cut commodity as a product of the U.S. exclusively. In other words, Plaintiffs are wrong to suggest that the question that Congress is answering with the text of subparagraph (A) is which country a retailer "may" choose when designating the country of origin of an animal that is born, raised, and slaughtered in the United States,[23] when, in reality, Congress appears to have crafted subparagraph (A) to address the propriety of an exclusive U.S. country-of-origin designation for *other* types of muscle cuts—*i.e.,* to address the question, "when a retailer is selecting the country of origin for an animal that does *not* have such a clear pedigree, can the retailer designate the animal as exclusively 'made in the USA'?"

Subparagraph (A) makes crystal clear that the answer to this question is "no." By its terms, "[a] retailer ... may designate the covered commodity as exclusively having a United States country of origin *only* " under the three listed circumstances. *See* 7 U.S.C. § 1638a(a)(2)(A) (emphasis added). Congress's use of the word "only"—which Plaintiffs ignore—means that the term "may" as it is used in subparagraph (A) does not convey any choice whatsoever; to the contrary, the provision effectively *restricts,* rather than augments, retailer discretion. In short, Plaintiffs are unlikely to prevail on this interpretation of the statute because they interpret subparagraph (A) as prescribing what a retailer "may" do when designating the muscle cuts of an animal that fits within one of the three listed types, when, with Congress's use of "may" "only" and "exclusively," the text actually states what a retailer *cannot* do in making a designation regarding the muscle cuts of all other types of animals.

Mindful that a statute must be construed as a whole, *see Brown & Williamson Tobacco Corp.,* 529 U.S. at 133, 120 S.Ct. 1291, this Court notes that the remainder of subsection (a)(2) is entirely consistent with

[23] As explained above, this is a nonsensical question because the only country of origin that is at all applicable to such an animal is the United States.

the view that the COOL statute's designation rules are not conveying commingling choice as Plaintiffs assert, but are most likely aimed at limiting what a retailer can claim about the origins of its meat products so far as U.S. designations are concerned. In section (a)(2)(A), Congress sets out the "only" circumstances in which an exclusive U.S. designation is appropriate, as explained above. In section (a)(2)(B), Congress appears to permit (but does not require) the muscle cuts of an animal that was born raised "or" slaughtered in the United States to be designated as a product of "all of the countries in which the animal may have been born raised or slaughtered," including the United States.[24] Section (a)(2)(C) establishes that animals that are imported into the United States for immediate slaughter are to be designated as originating from the importing country "and" the United States, regardless of their backgrounds in foreign lands. Finally, with respect to an animal "that is not born, raised, or slaughtered in the United States," Congress states that it is sufficient for retailer to designate "a country other than the United States as the country of origin." *Id.* § 1638a(a)(2)(D). Taken together, these statutory provisions make two things clear: that the animal's relationship to the United States is the crux of the country-of-origin designation as far as Congress is concerned, and that the thrust of subsection (a)(2) is Congress's effort to define and establish the boundaries of that relationship. In other words, contrary to Plaintiffs' contentions, Congress's focus in enacting subsection (a)(2) appears to have been on delineating the circumstances under which a retailer could properly designate the U.S. as the country of origin for muscle cut covered commodities, and Congress neither directly mentions, nor even necessarily contemplates, the effect of its prescriptions in this regard on commingling practices.

Notably, the legislative history of the COOL statute amply supports this reading of the statutory text. Members of Congress made numerous statements in 2002 when the COOL statute was initially enacted, and again when the statute was amended in 2008, that strongly suggest that Congress's primary intention was to direct retailers regarding the particular circumstances under which it is appropriate to designate meat

[24] As explained earlier, such a retailer presumably "may" also choose to designate one country of origin for such animal, so long as that one country is not the United States exclusively per subparagraph (A).

as being a 'product of the U.S.A.' *See, e.g.,* 153 Cong. Rec. S15,116 (daily ed. Dec. 11, 2007) (statement of Sen. John Barasso) ("We raise exceptional beef and exceptional lamb in this country. Our producers deserve the opportunity to label their product 'born and raised in the USA.' Consumers demand it, and they will buy it."); *see also* 153 Cong. Rec. S4229 (daily ed. May 24, 2007) (statement of Sen. Mike Enzi) ("COOL provides customers with important information about the source of food and allows our livestock producers, who hands down produce the highest quality meats in the world, to remain competitive in a growing global market."); 148 Cong. Rec. H1538 (daily ed. Apr. 24, 2002) (statement of Rep. John Thune) ("It is important ... that we put in place a mandatory country-of-origin labeling requirement so that the people in this country know where their food is coming from and so that producers in this country have an opportunity to have their product clearly identified as the finest and best in the world.").

Against this backdrop, Plaintiffs' primary counter-reference from the legislative history of the statute is a letter sent on May 9, 2008, from then-General Counsel of the USDA Marc L. Kesselman to Representative Robert Goodlatte, who was, at that time, the Ranking Member of the House Committee on Agriculture (the "Kesselman Letter"). (*See* Pl. Br., Ex. 12, ECF No. 24–14 (the Kesselman Ltr.); *see also* Hr'g Tr. at 14:25–15:2.) Plaintiffs tout the Kesselman Letter because it provides an opinion on the question of whether "products eligible for the U.S. Country of Origin label *must* bear that label, and consequently cannot bear a Multiple Countries of Origin label." (Kesselman Ltr. at 3.) Relying (as Plaintiffs do here) on the distinction between the "may" of Category A and the "shall" of Categories C and D, Mr. Kesselman concluded that the statute cannot be read to mandate a U.S. designation for animals born, raised, and slaughtered in the U.S., and accordingly did not bar commingling. (*Id.* at 3–4.)

For a number of reasons, the Kesselman Letter does not provide convincing proof that Congress intended commingling to be preserved under the COOL statute. First, the letter was not drafted or adopted by the legislature itself, and as an opinion offered *to* Congress, rather than something that originated with Congress, it does not necessarily evidence Congress's intent. Furthermore, all that is reflected in the letter is the general counsel of USDA's statement regarding the Secretary's best

guess as to what the statute might allow in regards to commingling at the time that the letter was written; it says nothing about what the statute *requires.* And this is even setting aside the fact that the letter indulges in the same mistakes of statutory interpretation that Plaintiffs' arguments here rely upon and that are detailed above. It is also significant that the Kesselman Letter represents an interpretation of the Secretary from 2008 that, whatever its merits, is unquestionably inconsistent with the interpretation that the Secretary holds today. That an agency may reevaluate its interpretation of a statute and come to a different conclusion is well established. *See Chevron,* 467 U.S. at 863–64, 104 S.Ct. 2778 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."). It is odd that Plaintiffs have proffered as the lynchpin of their statutory argument an interpretation previously held by the very agency that they are now accusing of having misinterpreted the extent of its statutory authority, and, in any event, surely the agency's now-disavowed former interpretation of the statute should not be given any more weight than the interpretation that the Secretary now advances.

At the end of the day, the fact that the COOL statute can reasonably be construed as being silent on the commingling question, and that it certainly does not speak unambiguously to the issue, as explained above, means that this Court's analysis of Plaintiffs' statutory argument in regard to commingling would likely proceed to the second step of the *Chevron* test. As mentioned earlier, at *Chevron's* step two, the deferential question at issue is whether the agency's interpretation is based on a permissible construction of the statute—an inquiry that is often fatal to regulatory challenges—and there is nothing in the instant case that suggests that the Plaintiffs will be any more successful on the merits of that inquiry here. The agency argues that its commingling ban is permissible because the statute gives the Secretary wide latitude to promulgate regulations to implement the statute. (Def. Br. at 18.) The agency also maintains that the commingling ban is consistent with the statutory purpose because the practice of commingling flies in the face of the express intent of the COOL statute to "provide consumers with additional information regarding the origin of certain covered commodities," given that in most cases commingling results in "potentially misleading labels that do not accurately reflect the actual

country of origin" of a covered commodity. (Def. Br. at 17.) Also, the record clearly establishes that there was no other way for the agency to implement a production-step labeling scheme without banning commingling; indeed, at oral argument Plaintiffs all but conceded this point. (Hr'g Tr. at 19:3–14.)

Affording the required deference to the agency's interpretation under *Chevron's* step two, this Court would most likely conclude that the commingling ban was a permissible way to further the statute's intent for the reasons the agency provides. All that *Chevron* requires is that an agency action reasonably fills a gap in the statutory framework in a manner that is consistent with Congress's overall goals. *See Continental Air Lines, Inc. v. Dep't of Transp.,* 843 F.2d 1444, 1449 (D.C.Cir.1988) (noting that "[r]easonableness in this context means ... the compatibility of the agency's interpretation with the policy goals ... or objectives of Congress" (internal quotation marks and citations omitted)). By pursuing a course of action that unquestionably furthers Congress's intent to require retailers to provide accurate origin information about the covered commodities, the AMS is likely to be able to demonstrate that the commingling ban satisfies this standard.

Finally, the Court notes generally that Plaintiffs' statutory arguments are unlikely to succeed on the merits in the overall scheme of things largely because they demand a narrow focus on specific words and phrases in the COOL statute and do not account for the broader context of the statute and what Congress apparently intended to achieve when it authorized the agency to promulgate rules to implement the statutory purpose. (In other words, Plaintiffs' statutory arguments cherry-pick the trees and miss the forest.) For example, Plaintiffs latch on to Congress's use of the word "may," as noted above, and argue that this term connotes a desire to maintain flexibility within the labeling program (*see, e.g.,* Hr'g Tr. at 14:25–15:2), all while persistently undervaluing the significance of Congress's entirely inflexible original mandate—that retailers "*shall* inform consumers, at the final point of sale ... of the country of origin of the covered commodity." 7 U.S.C. § 1638a(a)(1) (emphasis added). Similarly, Plaintiffs highlight portions of the statute in which the country-of-origin designation is not made to turn on the production steps (*e.g.,* Pl. Br. at 26–27), but give short shrift to the fact that, at least with respect to three of the four designation categories, the

COOL statute itself evaluates the country of origin in terms of the geographical location where the animal was "born, raised, or slaughtered," *see* 7 U.S.C. § 1638a(a)(2)(A), (B) and (D), making it hardly untoward for the AMS to have incorporated those same categories into its labeling standards.

Moreover, and perhaps most important, if there is anything that is clear about Congress's intent in regard to the COOL statute's disclosure requirement, it is this: that Congress meant to provide consumers with *more* information about the origins of their meat, not less. Plaintiffs' text-based arguments regarding congressional intent rely on the *opposite* assumption, *i.e.,* that Congress intended for retailers to provide consumers with some, but not all, of the known information about the history of marketed muscle cuts. This reading of the statute is flatly inconsistent with nearly every statement that members of Congress made about COOL when the law was enacted and amended.[25] And given that the statutory language does not unambiguously limit the amount of information that retailers can be required to disclose about the origins of the covered commodities, the AMS could reasonably assume that subsections (a)(1) and (2) merely establish the *floor*—that meat retailers must, at a minimum, disclose the country of origin as statutorily defined—and that the agency had Congress's blessing to ensure that all origin-related information that the industry maintains is accurately provided to consumers in the marketplace. What is more, if Congress's clear intent to provide consumers with more accurate information about the origins of their meat could not be achieved without requiring that packers and retailers segregate animals in order to track such information

[25] *See, e.g.,* 148 Cong. Rec. H1538 (daily ed. Apr. 24, 2002) (statement of Rep. John Thune) ("[C]onsumers have the right to know the origin of the meat that they buy."); 148 Cong. Rec. H1539 (daily ed. Apr. 24, 2002) (statement of Rep. David Wu) ("Country of origin is [a] way to help American consumers to make an informed choice at the supermarket."); 148 Cong. Rec. H1539 (daily ed. Apr. 24, 2002) (statement of Rep. Earl Pomeroy) ("Country of origin labeling is necessary to give U.S. consumers important information"); 148 Cong. Rec. S3909 (daily ed. May 7, 2002) (statement of Sen. Tom Harkin) ("A country of origin label will provide crucial information [for consumers]."); 148 Cong. Rec. S3918 (daily ed. May 7, 2002) (statement of Sen. Paul Wellstone) ("[C]onsumers have a right to know what they are eating and where it is from."); *see also* S.Rep. No. 110–220 (COOL program enacted "in order to provide consumers with additional information regarding the origin of certain covered commodities").

up to the point of sale, then, despite Plaintiffs' protestations, the AMS could also comfortably conclude that a regulation that prohibits commingling (a practice that appears nowhere in the statute) makes eminent sense as the only way to implement the labeling standards effectively.

Consequently, and for all of these reasons, Plaintiffs are unlikely to succeed on the merits of their statutory authority challenges to the Final Rule.

C. *Plaintiffs' APA Claim*

Plaintiffs' final claim on the merits is that the Final Rule is arbitrary and capricious in violation of the APA. (*See* Compl. ¶¶ 86–91 (citing 5 U.S.C. § 706(a)(2)).) In considering this claim, the Court must decide whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency[ ] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Menkes v. U.S. Dep't of Homeland Sec.,* 637 F.3d 319, 329 (D.C.Cir.2011) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). The Court is mindful that "the 'scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency,' " but the Court "must nonetheless be sure the [agency] has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " *Chamber of Commerce v. SEC,* 412 F.3d 133, 140 (D.C.Cir.2005) (second and third alterations added) (quoting *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856).

Plaintiffs advance several arguments as to why the Final Rule violates the APA. First, Plaintiffs argue that the Final Rule is arbitrary and capricious because "[the agency's] justifications for the Final Rule contradict the evidence before [it]." (Pl. Br. at 33.) In this vein, Plaintiffs contend that the Final Rule fails to achieve its stated goal of providing accurate country-of-origin information to consumers because the Final

Rule will not necessarily lead to more accurate labeling. (*Id.* at 33–34.) Likewise, Plaintiffs maintain that the agency's goal of bringing the U.S. into compliance with its international trade obligations remains elusive because the Final Rule exacerbates, rather than solves, the problems the Appellate Body Report identified with the prior COOL regime. (*Id.* at 34–36.) Plaintiffs also insist that the AMS acted arbitrarily and capriciously in not delaying the effective date of the Final Rule until after the WTO had a chance to evaluate the rule. (*Id.* at 36–38.)

For their part, Defendants acknowledge that providing more accurate information to consumers and complying with the Appellate Body Report were the primary justifications for promulgating the Final Rule, but contest Plaintiffs' assertions that there is no rational connection between these aims and the specifics of the Final Rule. (Def. Br. at 19–24.) Moreover, Defendants argue that the AMS had good reasons for its decision to make the Final Rule effective as of May 23, 2013. (*Id.* at 25–27.)

For reasons explained below, the Court concludes that Plaintiffs have not shown that they have a likelihood of success on the merits of their APA claims.

1. *Accurate Labeling*

Plaintiffs argue that, in certain circumstances, the Final Rule might require labels that are inaccurate or misleading, and therefore the Final Rule is arbitrary and capricious. (Pl. Br. at 33–34.) For example, Plaintiffs point out that, under the Final Rule, any animal imported into the United States more than two weeks before slaughter will be designated "raised in the United States" even if it spent the vast majority of its life elsewhere. (*Id.* at 20; Final Rule, 78 Fed.Reg. at 31,368.)[26]

[26] Similarly, Plaintiffs note that when an animal is imported for immediate slaughter under Category C, the Final Rule provides that the country of "raising" must be the country from which the animal was imported, even if it was actually "raised" elsewhere. (Pl. Br. at 20.) Plaintiffs also argue that, because the Final Rule requires production step labeling for covered commodities in Categories A, B, and C, but only labeling based on the country from which the covered commodity was imported for Category D, consumers will assume that all the production steps for Category D covered commodities took place in the country from which the covered commodity was imported, and will accordingly be "misinformed" any time that is not actually the case. (*Id.*) Finally, Plaintiffs maintain that

Plaintiffs' recitation of various possible factual scenarios in which the Final Rule purportedly mandates inaccurate or misleading labels is offered apparently to press the point that a regulation that may in some circumstances enable the exact outcome an agency is attempting to avoid (in this case, consumer confusion) must be arbitrary and capricious. But this is not the law. *See, e.g., ExxonMobil Oil Corp. v. FERC,* 487 F.3d 945, 955 (D.C.Cir.2007) ("Under the arbitrary and capricious test, our standard of review is 'only reasonableness, not perfection.' " (quoting *Kennecott Greens Creek Min. Co. v. MSHA,* 476 F.3d 946, 954 (D.C.Cir.2007))); *Flynn v. Comm'r,* 269 F.3d 1064, 1071 (D.C.Cir.2001) ("The Secretary's regulations need not perfectly accommodate all anomalous situations in order to be reasonable under the statute."). In fact, it is of no moment that Plaintiffs can dream up scenarios in which, under the Final Rule, "labels will in many cases be inaccurate" or will "sometimes omit" relevant production step information (Pl. Br. at 33–34), because the relevant APA question is not whether such scenarios exist, but whether the Final Rule is generally designed to achieve its stated purpose and therefore has some rational connection to the agency's goal. *See, e.g., Investment Co. Inst. v. Commodity Futures Trading Comm'n,* 720 F.3d 370, 376–77 (D.C.Cir.2013) ("So long as [the agency] provided a reasoned explanation for its regulation, and the reviewing court can reasonably discern the agency's path, we must uphold the regulation." (internal quotation marks and citations omitted)).

Plaintiffs have done little to show that the Final Rule is irrational in this regard. The Final Rule requires retailers to provide consumers with details regarding the geographical location of each production step for a given covered commodity, which is more information than was provided under the 2009 COOL Rule. And providing this additional information is exactly what the Final Rule purports to do. *See, e.g.,* Final Rule, 78 Fed.Reg. at 31,367 (stating that "[t]he [a]gency is issuing this rule ... to provide consumers with more specific information" regarding the country of origin of muscle cut covered commodities). Plaintiffs provide no reason to believe that the Final Rule was really aimed at something

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the lack of clarity with respect to Category D covered commodities will be especially acute where one of the production steps for Category D meat occurred in the U.S., because that part of the animal's life will not be reflected in the country of origin label. (*Id.* at 20–21.)

other than this stated goal. Nor do Plaintiffs argue that the Final Rule will provide less accurate information *in comparison* to the 2009 COOL Rule, which is the relevant benchmark given that the justification for the Final Rule is that it improves the accuracy of the COOL labeling system over what was in place under the prior program. In light of the agency's explanation of how production-step labeling requirements address meat labeling that was misleading under the prior regulations, Plaintiffs' argument that the Final Rule is arbitrary and capricious because it does not go so far as to require production-step labeling in every case has little force. Plaintiffs do not and cannot dispute that the new "born, raised, and slaughtered" requirement will likely generate more specific labels to a greater degree than the previous system and thus moves the COOL program in the direction of providing consumers with more specific, more accurate information, as it purports to do.

Significantly, Plaintiffs also fail to acknowledge that the potential inaccuracies they have identified are, by and large, a product of the COOL statute itself. For example, Plaintiffs complain that, for Category C muscle cuts, the Final Rule makes retailers equate the country from which an animal was imported with the country in which the animal was "raised" for labeling purposes, even if it spent most of its life elsewhere. (Pl. Br. at 20, 34.) Although Plaintiffs may be correct that a Category C label could, in certain circumstances, mislead a customer who is searching for muscle cuts derived from an animal that was imported into the U.S. for immediate slaughter after being raised in a particular foreign locale other than the importing country, this is not a reason to condemn the Final Rule because it is *Congress,* not the AMS, that determined that the importing country was the relevant foreign country of origin when an animal is imported into the United States for immediate slaughter. *See* 7 U.S.C. § 1638a(a)(2)(C). Far from acting arbitrarily, the agency appears to have carefully patterned its labeling rule for a Category C muscle cut commodity after the statutory parameters that Congress enacted to govern country-of-origin designations in this situation.

Similarly, Plaintiffs argue that the Final Rule contradicts its stated purpose of providing more specific information because the rule allows an animal that is imported into the U.S. more than two weeks before slaughter to be designated as "raised in" the U.S., even if most of the animal's life was spent elsewhere. (Pl. Br. at 20, 34.) Again, however,

setting aside the particular timeframe, it is the COOL statute itself that draws a distinction between muscle cuts derived from animals imported for "immediate slaughter" (Category C) and muscle cuts derived from animals with a mixed heritage that includes the United States, where such animals were *not* imported for immediate slaughter (Category B)—the Final Rule merely maintains this statutory distinction. *See* Final Rule, 78 Fed.Reg. at 31,368.[27] Thus, rather than accusing the AMS of acting arbitrarily, it seems that Plaintiffs' "real grievance lies with Congress for having directed" the agency to implement Congress's intent, "rather than with [the agency] for having adopted [a particular] method ... to comply with that congressional directive." *Associated Metals & Minerals Corp. v. Carmen,* 704 F.2d 629, 636 (D.C.Cir.1983).[28]

2. *The WTO Decision*

Plaintiffs' second APA line of attack is to argue that the Final Rule is arbitrary and capricious because it "exacerbates, rather than cures" the issues with the prior COOL regime that the WTO panel and Appellate Body identified. (Pl. Br. at 34–36.) The WTO Panel found, and the Appellate Body Report confirmed, that the COOL regime in place under the 2009 COOL Rule discriminated against foreign livestock by creating incentives for U.S. retailers to favor domestic livestock, and that such

[27] With respect to the allotted two-week period, Congress specifically delegated to the regulators the determination of what period of time qualified as "immediate," and the regulators set the period at two weeks. 7 C.F.R. § 65.180. Agencies are entitled to rely on their own expertise regarding matters that Congress leaves to their discretion. *See, e.g., EarthLink, Inc. v. FCC,* 462 F.3d 1, 12 (D.C.Cir.2006) ("[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable." (internal citations omitted) (alteration in original)).

[28] As an aside, it is at least mildly ironic that Plaintiffs assert that the agency has acted arbitrarily in violation of the APA insofar as the Final Rule incorporates the designation limitations that apparently Congress included in the statute to address industry concerns regarding otherwise potentially onerous record-keeping requirements. *Cf.* 154 Cong. Rec. H3819 (daily ed. May 14, 2008) (statement of Rep. Ike Skelton) ("[T]he legislation would require that all meat sold to American consumers have a country-of-origin label. But, importantly, this labeling agreement represents a compromise that would simplify record keeping and other requirements associated with the law."). One would not ordinarily expect industry representatives to fault an agency for adopting regulations that make it *easier* for industry participants to satisfy the regulatory requirements while still addressing Congress's primary concerns.

discrimination violated the United States's international trade obligations. In so holding, the WTO Panel and Appellate body considered the totality of the prior COOL program, including both the 2009 COOL Rule and the COOL statute.[29] There is no doubt that the WTO determination provided an impetus for promulgating the Final Rule. *See* Final Rule, 78 Fed.Reg. at 31,367–68.

Plaintiffs argue that the WTO decided that the prior COOL program (and in particular the record-keeping requirements for upstream producers) provided an incentive for retailers to favor domestic livestock and that the Final Rule does nothing to alleviate this discrimination. (Pl. Br. at 34–35.) In fact, according to Plaintiffs, by increasing the labeling requirements further downstream in the chain of production, the agency has made the problems the Appellate Body identified even worse. (*Id.*) Plaintiffs note that Canada and Mexico apparently share Plaintiffs' view, and have already filed paperwork with the WTO challenging the Final Rule. (Pl. Supp. Reply at 9.) Plaintiffs also contend that the Final Rule does nothing to address two additional problems identified in the Appellate Body Report as sources of discrimination: the possibility that, despite COOL, meat labels will not necessarily be accurate, and the carve-outs under the COOL program for processed food items and food service establishments. (Pl. Br. at 35.) *See also* 7 U.S.C. § 1638(2)(B); *id.* § 1638a(b).

Defendants respond that Plaintiffs have misconstrued the gravamen of the WTO decision. In Defendants' view, the WTO Appellate Body found fault mainly with the fact that the labeling requirements for retailers under the old COOL regime were not *commensurate* with the recordkeeping requirements for upstream producers, because the upstream firms were required to catalogue far more, and to pass along more detailed information, than retailers were required to convey on

[29] The Panel and the Appellate Body also considered two regulatory directives not relevant here: an "Interim Final Rule" that preceded the 2009 COOL Rule, and a letter from Secretary of Agriculture Tom Vilsack encouraging industry participants to voluntarily adopt practices to "ensure that consumers are adequately informed about the source of food products," such as "voluntarily includ[ing] information about what production steps occurred in each country when multiple countries appear on each label." WTO Panel Report ¶ 7.123.

labels. (Def. Br. at 23–24.) The agency argues that it has corrected the imbalance the Appellate Body identified by ratcheting up the disclosure requirements for retailers, and thereby creating the equilibrium that was lacking under the previous regime. (*Id.*)

At the outset, the Court emphasizes that its role in evaluating the instant motion for a preliminary injunction is *not* to determine whether the Final Rule actually complies with the Appellate Body's ruling. Compliance with adverse WTO dispute resolution proceedings is delegated by law to the Executive and Legislative branches, *see* 19 U.S.C. § 3533(g), and whether measures that the Executive and Legislative Branches take to comply with the WTO obligations are sufficient can be addressed only through the WTO dispute resolution system. Moreover, "if U.S. statutory [or regulatory] provisions are inconsistent with [the WTO treaties], it is strictly a matter for Congress." *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1348 (Fed.Cir.2005); *see also Koyo Seiko Co. v. United States,* 551 F.3d 1286, 1291 (Fed.Cir.2008) ("The determination whether, when, and how to comply with [a] WTO[ ] decision ... involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch."). Consequently, the Court's only purpose in considering the Appellate Body Report here is to determine whether Plaintiffs have a shown a likelihood of successfully proving that the agency had no reasonable basis for its statement that one of its goals in promulgating the Final Rule was to bring the United States into compliance with that decision. *See* Final Rule, 78 Fed.Reg. at 31,367 (the Final Rule will "bring the current mandatory COOL requirements into compliance with U.S. international trade obligations").

On that limited question, the Court finds that Defendants have the better argument. The WTO Appellate Body's conclusion that the COOL scheme unfairly discriminated against foreign goods primarily turned on its view that "the COOL measure does not impose labelling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit." Appellate Body Report ¶ 343; *see also id.* ¶ 349 ("In sum, our examination of the COOL measure ... reveals that its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the

mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these processors and producers."). Reading the plain language of the Report and comparing it to the Final Rule, it is clear that the agency increased the labeling requirements for retailers to generally approximate the recordkeeping requirements imposed on upstream producers and processors in an attempt to address the inequity that the Appellate Body identified. While it is conceivable that these measures might not ultimately pass muster in front of the WTO, this Court is satisfied that the production step labeling requirement bears a rational relationship to the agency's stated goal of bringing the United States into compliance with the Appellate Body Report.

It is true, as Plaintiffs point out, that the Appellate Body identified other issues with the previous COOL program that the Final Rule did not address. Specifically, Plaintiffs note that the Final Rule does not address the Appellate Body's skepticism over the fact that Category D muscle cuts are not subject to production step labeling, nor its contention that the carve-outs for food service establishments and processed food items contribute to the discrimination against foreign livestock. (Pl. Br. at 35 (citing Appellate Body Report ¶¶ 343–44).) But these alleged shortcomings can hardly form the basis for an argument that the Final Rule was arbitrary and capricious because both the Category D designation and the carve-outs are *required by COOL statute itself. See* 7 U.S.C. § 1638(4); *id.* § 1638a(a)(2)(D); *id.* § 1638a(b).[30] The AMS was not free to disregard the statute in favor of a rule that conformed to every aspect of the WTO decision. *See* 19 U.S.C. § 3533(g); *see also Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). And to the extent that Plaintiffs' arguments are based on the assertion that the statute itself is inconsistent with the Appellate Body Report, such arguments do not support a claim brought under the APA. *See, e.g., Associated Metals & Minerals Corp.,* 704 F.2d at 636.

[30] The same is true of Plaintiffs' argument that the Final Rule fails to correct potential inaccuracies in the previous COOL program identified by the Appellate Body. (*See* Pl. Br. at 35.) As explained in Section 4.C.1, *supra,* these inaccuracies are largely a product of the statute, not the regulations.

The Appellate Body Report and the record in this case demonstrate, essentially, that the AMS was stuck between a rock and a hard place after the WTO ruled. In the absence of a legislative solution to what the WTO had identified as problematic, the agency had to attempt to bring the COOL regulations into compliance with the international tribunal's decision without running afoul of the COOL statute. Given these constraints, it is evident to the Court that the agency did the best it could, and responded in a manner that was neither arbitrary nor capricious. Plaintiffs are unlikely to be able to demonstrate otherwise in a challenge to the Final Rule brought under the APA.

3. *Effective Date of the Final Rule*

Plaintiffs' final argument that the Final Rule is arbitrary and capricious in violation of the APA stems from the fact that the agency made the Final Rule effective on the day that it was published, May 23, 2013. (Pl. Br. at 36–37.) Plaintiffs argue that the AMS should have heeded commenters who warned that the Final Rule would impose severe costs for no reason because the Rule would be unlikely to satisfy the WTO, and thus should have obediently delayed implementation of the Rule until after the WTO had had a chance to review it. (*Id.*) Plaintiffs also assert that, in the face of calls for suspended implementation, the agency provided no reasonable response or meaningful justification for immediate implementation of the Final Rule. (*Id.*)

Plaintiffs' contentions in this regard are faulty and are likely to fail primarily because they all but ignore the significance of the date on which the Final Rule was published and made effective. May 23, 2013, is the exact deadline that the WTO arbitrator gave the United States to bring its COOL rules into compliance with the Appellate Body Report. And this date was hardly selected at random—it was the product of a separate arbitration proceeding within the WTO dispute resolution framework that generated a lengthy opinion holding that May 23, 2013, was the appropriate compliance deadline. WTO Arbitrator's Report ¶ 123. Defendant–Intervenors also point out that, per the WTO Dispute Settlement Understanding, failure to comply in a timely manner with a decision of the Appellate Body would give Canada and Mexico the right to pursue retaliatory sanctions against the U.S. *See* Understanding on

Rules and Procedures Governing the Settlement of Disputes, art. 22.2, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401.[31] The Court concludes that the directive from the WTO arbitrator in and of itself establishes a sufficiently reasoned basis for the agency to have made May 23, 2013, the Final Rule's effective date; the potential that the U.S. might face retaliatory sanctions as a result of any delay in compliance only strengthens that conclusion.

Plaintiffs nevertheless point out that, during the briefing for the instant motion, Canada and Mexico both filed paperwork with the WTO requesting formation of a panel to examine whether the Final Rule complies with international trade obligations. (Pl. Supp. Reply at 9; *id.* Ex. 1, ECF No. 42–1; *id.* Ex. 2, ECF No. 42–2.) Plaintiffs argue that these actions show that there is no chance that the feared consequences of delayed implementation (retaliation for non-compliance by Canada or Mexico) would have occurred, and thus that the agency could not reasonably have invoked the threat of sanctions as a justification for making the Final Rule effective immediately. (Pl. Supp. Reply at 9.) But Plaintiffs' logic is flawed. First of all, the fact that Canada and Mexico may not like the solution that the agency implemented to address the WTO decision does not mean those countries would have withheld retaliation if the United States had not implemented any changes at all. In this same vein, while it may be true that Canada and Mexico have now initiated a challenge to the rule the AMS implemented to respond to the Appellate Body Report (presumably because they believe that the Final Rule is even less in their interest than the 2009 COOL Rule was), the fact remains that Canada and Mexico had already challenged the COOL program once—and won. Based on this prior experience, the agency's belief that those countries might seek retaliatory sanctions in the absence of any changes to the COOL program by the given deadline was well founded. In other words, the risk that retaliatory sanctions would follow breach of the duty to respond to the WTO decision in a timely fashion

[31] The Dispute Settlement Understanding ("DSU") is the document which governs the procedures by which WTO disputes are adjudicated, and binds signatories to those procedures. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 1.1–1.2, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401. These WTO documents are available at http://www.wto.org/english/tratop_e/dispu_e/dsu_ e.htm.

loomed large given the prior WTO litigation, and that well-founded fear provided a sufficient reason for the agency to believe that it needed to act.[32]

Because the AMS patterned the Final Rule after the statute, and attempted to address the Appellate Body's concerns in a timely manner, Plaintiffs have failed to show a likelihood of success on their APA claim.

V. IRREPARABLE HARM

To be entitled to a preliminary injunction, even under the sliding scale approach that applies in this circuit, Plaintiffs must make a showing that they will suffer "irreparable harm" absent the extraordinary remedy of injunctive relief. *See CFGC,* 454 F.3d at 297 ("A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief."); *see also Sampson v. Murray,* 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." (citation and quotation marks omitted)); 11 A Wright & Miller, *Federal Practice and Procedure* § 2948.1 (2d ed. 2013) ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered."). Although the concept of "irreparable harm" is not easily defined, there is no doubt that "[t]he irreparable injury requirement erects a very high bar for a movant." *Coalition for Common Sense in Gov't Procurement v. United States* ("*Common Sense* "), 576 F.Supp.2d 162, 168 (D.D.C.2008).

[32] At oral argument, Plaintiffs' counsel additionally represented that Canada and Mexico have recently agreed not to seek sanctions based on the Appellate Body Report's decision regarding the 2009 COOL program until their current challenge to the Final Rule is resolved by the WTO. (Hr'g Tr. at 68:11–18.) That may be all well and good, but this fact has no bearing on the question of whether the agency acted arbitrarily in selecting the Final Rule's effective date. Plaintiffs must demonstrate a likelihood of success in proving that the AMS lacked a reasoned basis for its decision to make the Final Rule effective as of May 23, 2013, and this new willingness on Canada and Mexico's part to forbear from seeking retaliatory sanctions based on the prior COOL program has happened months after the agency made its decision to implement the Final Rule.

"[S]everal well-known and indisputable principles" guide the inquiry regarding irreparable injury. *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir.1985). The party seeking injunctive relief must demonstrate that the claimed injury is "both certain and great" and that the alleged harm is "actual and not theoretical." *Id.* Because "the court must decide whether the harm will *in fact* occur," a party seeking injunctive relief must "substantiate the claim [of] irreparable injury" and "must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Id.* (emphasis in original). In addition, "[i]njunctive relief will not be granted against something merely feared as liable to occur at some indefinite time"; therefore, the movant "must show that [t]he injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citations and internal quotation marks omitted) (second alteration in original).

Significantly for present purposes, the certain and immediate harm that a Plaintiff alleges must also be truly irreparable in the sense that it is "beyond remediation." *CFGC,* 454 F.3d at 297. This means that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id.* (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n,* 259 F.2d 921, 925 (D.C.Cir.1958)); *see also Wisconsin Gas Co.,* 758 F.2d at 674 ("Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."). Consequently, bearing the irreparable harm burden is an especially heavy lift for movants who claim injury based on potential economic losses; indeed, "[t]o successfully shoehorn potential economic loss into a showing of irreparable harm, a plaintiff must establish that the economic harm is so severe as to cause extreme hardship to the business or threaten its very existence." *Common Sense,* 576 F.Supp.2d at 168 (D.D.C.2008) (internal quotation marks and citations omitted).

In the instant case, Plaintiffs offer two lines of argument in an attempt to demonstrate that implementation of the Final Rule will cause irreparable harm. First, Plaintiffs argue that if compelled production-step labeling constitutes a violation of the First Amendment, then they have established irreparable harm *per se,* which Defendants do not dispute.

(Pl. Br. at 38–39; Def. Br. at 36; Int. Br. at 30.) Second, Plaintiffs maintain that meat industry participants at all stages of the production process will face crippling "new financial and operational burdens as a result of the Final Rule." (Pl. Br. at 39 (citation and internal quotations omitted).) The Court has considered each of these contentions and finds that neither establishes the harm that is required to warrant a preliminary injunction.

A. *First Amendment Violation As Irreparable Harm*

There is no doubt that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Here, however, the Court has already determined that Plaintiffs do not have a likelihood of success on the merits of their First Amendment claim. *See, supra,* Section IV.A. Accordingly, the Court concludes that Plaintiffs are unable to base their irreparable harm arguments on this basis. *See Edwards v. District of Columbia,* 765 F.Supp.2d 3, 19 (D.D.C.2011) (noting that where "[p]laintiffs' irreparable harm argument rests entirely on their First Amendment claim," and "plaintiffs have not shown that the [regulation at issue] violates their rights under the First Amendment," plaintiffs "are 'not faced with irreparable harm absent the issuance of an injunction' " (quoting *Enten v. District of Columbia,* 675 F.Supp.2d 42, 54 (D.D.C.2009))); *cf. CFGC,* 454 F.3d at 301 (noting that the D.C. Circuit "has construed *Elrod* to require movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work").

B. *Economic Irreparable Harm*

Plaintiffs second irreparable harm argument is that the Final Rule will impose devastating "new financial and operational burdens" on industry participants. (Pl. Br. at 39 (citation and internal quotations omitted).) Plaintiffs assert this claim with respect to both packers and processors, who are at the downstream end of the production process, and also upstream livestock suppliers, and have offered a number of declarations from individuals involved in both of these aspects of the meat production industry.

1. *Packers and Processors*

With respect to packers and processors, Plaintiffs argue that many packing and processing firms rely on commingling, and the Final Rule's commingling ban will impose "disproportionate burdens on businesses 'that currently commingl[e] domestic and foreign-origin cattle or hogs.' " (*Id.* at 40 (quoting Final Rule, 78 Fed.Reg. at 31,384).)[33] In this regard, Plaintiffs point out that the agency itself predicted its rule would impose significant costs on the meat packers and processors who are " 'located nearer to sources of imported cattle and hogs' " (*id.* (quoting Final Rule, 78 Fed.Reg. at 31,382)), and in Plaintiffs' view, the agency "cannot now dispute" that the new regulations would impose costs that are "certain," "great," and "actual." (*Id.* at 39.)[34]Additionally, Plaintiffs offer declarations from various meat packers and processers who testify that compliance with the Final Rule's commingling ban will force them to, among other things, build out separate facilities for handling and storing segregated cattle (Pl. Br., Decl. of Alan Rubin, ECF No. 24–21, ¶ 9; *id.,* Decl. of Brad McDowell, ECF No. 24–18, ¶ 14); incur significant annual administrative and recordkeeping costs (Decl. of Brad McDowell ¶ 16); and/or, in some cases, forgo buying foreign livestock entirely and thereby cede a competitive advantage to competitors who already buy only domestic cattle (*id.* ¶¶ 18–21.) Plaintiffs also assert that their declarations demonstrate that new segregated production processes will require packers to incur costs that pose "harm to [their] financial and competitive viability that cannot be restored by a favorable ruling." (Pl. Br. at 41.) Based on these declarations, Plaintiffs maintain that they have shown irreparable harm.[35]

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[33] The current record is not clear regarding the number of packing companies that commingle livestock.

[34] In the Final Rule, the agency estimated the total cost of industry compliance with the rule at between $53.1 and $137.8 million. Final Rule, 78 Fed.Reg. at 31,368.

[35] The Court notes in passing that, in addition to declarations submitted with their opening brief, Plaintiffs also submitted several supplemental declarations with their reply brief. Pursuant to Local Civil Rule 65.1(c), applications for a preliminary injunction "shall be supported by *all* affidavits on which the plaintiff intends to rely" and "[s]upplemental affidavits either to the application or the opposition may be filed only with permission of the court." LCvR 65.1(c) (emphasis added). Plaintiffs did not seek leave of court to file the supplemental declarations submitted with the reply. Nevertheless, the Court has reviewed those declarations, and it finds Plaintiffs' lack of compliance to be of no moment because, for the reasons stated herein, the declarations

The Court is not persuaded. As Defendants rightly argue, "bare allegations and fears about what *may* happen in the future" (Def. Br. at 37 (internal quotation marks and citation omitted)) are not sufficient to support a claim of irreparable injury. To be sure, Plaintiffs have gathered a number of declarants who are willing to speculate about the potential impact of the Final Rule on their business operations and profits, but without more than such blanket, unsubstantiated allegations of harm, there is no strength in these numbers. For example, declarant Alan Rubin, president of Dallas City Packing, states that adopting new segregated production procedures for the cattle that his company processes will increase costs "beyond the point where we would be able to recover those costs," as it will require his company to "build out separate facilities," add employees, and lengthen the workday, which he contends would lead to increased staffing costs, added "warehousing costs," and overall inefficiencies in the production process. (Decl. of Alan Rubin ¶¶ 4, 9, 10, 12, 13, 16.) Rubin even avers that "implementing these new rules could force [his] business to close." (*Id.* ¶ 8.) But he provides few if any facts that would permit the Court to evaluate the context in which these claims are made—*e.g.,* although declarant Rubin provides estimates for the number of cattle his company processes per day, and states the percentage of these cattle that are foreign, without any information about the overall size and scope of the business, the Court is left in the dark about the economic effect of the segregation rule on the company's bottom line.

Another Plaintiffs' declarant, Brad McDowell, who is the President of a wholly-owned subsidiary of meat-processing giant Agri Beef, similarly provides some "approximate" costs of implementing segregated production processes, and estimates that the change in the way that his company processes meat "will require Agri Beef to commit an additional $75–$100 million in working capital." (Decl. of Brad McDowell ¶¶ 13–

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have not influenced the Court to rule in Plaintiffs' favor regarding the irreparable harm factor. *Cf. Sataki v. Broad. Bd. of Governors,* 733 F.Supp.2d 1, 9 n. 11 (D.D.C.2010) (noting that the plaintiff did not seek leave of the Court to file supplemental materials with her reply as required under Local Civil Rule 65.1, but reviewing the declarations notwithstanding, and finding that consideration of the declarations did not alter the Court's decision in the matter).

19.) Again, however, what declarant McDowell does *not* say is that such additional expenditures will so severely impact the company's bottom line that the increased costs that the Final Rule imposes threaten the company's very existence. Indeed, none of the Plaintiffs' declarations adequately alleges and substantiates the kind of immediate and irreparable monetary injury that is required to sustain Plaintiffs' assertions regarding the Final Rule's dire financial effects or the lack of recoverability of the added expenditures. *See Nat'l Mining Ass'n v. Jackson,* 768 F.Supp.2d 34, 51 (D.D.C.2011) (finding that plaintiff failed to demonstrate irreparable harm where declarant mentioned his company's lost revenues and predicted that he "will be out of business within eighteen months" because the declaration failed to "offer a projection of anticipated future losses, tie that to an accounting of the company's current assets, or explain with any specificity how he arrived at the conclusion that he would be forced out of business in eighteen months"); *see also Wisconsin Gas Co.,* 758 F.2d at 674 ("[M]ovant must provide *proof* that the harm has occurred in the past and is likely to occur again, or *proof* indicating that the harm is certain to occur in the near future." (emphasis added)).[36]

[36] Defendant–Intervenors argue that Plaintiffs' packer declarants fail to provide substantiation for their claims of irreparable harm because none exists. Specifically, Defendant–Intervenors proffer their own declarants who attest that, given the structure of the industry and the way in which suppliers are paid, the packers (who are alleged to be relatively few in number) enjoy great market power and thus any additional costs borne by packers will be insignificant. (*See, e.g.,* Int. Br., Ex. 2.a, Decl. of Robert Taylor ¶ 6 ("[T]here are relativity few [meat packing] establishments ... resulting in an oligopolistic structure with power concentrated among a few participants."); *id.,* Ex. 2.b, Decl. of Charles McVean ¶¶ 4, 5 ("[T]here is no likelihood that any additional costs will not be passed back upstream to cattle producers."); *id.,* Ex. 2.c, Decl. of Bob Sears ¶ 7 ("[A]ny increased segregation of cattle [caused by the Final Rule] would almost certainly be addressed through actions taken by feedlots" and "would not be a significant cost for feedlots that already typically segregate by seller...."). *See also id.,* Ex. 2.d, Decl. of John Sumption ¶ 8 ("[T]he origin of each cow is already tracked through production [by the packer] ...."); *id.,* Ex. 2.e, Decl. of Paul Symens ¶ 9 (because packers already track each individual animal in order to pay their suppliers, "[t]he only extra step a plant would have to [take] to comply with the [Final Rule] is to add the label where the animal was from").) Moreover, Defendant–Intervenors argue that, based on public materials such as press reports about some of the businesses that employ Plaintiffs' declarants, the purported costs of compliance will not actually put these businesses at risk because they are of such a size and structure that the companies can absorb any added costs, particularly in light of their high revenues. (*See* Int. Br. 32–42.)

Notably, it appears that Plaintiffs' failure to substantiate the harms they assert is not for lack of trying. The packer declarants speak earnestly about what they truly "expect" to happen in the marketplace; what their customers are "likely" to demand; and what "could" happen to their businesses if they are made to follow the Final Rule. (*See, e.g.,* Decl. of Alan Rubin ¶¶ 8, 14, 18; Decl. of Brad McDowell ¶¶ 18, 21, 23; Pl. Reply, Supp. Decl. of Brad McDowell, ECF No. 33–2, ¶¶ 27–32.) But the Court cannot find "certain" or "actual" harm based on such speculation, let alone find the kind of extreme economic injury necessary to support a claim of irreparable harm. *See, e.g., GEO Specialty Chems., Inc. v. Husisian,* 923 F.Supp.2d 143, 150 (D.D.C.2013) (finding no irreparable harm where, "aside from speculative allegations of loss of revenue and other market advantages, all of which are merely economic, [Plaintiff] has completely failed to demonstrate the certainty or imminence of its financial deficits"); *Nat'l Mining Ass'n,* 768 F.Supp.2d at 52 (concluding that, while the declarant "raise[d] legitimate concerns about the current and future health of his company," to be entitled to preliminary injunctive relief, it was necessary to provide "more than [his] conclusory projection ... to show that any of the plaintiff's small business members currently face certain, imminent business closings").

2. *Suppliers*

In addition to highlighting the alleged irreparable harm that packers will purportedly suffer under the Final Rule, Plaintiffs also argue that the Final Rule will irreparably injure firms that supply livestock to packers—that is, livestock producers and feeders—especially those that rely on imported animals in the ordinary course of business. (Pl. Br. at 41.) To advance this argument, Plaintiffs rely on history. They provide declarations to the effect that, after the 2009 COOL Rule was adopted, certain suppliers were forced to accept significant discounts on foreign origin cattle. (*See, e.g., id.,* Decl. of Ed Attebury, ECF No. 24–15, ¶ 2 ("The current [ ]COOL regulations have cost my business approximately $1,347,500 due to discounts on Mexican cattle from packers of $35 per head."); *id.,* Decl. of Jim Peters, ECF No. 24–19, ¶ 2 ("The [2009 COOL Rule] ha[s] cost my business $1,237,415 due to discounts on Mexican cattle from packers ranging from $25–45 per head."); Pl. Reply, Decl. of Ricardo Pena Hinojosa, ECF No. 33–7, ¶ 4 ("When [the 2009 COOL

Rule] went into effect ... the American stockyards, feedlots, and packing plants, began discounting [Mexican] cattle because of COOL-compliance costs.").)

Furthermore, Plaintiffs' supplier declarants predict that what happened before will likely happen again; that is, once the Final Rule goes into effect, the suppliers' customers will demand even steeper discounts or stop buying Mexican-origin cattle entirely. (*See, e.g.,* Decl. of Ricardo Pena Hinojosa ¶ 5 ("Based on my experience with the 2009 version of the COOL Rule, I expect the new COOL regulations will make the discounts even greater...."); Pl. Br., Decl. of Andy Rogers, ECF No. 24–20, ¶ 3 ("Recent conversations with a cattle buyer from my packer customer indicated that the 2013 rule could see discounts paid on cattle of Mexican origin increase...."); Decl. of Jim Peters ¶ 10 ("Since we have received discounts due to the existing [ ]COOL regulations, we expect deeper discounts with the new [ ]COOL regulation."); Decl. of Ed Attebury ¶ 10 (same).)

Some of Plaintiffs' supplier declarants even further extrapolate these expected additional discounts into dire consequences for their businesses, asserting that packers may no longer buy foreign livestock at all and that the viability of declarants businesses' may be seriously threatened. (*See, e.g.,* Decl. of Ed Attebury ¶ 10 ("[B]oth packer [sic] and retailers will no longer be willing to process and sell beef from Mexican-origin cattle. This will lead to major changes to my business model and could result in the closure of my cattle business."); Decl. of Andy Rogers ¶ 3 ("[The increased discount in Mexican-origin cattle] would devastate my business."); Pl. Reply, Supp. Decl. of Jim Peters, ECF No. 33–3, ¶ 5 (noting that the possibility his business's main packer customer would stop accepting Mexican cattle due to retailer demands "could force my feedlot to close").)

Defendant–Intervenors, who also represent industry professionals, zealously contest the causal relationship that Plaintiffs have attempted to draw between the 2009 COOL regulations and the deep discounts for, and rejection of, foreign-born livestock, noting that average beef prices and total beef imports have risen since 2009 (*see* Int. Br., Ex. 5.a (USDA data indicating average beef prices and spreads have risen since 2009); *id.,* Ex. 5.b (USDA data indicating that beef imports have risen since

2009)). Defendant–Intervenors also offer their own declarations disputing Plaintiffs' supplier declarants' claims that any discounts for foreign cattle were due to the 2009 COOL Rule. (*See* Decl. of John Sumption ¶ 9 (lower prices for Mexican cattle "is not a new phenomenon in the last five years" and is "due to the breed of cattle, how the cattle tend to grade (amount of choice), and quality of feed supply in different stages of growth"); Decl. of Paul Symens ¶ 11 ("It has been my experience that cattle from Mexico are known to give a lower yield and lower quality of beef, which results in packinghouses offering a lower price for these cattle.").)

Even without wading into the debate over the effect of the 2009 COOL Rule, what the Court finds most significant about Plaintiffs' supplier declarants' dire predictions for the future based on the purported impact of the 2009 COOL Rule is what they do *not* say—that any of the declarants (or anyone else for that matter) suffered the kind of extreme hardship as a result of the 2009 COOL Rule that could provide a factual basis for a finding that the Final Rule is likely to cause irreparable harm if it is not enjoined. By using the 2009 COOL Rule as a model for what will happen under the Final Rule but failing to provide any evidence of the extreme consequences of the old rule, Plaintiffs are essentially asking the Court to conclude that, while the Final Rule is the same as the 2009 COOL Rule *in kind,* the difference between the two is so great *in degree* that the Final Rule will result in "severe [and] extreme hardship" that "threaten[s] [the] very existence" of the supplier declarants' businesses, *Common Sense,* 576 F.Supp.2d at 168, even though the 2009 COOL Rule apparently did not. Plaintiffs have not provided any basis for any such finding, however; and without it, the declarations of Plaintiffs' suppliers in regard to the expected impact of the Final Rule are mere speculation, which, as stated above, is not the stuff of which successful irreparable injury claims are ordinarily made. *See, e.g., Nat'l Mining Ass'n,* 768 F.Supp.2d at 52; *see also GEO Specialty Chems.,* 923 F.Supp.2d at 147–51; *Nat'l Tobacco Co., L.P. v. District of Columbia,* 11–cv–388 RLW, 2011 WL 4442771, at *6–7 (D.D.C. Sept. 14, 2011); *Sterling Commercial Credit–Michigan, LLC v. Phoenix Indus. I, LLC,* 762 F.Supp.2d 8, 14–16 (D.D.C.2011); *Common Sense,* 576 F.Supp.2d at 170; *Power Mobility Coal. v. Leavitt,* 404 F.Supp.2d 190, 204–05 (D.D.C.2005).

Finally, and significantly, with respect to both packers and suppliers, Plaintiffs appear to have generally overlooked a critical component of the irreparable injury analysis insofar as it is clear that the harm that the supplier declarants fear does not flow *directly* from the requirements of the Final Rule but is instead based on independent market variables such as how the supplier's customers and/or retail consumers might react. (*See, e.g.,* Decl. of Ricardo Pena Hinojosa ¶ 6 (predicting that stockyards and feedlots will stop importing Mexican cattle in part "because their customers elect no longer to accept cattle other than those born and raised in the United States"); Decl. of Alan Rubin ¶ 14 (stating that packers will be unable to pass on additional costs because "customers are likely to demand the products that require the simplest labels"); Decl. of Bryan Karwal ¶ 7 ("I have serious concerns that, as a result of the new regulations, packers will stop purchasing finished Canadian-born pigs ...."); *see also, e.g.,* Decl. of Brad McDowell ¶ 23 (noting that the word "slaughtered ... reinforces negative consumer misperceptions about meatpacking" and will therefore lead to "substantial" losses); Decl. of Alan Rubin ¶ 18 ("[T]he new labels will likely cause us to lose sales" because "[c]onsumers will have to think about slaughter every time they buy or prepare meat.").) The D.C. Circuit has made clear that one who moves for a preliminary injunction "must show that the alleged harm will *directly* result from the action which the movant seeks to enjoin." *Wisconsin Gas Co.,* 758 F.2d at 674 (emphasis added). It would be one thing if Plaintiffs were making a substantiated allegation that the demands of complying with the Final Rules segregation and labeling requirements are in-and-of-themselves impossible to meet without destroying their companies. But here, to the contrary, Plaintiffs' declarants appear most concerned that they will ultimately lose future business because others may respond to the new labeling rules and react in a manner that may ultimately affect their companies negatively. This Circuit's precedents suggest that such indirect harm is neither certain nor immediate, and thus cannot be the basis for a finding of irreparable harm. *See, e.g., Hunter v. FERC,* 527 F.Supp.2d 9, 14–15 (D.D.C.2007) (noting that even "where the threat is to the very existence of the plaintiff's business, it must still occur as a *direct result* of the action the movant seeks to enjoin."); *Bloomberg L.P. v. Commodity Futures Trading Comm'n,* 949 F.Supp.2d 91, 125, 13–523(BAH), 2013 WL 2458283, at *27 (D.D.C. June 7, 2013) (finding no irreparable harm where the plaintiff's theory of harm was "based upon a series of worst-case

scenarios").

Consequently, and for all of the reasons discussed above, the Court concludes that Plaintiffs have failed to establish the irreparable harm factor as required to warrant injunctive relief.

VI. BALANCE OF HARMS

The third factor to be weighed on the sliding scale in ruling on a preliminary injunction requires the Court to "balance the competing claims of injury," which involves "consider[ing] the effect on each party of the granting or withholding of the requested relief." *Winter,* 555 U.S. 7, 24, 129 S.Ct. 365 (2008).

[26] Plaintiffs argue that they will suffer the greatest harm because they are potentially subject to serious financial losses if the Final Rule is not enjoined. (*See* Pl. Br. at 44; *see also id.,* Decl. of Jerry Holbrook, ECF No. 24–16, ¶ 7 (estimating cost of compliance for Tyson Foods as $70 million); Decl. of Brad McDowell ¶¶ 14, 15 (estimating $7 million annual lost opportunity costs and $18 million in additional storage costs under the Final Rule).) Plaintiffs also argue that the delay in implementing the Final Rule if an injunction is granted will cause no harm to the government, which the AMS itself has tacitly admitted by setting up a six-month education period to help the industry conform to the new regulations. (Pl. Br. at 44–45.)

The agency responds that, because Plaintiffs' claims of irreparable harm are largely unsubstantiated, they should be given little weight. (Def. Br. at 39.) The agency also argues that there is inherent harm in enjoining regulatory agencies from enforcing validly promulgated rules. (*Id.*) Adding to the harm-to-the-government side of the scale, Defendant–Intervenors additionally point out that an injunction would ensure that the United States would be in violation of its WTO obligations, and would thereby put the country at risk for retaliatory sanctions that have been estimated at $1–2 billion. (Int. Br. at 43 (citing Remy Jurenas & Joel L. Greene, Cong. Research Serv., RS22955, Country–of–Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling 30 (2013)).)

Regardless of whether Plaintiffs have sufficiently shown irreparable harm either in the form of a First Amendment violation or due to severe economic losses, there is no doubt that the Final Rule imposes significant compliance costs on some companies in the meat production industry—costs that the agency itself estimated at between $53.1 and $137.8 million. Final Rule, 78 Fed.Reg. at 31,368. However, it is also true that granting an injunction could cause the United States to be deemed out of compliance with its international trade obligations, which apparently is also a costly proposition. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (Nov. 6, 1998) (a WTO member "bears responsibility for acts of all of its departments of government, including its judiciary"). If Canada and Mexico have agreed not to seek any retaliation until the WTO issues a decision about whether the Final Rule complies with the United States' WTO obligations, as Plaintiffs' counsel represented at oral argument (*see* Hr'g Tr. at 68:11–18); *see also* 147 Canada Gazette No. 24, June 15, 2013, 1459, then retaliation due to the issuance of an injunction is unlikely, and the cost to the government of imposing the injunction should be significantly discounted.

Consequently, the Court concludes that the balance of harms swings slightly in favor of Plaintiffs. Nevertheless, in terms of the overall sliding scale, Plaintiffs' advantage on the balance of harms factor is not enough to tip the totality of the injunction scale in their favor given that they have failed to show a likelihood of success on the merits or irreparable harm.

VII. PUBLIC INTEREST

The final factor that the Court must consider is the effect on the public's interest of granting or withholding the requested injunction. "In exercising their sound discretion" when deciding a motion for preliminary injunction, "courts of equity should [have] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24, 129 S.Ct. 365 (internal quotation marks and citations omitted). Here, the parties' arguments regarding the public interest are largely dependent upon their merits arguments. Plaintiffs argue that there is a public interest both in not enforcing unconstitutional laws, particularly where such laws have severe

economic effects, and in ensuring that regulatory agencies do not overstep their statutory limits. (Pl. Br. at 45.) The Government responds that the public has an interest in allowing regulatory agencies to function pursuant to their legislatively designated authority, and that there is also a significant public interest in achieving Congress' goal of providing more country-of-origin information to consumers. (Def. Br. at 39.)

Because the parties' public interest arguments are essentially derivative of the parties' arguments on the merits of the case, it follows that the public interest factor of the preliminary injunction test should weigh in favor of whoever has the stronger arguments on the merits—in this case, Defendants. *See, e.g., Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1326 (D.C.Cir.1998) ("The final preliminary injunction factor, the public interest, also offers [plaintiff] no support because it is inextricably linked with the merits of the case. If, as we have held, [plaintiff] is not likely to establish [a likelihood of success in the merits], then public interest considerations weigh against an injunction."); *ViroPharma, Inc. v. Hamburg,* 898 F.Supp.2d 1, 29–30 (D.D.C.2012) (where plaintiff was unlikely to establish that agency action did not comply with the law, the public interest factor weighed against granting an injunction); *Hubbard v. United States,* 496 F.Supp.2d 194, 203 (D.D.C.2007) ("Because it concludes that the plaintiff has not demonstrated a likelihood of success on the merits, the court need not linger long to discuss ... public interest considerations [as] ... [i]t is in the public interest to deny injunctive relief when the relief is not likely deserved under law." (internal quotations marks and citations omitted) (second alteration in original)). Thus, like the likelihood of success and irreparable harm factors, the public interest factor weighs against granting an injunction in the instant case.

VIII. CONCLUSION

The parties' arguments for and against the issuance of a preliminary injunction have focused primarily on the likelihood of success and irreparable harm factors, and the Court rests its conclusion regarding the requested preliminary injunction primarily on its evaluation of those two factors. For the reasons set forth above, and especially Plaintiffs' failure to demonstrate either a likelihood of success on the merits or irreparable injury, Plaintiffs' Motion for a preliminary injunction is **DENIED.** A separate order will follow.

APPENDIX

§ 1638a. Notice of country of origin

(a) In general

(1) Requirement

Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.

(2) Designation of country of origin for beef, lamb, pork, chicken, and goat meat

(A) United States country of origin

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat may designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was—

(i) exclusively born, raised, and slaughtered in the United States;

(ii) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or

(iii) present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.

(B) Multiple countries of origin (i) in general

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is—

(I) not exclusively born, raised, and slaughtered in the United States,

(II) born, raised, or slaughtered in the United States, and

(III) not imported into the United States for immediate slaughter, may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered.

(ii) Relation to general requirement
Nothing in this subparagraph alters the mandatory requirement to inform consumers of the country of origin of covered commodities under paragraph (1).

(C) Imported for immediate slaughter

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is imported into the United States for immediate slaughter shall designate the origin of such covered commodity as—

(i) the country from which the animal was imported; and

(ii) the United States.

(D) Foreign country of origin

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is not born, raised, or slaughtered in the United States shall designate a country other than the United States as the country of origin of such commodity.

(E) Ground beef, pork, lamb, chicken, and goat

The notice of country of origin for ground beef, ground pork, ground lamb, ground chicken, or ground goat shall include—

(i) a list of all countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat; or

(ii) a list of all reasonably possible countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat.

* * *

(b) Exemption for food service establishments

Subsection (a) of this section shall not apply to a covered commodity if the covered commodity is—

(1) prepared or served in a food service establishment; and

(2)(A) offered for sale or sold at the food service establishment in normal retail quantities; or

(B) served to consumers at the food service establishment.

(b) Method of notification

(1) In general

The information required by subsection (a) of this section may be provided to consumers by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers.

(2) Labeled commodities

If the covered commodity is already individually labeled for retail sale regarding country of origin, the retailer shall not be required to provide any additional information to comply with this section.

(d) Audit verification system

(1) In general

The Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify

compliance with this subchapter (including the regulations promulgated under section 1638c(b) of this title).

(2) Record requirements

(A) In general

A person subject to an audit under paragraph (1) shall provide the Secretary with verification of the country of origin of covered commodities. Records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification.

(B) Prohibition on requirement of additional records
The Secretary may not require a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of the country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person.

* * *

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ANIMAL WELFARE ACT

COURT DECISION

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. v. USDA.
No. 13-976.
Court Decision.
Filed December 16, 2013.

AWA – Motion to dismiss – Standing – Statutory definition of "animal" – Birds.

[Cite as: 7 F. Supp. 3d 1 (D.D.C. 2013).]

Court granted Defendants' motion to dismiss Complaint, finding that, although Plaintiffs had organizational standing to bring suit, the Animal Welfare Act grants USDA "complete discretion" in decisions regarding the enforcement and promulgation of animal-specific regulations.

United States District Court,
District of Columbia.

Judge JAMES E. BOASBERG, United States District Judge,
delivered the opinion of the Court.

MEMORANDUM OPINION

The nation's circle of concern expanded a little wider in 2002 when Congress amended the Animal Welfare Act to include birds as creatures deserving of legal protection. The agency charged with implementing the Act—the United States Department of Agriculture—has, however, so far failed to defend the country's feathered friends, both by not enforcing the Act against bird abusers and by not promulgating regulations specific to the mistreatment of avians. People for the Ethical Treatment of Animals, Inc., a non-profit organization dedicated to preventing cruelty to animals, has brought this lawsuit against USDA and its Secretary in order to compel the agency to follow through on the 2002 amendment and put a stop to the inhumane treatment of birds. Specifically, PETA wants USDA to immediately begin enforcing the AWA against entities that

mistreat birds and to publish new animal-welfare regulations specific to birds' unique needs.

Defendants now move to dismiss the Complaint. They claim that PETA lacks standing to bring this case and that the AWA commits these issues to USDA's discretion. Although PETA presents some strong arguments, the Court ultimately finds that the AWA gives USDA complete discretion on decisions here relating to enforcement and promulgation of animal-specific regulations. The Court thus must grant Defendants' Motion.

I. BACKGROUND

Congress enacted the Animal Welfare Act in 1966 in order "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" and "to assure the humane treatment of animals during transportation in commerce." 7 U.S.C. § 2131(1) & (2). The Act therefore instructs the Secretary of USDA both to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors," *id.* § 2143(a)(1), and to "make such investigations or inspections as he deems necessary to determine whether any [person or entity subject to the AWA] has violated or is violating" the AWA or its implementing regulations. *Id.* § 2146(a).

The AWA, however, does not protect every subject of the animal kingdom. Before 2002, the Act defined the term "animal" to include "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmed-blooded animal, as the Secretary may determine is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet." Animal Welfare; Definition of Animal, 69 Fed.Reg. 31,513, 31,513 (June 4, 2004) (citing 7 U.S.C. § 2132(g)). USDA therefore concluded that birds were excluded from coverage under the AWA and limited the scope of its regulations accordingly. *See* Animal Welfare; Regulations and Standards for Birds, Rats, and Mice, 69 Fed.Reg. 31,537, 31,537 (June 4, 2004).

In 2002, however, Congress amended the statutory definition of "animal"

to specifically exclude "birds, rats of the genus Rattus, and mice of the genus Mus, *bred for use in research.*" 7 U.S.C. § 2132(g) (emphasis added). USDA read this new language to mean that Congress intended to *include* within the definition of "animal" birds not bred for research, and so the agency followed suit by amending its own regulations to "narrow[ ] the scope of the exclusion for birds to only those birds bred for use in research." Regulations and Standards for Birds, Rats, and Mice, 69 Fed.Reg. at 31,537. The parties agree that non-research birds are now protected by the AWA. *See* Mot. at 3–4; Opp. at 4.

Pursuant to the Act, USDA has also promulgated regulations specific to certain creatures. For instance, dogs, cats, nonhuman primates, guinea pigs, hamsters, rabbits, and marine mammals are all governed by their own unique regulatory standards. *See* 9 C.F.R. §§ 3.1–3.118. Other animals covered by the AWA—from aardvarks to zebras—are protected by a set of general standards. *See id.* §§ 3.125–3.142. These rules ensure that the animals are treated humanely by setting minimum standards for matters such as veterinary care, potable water, housing, and lighting. *See generally id.*

USDA has not, so far, promulgated any regulations specific to birds. In 2004, the agency announced that it "intend[ed] to extend enforcement of the AWA to birds," but that "before [it could] begin enforcing the AWA with respect to ... birds, [it] believe[d] it is necessary to consider what regulations and standards are appropriate for them." Regulations and Standards for Birds, Rats, and Mice, 69 Fed.Reg. at 31,538–39. The agency thus sought "comments from the public to aid in the development of appropriate standards for birds." *Id.* at 31,539. In response, it received over 7,000 comments on the subject, *see* Mot., Exh. 1 (Declaration of Johanna Briscoe), ¶ 6, and it has consulted with veterinarians, economists, industry members, related government agencies, and other stakeholders in order to develop a proposed set of regulations specific to avians. *See id.*, ¶¶ 8–11. But in the nine years since the comment period closed, no such regulations have issued. Instead, with surprising regularity, the agency has repeatedly set, missed, and then rescheduled deadlines for the publication of proposed bird-specific regulations. *See* Opp. at 6–7 (collecting citations).

Even without specific regulations to protect them, birds, in theory,

remain covered by USDA's general animal-welfare regulations. Yet, according to PETA, USDA has failed to enforce even those general regulations with respect to birds. Despite USDA's official position that avians are protected by the AWA, USDA officials have repeatedly responded to complaints about the inhumane treatment of birds by claiming either that they are not regulated by USDA or that they do not fall under USDA jurisdiction. *See* Opp., Att. 2 (Declaration of Jeffrey S. Kerr), ¶ 7; *see also* Opp., Exhs. 1–5 (USDA documents). Indeed, USDA is not even on the same page as its own FOIA Director, who answered a request for information related to the agency's investigations into avian mistreatment by explaining that "Agency employees conducted a thorough search of their files and advised our office that birds are not being regulated." Opp., Exh. 7 (FOIA Letter).

PETA is understandably frustrated by these misrepresentations and USDA's continued inaction in regard to the inhumane treatment of birds. The group cites a number of disturbing incidents that have gone unpunished by USDA, including zoos' failure to protect flamingoes and waterfowl in their care from fatal attacks by feral dogs and pet stores' allowing hundreds of their parakeets to die from starvation and disease. *See, e.g.,* Kerr Decl., ¶ 7(b)–(d). PETA thus filed this lawsuit, seeking to compel the agency to enforce the existing general animal-welfare regulations against bird abusers and to promulgate new regulations specific to birds. *See* Compl. at 7. Defendants now move to dismiss the case.

II. LEGAL STANDARD

In evaluating Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) and 12(b)(1), the Court must "treat the complaint's factual allegations as true." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C.Cir.2000) (quoting *Schuler v. United States,* 617 F.2d 605, 608 (D.C.Cir.1979)) (internal citation omitted); *see also Jerome Stevens Pharms., Inc. v. FDA,* 402 F.3d 1249, 1253 (D.C. Cir. 2005). This standard governs the Court's considerations of Defendants' Motion under both Rules 12(b)(1) and 12(b)(6). *See Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) ("[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the

complaint should be construed favorably to the pleader."); *Walker v. Jones,* 733 F.2d 923, 925–26 (D.C.Cir.1984) (same). The Court need not accept as true, however, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the Complaint. *Trudeau v. FTC,* 456 F.3d 178, 193 (D.C.Cir.2006) (quoting *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (internal quotation marks omitted)).

To survive a motion to dismiss under Rule 12(b)(1), Plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear its claims. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *U.S. Ecology, Inc. v. U.S. Dep't of Interior,* 231 F.3d 20, 24 (D.C.Cir.2000). A court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F.Supp.2d 9, 13 (D.D.C.2001). For this reason, " 'the [p]laintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 13–14 (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed.1987) (alteration in original)). Additionally, unlike with a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens,* 402 F.3d at 1253; *see also Venetian Casino Resort, LLC v. EEOC,* 409 F.3d 359, 366 (D.C.Cir.2005) ("[G]iven the present posture of this case—a dismissal under Rule 12(b)(1) on ripeness grounds—the court may consider materials outside the pleadings."); *Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197 (D.C.Cir.1992).

Rule 12(b)(6) provides for the dismissal of an action where a complaint fails "to state a claim upon which relief can be granted." Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955). A plaintiff must put forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Id.* Though a plaintiff may survive a 12(b)(6) motion even if "recovery is very remote and unlikely," *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955 (citing *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683), the facts alleged in the Complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S.Ct. 1955.

III. ANALYSIS

In seeking dismissal here, Defendants offer two arguments. First, they say that PETA lacks standing to bring this case. Second, they assert that even if PETA has standing, it has failed to state a claim upon which relief can be granted because USDA has discretion to act as it has. *See* Mot. at 1–2. The Court will address these issues separately.

A. *Standing*

The Court begins with standing. As standing is a "threshold jurisdictional question," the Court must address it before moving on to the merits of the case. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In order to establish standing—a prerequisite for opening the courthouse doors—a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal [subject-matter] jurisdiction." *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378–79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (internal quotation marks omitted). Standing comprises three elements: (1) a concrete and particularized injury suffered by the plaintiff; (2) a traceable causal connection between the plaintiff's injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision by the court will redress the plaintiff's injury. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Just like an individual plaintiff, an organizational plaintiff such as PETA may have standing to sue in its own right if it can demonstrate that these three requirements have been satisfied. *See Havens Realty,* 455 U.S. at 378–79, 102 S.Ct. 1114. This "organizational standing" is distinct from "representational standing," wherein a plaintiff organization brings a suit on behalf of its members, rather than on behalf of itself. *See Scenic America, Inc v. United States Dep't of Transp.,* 983 F.Supp.2d 170, 176, 2013 WL 5745268, at *3 (D.D.C. Oct. 23, 2013).

USDA argues that PETA has not established any of the three elements of standing. The Court disagrees. The closest question is whether PETA has demonstrated, as required for organizational standing, a "concrete and demonstrable injury to [its] activities—with [a] consequent drain on [its] resources," rather than "simply a setback to [its] abstract social interests." *Nat'l Ass'n of Home Builders v. EPA,* 667 F.3d 6, 11 (D.C.Cir.2012); *see also Nat'l Treasury Employees Union v. United States,* 101 F.3d 1423, 1430 (D.C.Cir.1996); *American Legal Foundation v. FCC,* 808 F.2d 84, 91–92 (D.C.Cir.1987). Specifically, to establish an injury-in-fact, PETA must allege "that discrete programmatic concerns are being directly and adversely affected by" USDA's inaction. *Nat'l Taxpayers Union, Inc. v. United States,* 68 F.3d 1428, 1433 (D.C.Cir.1995).

PETA cites two injuries to its activities that have resulted from USDA's failure to enforce the AWA with respect to birds. First, "it [is] preclude[d] ... from preventing cruelty to and inhumane treatment of these animals through its normal process of submitting USDA complaints," and second, "it [is] deprive[d] ... of key information that it relies on to educate the public," since the group typically uses USDA's AWA inspection reports in order to prepare promotional materials on animal abuse. *See* Opp. at 11; Kerr Decl., ¶¶ 9, 14–17. As a result, PETA says that it has been forced to expend additional resources—for instance, by pursuing complaints about bird mistreatment through local, state, and other federal authorities and by conducting its own investigations in order to obtain educational information on bird abuse. *See* Opp. at 12–13; Kerr Decl., ¶¶ 9–10, 14–19.

These are real, concrete obstacles to PETA's work, rather than the kind of "abstract concern that does not impart standing." *Nat'l Taxpayers Union,* 68 F.3d at 1433. PETA's animal-rights programs are "perceptibly impaired" when USDA refuses to take action in response to the group's complaints about bird abuse and when it fails to compile information the group needs on the inhumane treatment of birds because PETA is then forced to expend additional resources on more expensive and less effective alternatives. *Havens Realty,* 455 U.S. at 379, 102 S.Ct. 1114. The D.C. Circuit has recognized both of these harms as sufficient to confer standing on an organization:

> [Plaintiffs] plead[ ] the same type of injury as the plaintiffs in *Havens Realty:* the challenged regulations *deny the [plaintiff] organizations access to information and avenues of redress* they wish to use in their routine ... activities. Unlike [a] mere interest in a problem or ideological injury ... the [plaintiff] organizations have alleged inhibition of their daily operations, an injury both concrete and specific to the work in which they are engaged.

Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 937–38 (D.C.Cir.1986) (emphasis added) (internal quotation marks omitted); *see also Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach,* 469 F.3d 129, 132–33 (D.C.Cir.2006); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1087 n. 29 (D.C.Cir.1973). PETA has therefore alleged an injury-in-fact.

USDA offers several reasons why PETA's injury is insufficient, but none of its arguments persuades. First, USDA insists that PETA has only alleged an abstract harm to its ideological mission, rather than a concrete harm to its activities. This argument simply ignores the two specific, programmatic harms that PETA has laid out in its briefs. Second, USDA cites *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.,* 28 F.3d 1268 (D.C.Cir.1994), for the proposition that PETA cannot establish standing based on the self-inflicted harm it suffered by choosing to redirect its resources in response to the agency's inaction. *See id.* at 1277. But the D.C. Circuit has emphatically rejected precisely that reading of *BMC:* "[O]ur standing analysis [does not] depend on the voluntariness or involuntariness of the plaintiffs' expenditures. Instead, we focus[ ] on whether they undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination rather than in anticipation of litigation." *Equal Rights Ctr. v. Post Properties, Inc.,* 633 F.3d 1136, 1140 (D.C.Cir.2011). As there is no indication that PETA's diversion of resources here was done in anticipation of litigation, USDA's argument on this point falls flat as well. Third, USDA argues that an advocacy group like PETA does not suffer an injury when it is forced "to shift resources from one advocacy agenda to another" or when its "advocacy

efforts [are made] more costly." Reply at 4. The cases it cites for this premise, however, all deal with groups that alleged injuries related to the costs of litigation, legal counseling, and lobbying, none of which is relevant here. *See, e.g., Ctr. For Law & Educ. v. Dep't of Educ.,* 396 F.3d 1152, 1161–62 (D.C.Cir.2005); *Nat'l Taxpayers Union,* 68 F.3d at 1434. Finally, USDA suggests that the organizational-standing doctrine is limited to cases involving disputes between private parties, *see* Mot. at 11–12, or, alternatively, to cases involving challenges to government action, rather than inaction. *See* Reply at 7–8. Leaving aside the obvious contradiction between these two premises, the first is flatly refuted by the precedent, *see, e.g., Abigail Alliance,* 469 F.3d at 132–33, and the second, while one possible inference from past practice, finds no express support in any D.C. Circuit opinion.

Causation and redressability are simpler matters. It is clear that the injuries complained of—USDA's refusal to take enforcement action in response to PETA's complaints and USDA's failure to compile the information PETA wants to use in its educational materials—are caused by the agency. It is also clear that the remedies sought—an order compelling USDA to enforce the AWA with respect to birds and to promulgate more protective, bird-specific regulations—would redress those injuries. USDA devotes several pages of its pleadings to the argument that PETA's injuries are actually caused by the third parties who are mistreating birds, but this defense simply misses PETA's point. The group's harms—a lack of redress for its complaints and a lack of information for its membership—are traceable to its interactions with the agency, not to the actions of third parties. Whether the rate of bird abuse rises or falls, for instance, the harm that PETA suffers as a result of USDA's inaction will remain the same.

The Court therefore concludes that PETA has standing as an organization to bring this case.

B. *Failure to State a Claim*

PETA's lawsuit aims to force USDA to act in two ways: (1) enforce the general AWA regulations with respect to the mistreatment of birds and (2) promulgate new AWA regulations that are specific to birds. *See* Compl. at 6–7. USDA counters that because the AWA does not require it to take either action but instead leaves both matters to the agency's

discretion, PETA's suit should be dismissed. *See* Mot. at 17–18. The Court will tackle PETA's two issues in turn.

1. *Enforcement with Respect to Birds*

PETA bases its enforcement-related claim on § 706(1) of the Administrative Procedure Act, which empowers the Court to compel "agency action unlawfully withheld." 5 U.S.C. § 706(1). According to PETA, USDA's failure to prosecute violations of the AWA related to birds contravenes the Act's instruction that the agency should conduct "investigations or inspections" in order to ensure compliance with the statute. 7 U.S.C. § 2146. PETA therefore requests that this Court compel USDA to take such actions with respect to the mistreatment of birds.

USDA reminds the Court, however, that "before any review ... may be had" under § 706, PETA "must first clear the hurdle of § 701(a)." *Heckler v. Chaney,* 470 U.S. 821, 828, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Section 701(a) of the APA bars judicial review of agency action in two situations: first, if an applicable statute precludes judicial review, and second, if the agency action at issue is "committed to agency discretion by law." 5 U.S.C. § 701(a)(1) & (2). USDA invokes the second of these exceptions, claiming that the AWA commits enforcement decisions to its sole discretion.

An action is "committed to agency discretion" if "the [applicable] statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney,* 470 U.S. at 830, 105 S.Ct. 1649. In other words, when the applicable statute does not provide "judicially manageable standards ... for judging how and when an agency should exercise its discretion," *id.* then a court has no choice but to dismiss the case because there is "no law to apply." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (quoting S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)); *see also Claybrook v. Slater,* 111 F.3d 904, 909 (D.C.Cir.1997). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Chaney,* 470 U.S. at 830, 105 S.Ct. 1649.

One classic example of action committed to agency discretion is an

agency's decision whether or not to take an enforcement action. *Id.* at 831, 105 S.Ct. 1649. As a practical matter, an agency "generally cannot act against each technical violation of the statute it is charged with enforcing," and so every time the agency decides whether to prosecute a potential wrongdoer, it must perform "a complicated balancing of a number of factors which are peculiarly within its expertise," including "whether a violation has occurred, ... whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and ... whether the agency has enough resources to undertake the action at all." *Id.* In the face of these competing and often technical concerns, the Supreme Court has counseled humility: "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its [enforcement] priorities." *Id.* at 831–32, 105 S.Ct. 1649. Indeed, the Court has instructed that an agency's decision not to take an enforcement action should be considered "presumptively unreviewable" under § 701(a)(2). *Id.* at 832, 105 S.Ct. 1649.

That presumption, however, may be rebutted if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833, 105 S.Ct. 1649. "Congress may limit an agency's exercise of enforcement power ... either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* In that situation, of course, there will be "law to apply," *Overton Park,* 401 U.S. at 410, 91 S.Ct. 814; *Claybrook,* 111 F.3d at 909, since the statute will provide "legislative direction" for the agency to follow and the courts to enforce. *Chaney,* 470 U.S. at 833, 105 S.Ct. 1649.

Here, USDA invokes *Chaney* to argue that its enforcement decisions with respect to birds are presumptively unreviewable. That much is clear. The Court next looks to the language of the AWA to determine whether the statute "has provided guidelines for [USDA] to follow in exercising its enforcement powers." *Id.* at 833, 105 S.Ct. 1649. Section 2146 states: "The Secretary shall make such investigations or inspections *as he deems necessary* to determine whether any [covered entity] ... has violated or is violating any provision of this chapter or any regulation or standard issued thereunder." 7 U.S.C. § 2146 (emphasis added). The key phrase,

of course, is "as he deems necessary." In a similar case, the Supreme Court found that language like this "fairly exude[d] deference" to the agency and "foreclose[d] the application of any meaningful judicial standard of review." *Webster v. Doe,* 486 U.S. 592, 600, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (finding that Congress had committed CIA employee-termination decisions to CIA Director where statute allowed termination whenever the Director "shall deem such termination necessary or advisable in the interests of the United States"); *see also Claybrook,* 111 F.3d at 908–09. The AWA's enforcement provision "thus strongly suggests that its implementation was 'committed to agency discretion by law,' " *Webster,* 486 U.S. at 600, 108 S.Ct. 2047 (quoting 5 U.S.C. § 701(a)(2)), which means that Section 701(a)(2) of the APA bars the Court from hearing PETA's claim on this issue.

PETA, nevertheless, has a trick up its sleeve. Although an agency's decision not to bring a *specific* enforcement action is generally presumed to be unreviewable under *Chaney,* the D.C. Circuit has recognized an exception in cases where a plaintiff seeks judicial review of any agency's "*general enforcement policy.*" *Crowley Caribbean Transp., Inc. v. Pena,* 37 F.3d 671, 676 (D.C.Cir.1994); *see also Edison Elec. Inst. v. EPA,* 996 F.2d 326, 333 (D.C.Cir.1993); *Nat'l Wildlife Fed'n v. EPA,* 980 F.2d 765, 772–73 (D.C.Cir.1992). According to the Court of Appeals, there are "ample reasons for distinguishing the two situations":

> [E]xpressions of broad enforcement policies are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings. As general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are ... peculiarly within the agency's expertise and discretion. Second, an agency's pronouncement of a broad policy against enforcement poses special risks that it "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," a situation in which the normal presumption of non-reviewability may be

> inappropriate. Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to for[ ]go enforcement tend to be cursory, ad hoc, or post hoc. These latter cases confront courts (as here) with the task of teasing meaning out of agencies' side comments, form letters, litigation documents, and informal communications.

Crowley, 37 F.3d at 677 (quoting *Chaney,* 470 U.S. at 833 n. 4, 105 S.Ct. 1649).

Invoking this exception to *Chaney,* PETA contends that its challenge is judicially reviewable because it is not directed to "any of [USDA's] particular enforcement decisions, but rather [to the agency's] general policy of not regulating birds under the AWA." Opp. at 22. To support its contention that USDA has such a non-enforcement policy, PETA cites to a slew of incidents where USDA officials repeatedly responded to complaints about avian abuse by claiming that birds "do not fall under USDA regulation" or were "not under [USDA] jurisdiction." Kerr Decl., at ¶ 7.

PETA's argument has force, but because it cannot identify any concrete statement from USDA announcing a general policy not to regulate birds under the AWA, the group cannot prevail on this point. On the contrary, USDA says that it "expressed its official position" on the matter "when it promulgated regulations bringing birds under the scope of the AWA." Reply at 17 n.13. In 2004, moreover, the agency published an Advance Notice of Rulemaking announcing that it "intend[ed] to extend enforcement of the AWA to birds" and asking for "comments from the public to aid in the development of appropriate standards for birds." Regulations and Standards for Birds, Rats, and Mice, 69 Fed.Reg. at 31,537. Although several individual USDA officials appear to have given misleading explanations about the scope of the agency's authority in response to complaints about the mistreatment of the feathered, these assertions contradict official USDA policy. *See* Reply at 17 n.13. If they did reflect USDA policy, PETA might well be able to invoke yet another exception to *Chaney's* presumption of unreviewability, which permits

plaintiffs to challenge a non-enforcement decision that was "based solely on the belief that [the agency] lacks jurisdiction" over the matter. *Chaney,* 470 U.S. at 833 n. 4, 105 S.Ct. 1649; *see also id.* at 839, 105 S.Ct. 1649 (Brennan, J., concurring). USDA would therefore be well advised to educate its officials on the agency's policy regarding birds—namely, that birds *are* regulated by the AWA and *do* fall under the agency's enforcement jurisdiction—and to ensure that they break their bad habit of misinforming the public on this matter.

These errors notwithstanding, in every D.C. Circuit case that PETA has cited where a plaintiff challenged an agency's general enforcement policy, the agency had somehow formally expressed that policy through some kind of official pronouncement. *See, e.g., OSG Bulk Ships, Inc. v. United States,* 132 F.3d 808, 811–12 (D.C.Cir.1998) (agency sent letters to regulated entities); *Edison Elec.,* 996 F.2d at 330–31 (agency issued "Enforcement Policy Statement"); *Nat'l Wildlife,* 980 F.2d at 772–73 (agency promulgated regulation after notice-and-comment rulemaking); *see also Ctr. for Auto Safety, Inc. v. Nat'l Hwy Traffic Safety Admin.,* 342 F.Supp.2d 1, 6–8 (D.D.C.2004) (agency sent letters to regulated entities). *But see Roane v. Holder,* 607 F.Supp.2d 216 (D.D.C.2009) (permitting a general-enforcement-policy challenge without mentioning whether a formal agency statement of that policy existed); *Jones v. Office of the Comptroller,* 983 F.Supp. 197 (D.D.C.1997) (same). Indeed, the case that first recognized this exception to Chaney repeatedly referred to agencies' "expressions," "statements," and "pronouncements" of their enforcement policies. *Crowley,* 37 F.3d at 677. While the Circuit has also recognized that, in rare instances, "a document announcing a particular non-enforcement decision" might "lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties" such that it could be challenged as a statement of the agency's general enforcement policy, the documents PETA has submitted in this case do not rise to that level. *Id.*

There is good reason, moreover, for requiring plaintiffs to cite to some kind of official, concrete statement of the agency's general enforcement policy in order for them to invoke this exception to *Chaney.* The D.C. Circuit permits general-enforcement-policy challenges in part because they provide more material for courts to review: "An agency will generally present a clearer (and more easily reviewable) statement of its

reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to for[ ]go enforcement tend to be cursory, ad hoc, or post hoc." *Crowley,* 37 F.2d at 677. But where, as here, a plaintiff simply alleges without proof that an agency has a general policy of non-enforcement, there is by definition almost nothing for the Court to review, forcing it to "teas[e] meaning out of agencies' side comments, form letters, litigation documents, and informal communications"—one of the main reasons why plaintiffs are not permitted to challenge agencies' individual enforcement decisions. *Id.*; *see also Chaney,* 470 U.S. at 832, 105 S.Ct. 1649. The task is complicated even further where, as here, the agency affirmatively *denies* that it has a general non-enforcement policy, which sends the Court down the rabbit hole of reviewing the lawfulness of an agency policy that the agency insists does not even exist.

The Court concludes, therefore, that PETA's enforcement-related claim must fail. To the extent that it is a challenge to individual decisions by USDA not to enforce the AWA with respect to particular avian incidents, those decisions are unreviewable because they are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). To the extent that it is a challenge to USDA's "general enforcement policy" with respect to birds, PETA has not identified any concrete statement of that policy for the Court to review. The Court, accordingly, will grant Defendants' Motion to Dismiss on this count.

2. *Promulgation of Bird–Specific Regulations*

For its regulation-related claim, PETA again invokes § 706(1), asserting that USDA's failure to promulgate new regulations specific to birds constitutes "agency action unlawfully withheld." In support of this argument, PETA cites to § 2143 of the AWA, which directs that "[t]he Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1). PETA therefore asks this Court to order that, by a certain deadline, USDA must publish for public comment, and then promulgate, new animal-welfare regulations tailored to birds.

USDA points out, however, that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). This limitation "rules out judicial direction of ... agency action that is not demanded by law." *Id.* at 65, 124 S.Ct. 2373. For instance, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Id.*; *see also Citizens for Responsibility and Ethics in Washington v. S.E.C.,* 916 F.Supp.2d 141, 148 (D.D.C.2013).

Section 2143 of the AWA does not require USDA to issue avian-specific animal-welfare standards. The statute simply directs the agency to promulgate standards for the "humane handling, care, treatment, and transportation of *animals*." 7 U.S.C. § 2143(a)(1) (emphasis added). By contrast, that same provision *does* require USDA to promulgate standards specific to "the exercise of dogs" and "the psychological well-being of primates." *Id.* at § 2143(a)(2)(B). Otherwise, though, the AWA leaves to USDA's discretion the question of whether specific standards are appropriate for each covered animal or if the general standards will suffice, authorizing "[t]he Secretary ... to promulgate such rules, regulations, and orders *as he may deem necessary* in order to effectuate the purposes of this chapter." *Id.* at § 2151 (emphasis added); *see also Webster,* 486 U.S. at 600, 108 S.Ct. 2047. In sum, the language of the AWA "would ... support[ ] a judicial decree under the APA requiring the prompt issuance of [animal-welfare] regulations, but not a judicial decree setting forth the content of those regulations." *Southern Utah,* 542 U.S. at 65, 124 S.Ct. 2373; *see also Missouri Coal. for the Env't Found. v. Jackson,* 853 F.Supp.2d 903, 911–12 (W.D.Mo.2012) (court could not compel EPA "to promulgate new or revised water quality standards ... for a specific state" because the applicable statute "specifie[d] no standard as to when a [state-specific regulation] should be issued, other than when the Administrator determines that it is necessary to 'meet the requirements of this chapter' "). The statute leaves USDA free to choose if it will stick with the general standards or issue new rules specific to birds.

PETA notes, however, that when USDA amended the regulatory

definition of "animal" to include birds, it also made clear that it "d[id] not believe that the general [animal-welfare] standards ... would be appropriate or adequate to provide for the humane handling, care, treatment, and transportation of birds" and that "it [was] necessary to consider what regulations and standards are appropriate for them." Regulations and Standards for Birds, 69 Fed.Reg. at 31,538–39. The agency has since repeatedly reaffirmed that such regulations are necessary and that it intends to promulgate them at some point in the future. *See, e.g.,* 70 Fed.Reg. 64,097, 64,104 (Oct. 31, 2005); 71 Fed.Reg. 72,736, 72,738 (Dec. 11, 2006); 72 Fed.Reg. 69,755, 69,757 (Dec. 10, 2007); 73 Fed.Reg. 71,112, 71,117 (Nov. 24, 2008); 74 Fed.Reg. 21,873, 21,873 (May 11, 2009); 75 Fed.Reg. 21,736, 21,736 (Apr. 26, 2010); 76 Fed.Reg. 39,998, 40,003 (July 7, 2011); 78 Fed.Reg. 1,522, 1,526 (Jan. 8, 2013).

PETA links these pronouncements to the language of the AWA in order to construct the following syllogism: if USDA is authorized to promulgate animal-welfare regulations "as [it] may deem necessary ... to effectuate the purposes of this chapter," 7 U.S.C. § 2151, and if USDA has concluded that bird-specific standards are "necessary" to ensure the welfare of those animals, Regulations and Standards for Birds, 69 Fed.Reg. at 31,538, then USDA is required to promulgate bird-specific animal-welfare regulations. Unfortunately for PETA, however, this chain of logic includes several weak links. First, USDA's conclusion that bird-specific regulations are "necessary to consider" may well sound in a different register from the AWA's instruction that USDA should promulgate regulations that it deems "necessary ... to effectuate the purposes of [the AWA]." In other words, the fact that USDA believes that it must contemplate, and eventually adopt, bird-specific regulations does not mean that the agency has concluded that those regulations are essential as of this moment; in the meantime, the agency might believe that the general animal-welfare regulations will do just fine. Second, PETA cites no authority for the proposition that USDA's public statements can create binding obligations on the agency enforceable under § 706(1). On the contrary, the Supreme Court has indicated that "[a] statement by [an agency] about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1)." *Southern Utah,* 542 U.S. at 71, 124 S.Ct. 2373; *see also*

Chaney, 470 U.S. at 836, 105 S.Ct. 1649 (questioning "whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce").

In a last-ditch effort to keep this case in court, PETA argues for the first time in its Opposition that it is entitled to the relief it seeks pursuant to § 706(2) of the APA, which authorizes the Court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). PETA argues that USDA's failure to promulgate bird-specific regulations is a failure to act that is arbitrary and capricious. Unfortunately for PETA, however, it did not raise this claim in its Complaint, and a "[p]laintiff is not permitted to advance a claim in [its] Motion and Opposition that was not alleged in [its] Complaint." *Richardson v. Capital One, N.A.,* 839 F.Supp.2d 197, 202 (D.D.C.2012); *see also Palmer v. GMAC Commercial Mortg.,* 628 F.Supp.2d 186, 195 n. 10 (D.D.C.2009). The Court will therefore not consider this argument.

To recap, the AWA does not require USDA to adopt bird-specific standards. USDA's statements that the general animal-welfare standards are not adequate to protect birds and that bird-specific standards should be considered do not impose an obligation on the agency enforceable under § 706(1) of the APA. Defendants' Motion to Dismiss on this count thus succeeds.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss. A separate Order consistent with this Opinion will be issued this day.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: LEE MARVIN GREENLY.
Docket No. 11-0073.
Decision and Order.
Filed July 2, 2013.

AWA – Disposition of proceedings – Double jeopardy – License revocation – Statute of limitations.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondent.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On November 29, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this adjudicatory 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], by filing an Order to Show Cause Why Animal Welfare License 41-C-0122 Should Not Be Terminated [hereinafter Order to Show Cause].

The Administrator alleges: (1) Lee Marvin Greenly was convicted in *United States v. Greenly*, Crim. No. 06-235 (PAM) (D. Minn.), of criminally conspiring to violate and violating the Lacey Act by maintaining bear-baiting stations on a federal wildlife refuge where bear hunting is unlawful and guiding paying clients onto the federal wildlife refuge to unlawfully hunt bears and coyotes, resulting in the deaths of no fewer than two bears and one coyote; (2) on February 12, 2009,

August 14, 2010, and October 19, 2010, Mr. Greenly placed animals and people in danger by failing to house animals in secure enclosures and by exhibiting dangerous animals without any distance and/or barriers between the animals and the public, resulting in injuries; (3) on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Mr. Greenly failed to permit inspection of his animals, premises, and records by the Administrator; and (4) Mr. Greenly made false statements and provided false documents to government officials regarding the death of a bear and the maintenance of bear-baiting stations on a federal wildlife refuge.[1] The Administrator seeks an order terminating Mr. Greenly's Animal Welfare Act license and disqualifying Mr. Greenly from obtaining an Animal Welfare Act license for not less than a period of 2 years.[2] On January 14, 2011, Mr. Greenly filed an Answer to Show Cause Order in which he admitted he entered into a plea agreement in *United States v. Greenly* (Plea Agreement and Sentencing Stipulations), Crim. No. 06-235 (PAM) (D. Minn. Nov. 27, 2006).[3] On January 14, 2011, Mr. Greenly also filed a motion to consolidate the instant proceeding with *Greenly*, AWA Docket No. 11-0072. On January 19, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] granted Mr. Greenly's motion and consolidated the instant proceeding with *Greenly*, AWA Docket No. 11-0072, for the purposes of hearing.[4]

On February 8, 2011, the Administrator filed Complainant's Motion for Summary Judgment and, on March 4, 2011, Mr. Greenly filed Respondents [sic] Response to Complainant's Motion for Summary Judgment. On March 8, 2011, the Chief ALJ issued an Order deferring a ruling on Complainant's Motion for Summary Judgment pending argument on Complainant's Motion for Summary Judgment during the consolidated hearing.

On May 1-2, 2012, the Chief ALJ conducted a consolidated hearing in Minneapolis, Minnesota. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Larry D. Perry, Knoxville, Tennessee,

[1] Order to Show Cause at 2-3, ¶¶ 3-7.
[2] Order to Show Cause at 4.
[3] Answer to Show Cause Order at 1-2, ¶ 3.
[4] Chief ALJ's Sum. of Teleconference and Order filed January 19, 2011.

represented Mr. Greenly. The Administrator called 12 witnesses, and Mr. Greenly called seven witnesses.[5] The Administrator introduced 51 exhibits that were admitted into evidence,[6] and Mr. Greenly introduced 48 exhibits that were admitted into evidence.[7]

On August 22, 2012, after the parties submitted post-hearing briefs, the Chief ALJ filed a Decision and Order in which he: (1) concluded that Mr. Greenly, having been found guilty of conspiracy to violate the Lacey Act, is unfit to hold an Animal Welfare Act license; (2) ordered that, should the Chief ALJ's Order in *Greenly*, AWA Docket No. 11-0072 (Aug. 22, 2012), revoking Mr. Greenly's Animal Welfare Act license be vacated, Mr. Greenly's Animal Welfare Act license would be terminated; and (3) disqualified Mr. Greenly from becoming licensed under the Animal Welfare Act for a period of 2 years.[8]

On September 27, 2012, Mr. Greenly appealed the Chief ALJ's Decision and Order to the Judicial Officer. On October 17, 2012, the Administrator filed Complainant's Response to Petition for Appeal, and on October 22, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the Chief ALJ's termination of Mr. Greenly's Animal Welfare Act license and the Chief ALJ's disqualification of Mr. Greenly from becoming licensed under the Animal Welfare Act for a period of 2 years; except that, the Order terminating Mr. Greenly's Animal Welfare Act license in this Decision and Order is not contingent upon the ultimate disposition of *Greenly*, AWA Docket No. 11-0072.

DECISION

Discussion

[5] References to the transcript of the May 1-2, 2012, hearing are indicated as "Tr." and the page number.
[6] The Administrator's exhibits are identified as "CX" and the exhibit number.
[7] Mr. Greenly's exhibits are identified as "RX" and the exhibit number.
[8] Chief ALJ's Decision and Order at 8-9.

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133). The power to require and to issue licenses under the Animal Welfare Act includes the power to terminate licenses and to disqualify persons from becoming licensed.[9]

The basis for the Administrator's determination that Mr. Greenly is no longer fit to hold an Animal Welfare Act license is the evidence that Mr. Greenly made false statements and provided false records to a government agency and was convicted of conspiring to violate and violating the Lacey Act. Mr. Greenly admits entering a plea agreement in *United States v. Greenly* (Plea Agreement and Sentencing Stipulations), Crim. No. 06-235 (PAM) (D. Minn. Nov. 27, 2006).[10]

The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

> **§ 2.11. Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
> . . . .
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the

[9] Vanishing Species Wildlife, Inc., No. 10-0194, 69 Agric. Dec. 1068, 1070, 2010 WL 3429510 (U.S.D.A. Aug. 5, 2010); Animals of Mont., Inc., No. D-05-0005, 68 Agric. Dec. 92, 94, 2009 WL 624354 (U.S.D.A. Mar. 10, 2009); Amarillo Wildlife Refuge, Inc., No. 07-0077, 68 Agric. Dec. 77, 81, 2009 WL 248415 (U.S.D.A. Jan. 6, 2009); Vigne, No. 07-0174, 67 Agric. Dec. 1060, 1062, 2008 WL 8120958 (U.S.D.A. Nov. 18, 2008); Bradshaw, No. 09-22, 50 Agric. Dec. 499, 507, 1991 WL 290586 (U.S.D.A. May 17, 1991).

[10] Answer to Show Cause Order at 1-2 ¶ 3.

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

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

> **§ 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.

7 U.S.C. § 2131.

The evidence establishes that on November 27, 2006, the United States and Mr. Greenly entered into a Plea Agreement and Sentencing Stipulations whereby Mr. Greenly pleaded guilty to an Information charging him with conspiracy to violate the Lacey Act and violating the Lacey Act (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B) and 18 U.S.C. § 371). *United States v. Greenly*, Crim. No. 06-235 (PAM) (D. Minn. Nov. 27, 2006) (Plea Agreement and Sentencing Stipulations); (CX 120 at 1-10). On March 5, 2007, judgment was imposed on Mr. Greenly and on March 14, 2007, Senior United States District Judge Paul A. Magnuson, United States District Court for the District of Minnesota, issued an order of judgment which states that Mr. Greenly pleaded guilty to Count 1 - Conspiracy to Violate the Lacey Act-Bear Guiding (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B) and 18 U.S.C. § 371) and to Count 2 - Violation of the Lacey Act-Bear Guiding (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B)). *United States v. Greenly* (Judgment in a Criminal Case), Crim. No. 06-235 (PAM) (D. Minn. Mar. 14, 2007); (CX 120 at 11-15).

In addition to the admissions contained in the Plea Agreement and Sentencing Stipulations, the record contains evidence reflecting that Mr. Greenly made false statements and provided false records to the Minnesota Department of Natural Resources in which he represented that he had guided Troy Gentry on a commercial hunt "in a no-quota zone" where Mr. Gentry had killed a bear from the wild population, when, in fact, the bear was a tame captive-reared bear that Mr. Gentry killed while the bear was enclosed in a pen on Mr. Greenly's property (CX 32-CX 33, CX 35, CX 121).

Mr. Greenly's Appeal Petition

Mr. Greenly raises two issues in his Appeal Petition. First, Mr. Greenly contends the Chief ALJ erroneously concluded that this Animal Welfare Act license termination proceeding does not subject Mr. Greenly to double jeopardy in violation of the Double Jeopardy Clause

of the Fifth Amendment to the Constitution of the United States. Mr. Greenly asserts he was prosecuted and punished for his violations of the Lacey Act in *United States v. Greenly*, Crim. No. 06-235 (PAM) (D. Minn.) (CX 120). Mr. Greenly contends this Animal Welfare Act license termination proceeding constitutes a second prosecution for his Lacey Act violations and termination of his Animal Welfare Act license would constitute a second punishment for his Lacey Act violations (Appeal Pet. at 2-4).

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" (U.S. Const. amend. V.) The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense.[11]

This license termination proceeding is not a second prosecution for Mr. Greenly's Lacey Act violations. This proceeding is an administrative Animal Welfare Act license termination proceeding brought under the Animal Welfare Act and the Regulations to determine whether Mr. Greenly is fit to be licensed under the Animal Welfare Act and is not a "prosecution" within the meaning of the Double Jeopardy Clause.[12] The Animal Welfare Act is a remedial statute and Animal Welfare Act license termination proceedings are not penal.[13] The

[11] Monge v. California, 524 U.S. 721, 727-28 (1998); United States v. Dixon, 509 U.S. 688, 696 (1993); Ohio v. Johnson, 467 U.S. 493, 499-500 (1984); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 306-07 (1984); Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Illinois v. Vitale, 447 U.S. 410, 415-16 (1980); United States v. Dinitz, 424 U.S. 600, 606 (1976); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[12] *See* United States v. Bizzell, 921 F.2d 263, 266 (10th Cir. 1990) (stating administrative proceedings where defendants were debarred from Housing and Urban Development programs were not prosecutions within the meaning of the Double Jeopardy Clause).

[13] Ash, No. 11-0380, 71 Agric. Dec. 900, 908-09, 2012 WL 10767598 (U.S.D.A. Sept. 14, 2012) (concluding the termination of Mr. Ash's Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6) and 2.12 promotes the remedial purposes of the Animal Welfare Act); Arends, 70 Agric. Dec. ___, slip op. at 6 (U.S.D.A. Nov. 15, 2011) (finding the Animal Welfare Act is a remedial statute enacted to insure that animals are provided humane care and treatment); Animals of Mont., Inc., No. D-05-0005, 68 Agric. Dec. 92, 106, 2009 WL 624354 (U.S.D.A. Mar. 10, 2009) (stating 9 C.F.R. §§ 2.11 and 2.12 promote the remedial purpose of the Animal Welfare Act and are rationally related to the purpose of denying Animal Welfare Act licenses to applicants unfit to hold Animal

Administrator does not seek to punish Mr. Greenly for his actions. Instead, the Administrator seeks termination of Mr. Greenly's Animal Welfare Act license because Mr. Greenly's actions reflect on his fitness to be licensed under the Animal Welfare Act. Therefore, I reject Mr. Greenly's contention that this proceeding constitutes a second prosecution for Mr. Greenly's Lacey Act violations in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, and I reject Mr. Greenly's contention that termination of his Animal Welfare Act license would constitute a second punishment for Mr. Greenly's Lacey Act violations in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

Second, Mr. Greenly contends the Chief ALJ erroneously concluded this proceeding is not time barred. Mr. Greenly asserts this proceeding is time barred by 18 U.S.C. § 3282(a) and 28 U.S.C. § 2462 because these statutes of limitations prohibit commencement of a proceeding more than 5 years after an offense has been committed. Mr. Greenly asserts he committed the Lacey Act offenses in September and October 2005 and the Administrator commenced this proceeding by filing the Order to Show Cause on November 29, 2010 (Appeal Pet. at 4-10.)

The statute of limitations in 18 U.S.C. § 3282(a) limits the time within which a proceeding may be instituted after an offense, as follows:

> **§ 3282. Offenses not capital**
>
> (a) IN GENERAL.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

The purpose of the statute of limitations in 18 U.S.C. § 3282(a) is to limit exposure to criminal prosecution to a certain fixed time following

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Welfare Act licenses and terminating Animal Welfare Act licenses held by persons unfit to hold Animal Welfare Act licenses).

occurrence of acts the legislature has decided to punish by criminal sanctions.[14] This proceeding is an administrative proceeding not a criminal proceeding; therefore, I conclude the time bar in 18 U.S.C. § 3282(a) is not applicable to this proceeding.

The statute of limitations in 28 U.S.C. § 2462 provides, as follows:

> **§ 2462. Time for commencing proceedings**
>
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

A "penalty," as that term is used in 28 U.S.C. § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct which goes beyond remedying the damage caused to the harmed parties by the respondent's actions.[15] The Administrator does not seek to punish Mr. Greenly for his actions. Instead, the Administrator seeks termination of Mr. Greenly's Animal Welfare Act license because Mr. Greenly's actions reflect on his fitness to be licensed under the Animal Welfare Act. Thus, I conclude the statute of limitations in 28 U.S.C. § 2462 is not applicable to an action by the Secretary of Agriculture to terminate an existing Animal Welfare Act license pursuant to 9 C.F.R. § 2.12, based upon a licensee's unfitness to continue to be licensed under the Animal Welfare Act. Termination of an Animal

[14] United States v. Marion, 404 U.S. 307, 323 (1971); Toussie v. United States, 397 U.S. 112, 114 (1970); *see also* United States v. Oliva, 46 F.3d 320, 324 (3d Cir. 1995) (stating the general five-year statute of limitations in 18 U.S.C. § 3282 applies to noncapital criminal offenses).

[15] Coghlan v. NTSB, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam); Johnson v. SEC, 87 F.3d 484, 487-88 (D.C. Cir. 1996); Vigne, No. 07-0174, 67 Agric. Dec. 1060, 1068, 2008 WL 8120958 (U.S.D.A. Nov. 18, 2008).

Welfare Act license pursuant to 9 C.F.R. § 2.12 is remedial and thus outside the scope of the statute of limitations in 28 U.S.C. § 2462.[16]

Moreover, even if a 5-year statute of limitations were applicable to this proceeding, this proceeding, at least as it relates to Mr. Greenly's Lacey Act violations, would not be time barred. The Regulations provide that an Animal Welfare Act license may be terminated if the licensee "has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals[.]" (9 C.F.R. §§ 2.11(a)(6), .12).) Thus, the "claim" in this proceeding first accrued on March 14, 2007, when Mr. Greenly was convicted of violating the Lacey Act, not in September and October 2005, when Mr. Greenly asserts he violated the Lacey Act.[17]

The Administrator's Response to Petition for Appeal

In addition to the Administrator's response to Mr. Greenly's Appeal Petition, the Administrator raises two issues in Complainant's Response to Petition for Appeal. First, the Administrator contends the Chief ALJ erroneously failed to rule on Complainant's Motion for Summary Judgment (Complainant's Response to Pet. for Appeal at 13-15).

The Rules of Practice require administrative law judges to rule on all motions filed prior to the filing of an appeal of the administrative law judge's decision, as follows:

> **§ 1.143. Motions and requests.**
>
> (a) *General*. . . . . 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.

[16] Vigne, No. 07-0174, 67 Agric. Dec. 1060, 1068, 2008 WL 8120958 (U.S.D.A. Nov. 18, 2008).

[17] Animals of Mont., Inc., No. D-05-0005, 68 Agric. Dec. 92, 109, 2009 WL 624354 (U.S.D.A. Mar. 10, 2009) (holding conviction triggers the Secretary of Agriculture's ability to terminate an Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6) and 2.12; not the date of the underlying criminal activities).

> 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). I find nothing in the record indicating that the Chief ALJ ruled on Complainant's Motion for Summary Judgment. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Complainant's Motion for Summary Judgment. Instead, I find the Chief ALJ's issuance of the Chief ALJ's August 22, 2012, Decision and Order and failure to rule on Complainant's Motion for Summary Judgment operate as an implicit denial of Complainant's Motion for Summary Judgment.[18]

Second, the Administrator asserts the Chief ALJ unnecessarily intertwined his Order in the instant proceeding with the ultimate disposition of *Greenly*, AWA Docket No. 11-0072, in a manner that the Administrator finds confusing (Complainant's Resp. to Pet. for Appeal at 15).

The Chief ALJ terminated Mr. Greenly's Animal Welfare Act license contingent upon the ultimate disposition of *Greenly*, AWA Docket No. 11-0072, as follows:

Order

> 1. Should the revocation of Respondent's Animal Welfare Act license No. 41-C-0122 in Docket No. 11-

[18] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than 3 years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion).

> 0072 be vacated for any reason, said license is terminated by this action.
>
> 2. The Respondent is disqualified for a period of 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

Chief ALJ's Decision and Order at 8-9. I agree with the Administrator that termination of Mr. Greenly's Animal Welfare Act license contingent upon the ultimate disposition of *Greenly*, AWA Docket No. 11-0072, is unnecessary; therefore, I issue an Order that is not contingent upon the ultimate disposition of *Greenly*, AWA Docket No. 11-0072.

Based upon the record before me, I enter the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Mr. Greenly is an individual residing in the State of Minnesota.

2. Mr. Greenly holds Animal Welfare Act license number 41-C-0122 (CX 2).

3. Mr. Greenly exhibits wild and exotic animals to the public at various locations and operates a photographic educational game farm on property he owns on the Kettle River near Sandstone, Minnesota (Tr. 382-83). On various occasions, Mr. Greenly provides animals for photographic opportunities at other locations on nearby private or public land that he does not own (Tr. 439-40).

4. On November 27, 2006, the United States and Mr. Greenly entered into a Plea Agreement and Sentencing Stipulations whereby Mr. Greenly pleaded guilty to an Information charging him with conspiracy to violate the Lacey Act and violating the Lacey Act, as follows:

> UNITED STATES DISTRICT COURT

ANIMAL WELFARE ACT

DISTRICT OF MINNESOTA
Criminal No. 06-235 (PAM)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	PLEA AGREEMENT
	)	AND SENTENCE
LEE MARVIN GREENLY,	)	STIPULATIONS
	)	
Defendant.	)	

. . . .

PLEA AGREEMENT

1. Charges. The defendant agrees to plead guilty to: (a) Count 1 charging the defendant with conspiracy to violate the Lacey Act, 16, United States Code, Sections 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B), all in violation of 18 U.S.C. § 371; (b) Count 2 charging the defendant with a Lacey Act violation, 16, United States Code, Sections 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B). At time of sentencing, the Government will move for dismissal of Count 3.

2. Factual Basis. Count 1: From on or before September 2004, through in or about October 2005, in the State and District of Minnesota and elsewhere, the defendant, **LEE MARVIN GREENLY**, did knowingly and willfully combine, conspire, confederate, and agree with other persons, both known and unknown to the grand jury, to engage in conduct that involved the offer for sale and sale of wildlife with a market value in excess of $350, that is multiple black bears, and did knowingly sell, transport, receive and acquire said wildlife, knowing that said wildlife was taken, possessed and transported in violation of and in a manner unlawful under the laws and regulations of the United States, specifically, Title 16, United States Code, Section 668dd(c), and Title 50, Code of

Federal Regulations Part 32, all in violation of Title 16, United States Code, Sections 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B), and Title 18, United States Code, Section 371.

MANNER AND MEANS OF THE CONSPIRACY

a. It was part of this conspiracy that the defendant, LEE MARVIN GREENLY, was a licensed commercial bear guide in the State of Minnesota and as such held himself out to the public as a professional that charged individual hunters a fee for his assistance in hunting and killing black bears. It is known that GREENLY charged each individual hunter approximately $750.00 per guided hunt.

b. It was further part of this conspiracy that GREENLY guided multiple hunters per year in an attempt to kill black bears. GREENLY knowingly guided a portion of his commercial hunting clients onto the Sandstone National Wildlife Refuge where it is unlawful to hunt black bears.

c. It was further part of this conspiracy that GREENLY used the assistance of his employees in the course of his unlawful commercial bear guiding operation.

OVERT ACTS

In furtherance of the conspiracy:

a. On or before August 27, 2004, through in or about October 2005, GREENLY and his employees unlawfully established and maintained or directed the maintenance of multiple bear baiting stations and hunting stands within the boundaries of the Sandstone National Wildlife Refuge.

b. On at least two (2) different occasions during October 2004, GREENLY or his employees guided an individual paying client onto the Sandstone National Wildlife Refuge to hunt black bears. The client did not kill a bear but rather unlawfully killed a coyote during the hunt. The animal was

later transported from the Sandstone National Wildlife Refuge to the residence of GREENLY. The commercial hunting client paid GREENLY approximately $800.00 for the guided hunt.

c. On or around August 29, 2005, through September 8, 2005, GREENLY or his employees guided two individual paying clients onto the Sandstone National Wildlife Refuge to hunt black bears. One of the clients killed two black bears during the hunt. The harvested bears were later transported from the Sandstone National Wildlife Refuge to the residence of GREENLY. The commercial hunting clients each paid GREENLY approximately $750.00 for the guided hunts.

All in violation of Title 18, United States Code, Section 371.

Count 2: From on or about August 29, 2005, through on or about September 8, 2005, in the State and District of Minnesota and elsewhere, the defendant, **LEE MARVIN GREENLY**, did knowingly engage in conduct that involved the offer for sale and sale of wildlife with a market value in excess of $350, that is two (2) black bears, and did knowingly sell, transport, receive and acquire said wildlife, knowing that said wildlife was taken, possessed and transported in violation of and in a manner unlawful under the laws and regulations of the United States, specifically, Title 16, United States Code, Section 668dd(c), and Title 50, Code of Federal Regulations, Part 32, all in violation of Title 16, United States Code, Sections 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B).

United States v. Greenly (Plea Agreement and Sentencing Stipulations at 1-3), Crim. No. 06-235 (PAM) (D. Minn. Nov. 27, 2006) (CX 120 at 1-3) (emphasis in original).

5. On March 5, 2007, judgment was imposed on Mr. Greenly, and on March 14, 2007, Senior United States District Judge Paul A. Magnuson, United States District Court for the District of Minnesota, issued an order of judgment which states that Mr. Greenly pleaded guilty to Count 1 - Conspiracy to Violate the Lacey Act-Bear Guiding (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B) and 18 U.S.C. § 371)

and to Count 2 - Violation of the Lacey Act-Bear Guiding (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B)). *United States v. Greenly* (Judgment in a Criminal Case), Crim. No. 06-235 (PAM) (D. Minn. Mar. 14, 2007); (CX 120 at 11-15).

6. Mr. Greenly made false statements and provided false records to the Minnesota Department of Natural Resources representing that he had guided Troy Gentry on a commercial hunt "in a no-quota zone" where Mr. Gentry had killed a bear from the wild population, when, in fact, the bear was a tame captive-reared bear that Mr. Gentry killed while the bear was enclosed in a pen on Mr. Greenly's property (CX 32-CX 33, CX 35, CX 121).

7. The Administrator instituted this Animal Welfare Act license termination proceeding by filing the Order to Show Cause on November 29, 2010, fewer than 5 years after Mr. Greenly was found to have conspired to violate and to have violated the Lacey Act.

Conclusions of Law

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

2. Mr. Greenly, having been found guilty of conspiring to violate the Lacey Act and violating the Lacey Act (16 U.S.C. §§ 3372(a)(1), 3372(c)(1)(A), and 3373(d)(1)(B) and 18 U.S.C. § 371) by the United States District Court for the District of Minnesota, is unfit to hold an Animal Welfare Act license and allowing Mr. Greenly to hold an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.

3. Mr. Greenly, having made false statements and having provided false records to the Minnesota Department of Natural Resources, is unfit to hold an Animal Welfare Act license and allowing Mr. Greenly to hold an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.

4. This Animal Welfare Act license termination proceeding does not constitute a second prosecution for Mr. Greenly's conspiring to violate the Lacey Act or for Mr. Greenly's violations of the Lacey

Act, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

5. The termination of Mr. Greenly's Animal Welfare Act license does not constitute a second punishment for Mr. Greenly's conspiring to violate the Lacey Act or for Mr. Greenly's violations of the Lacey Act, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

6. This Animal Welfare Act license termination proceeding is not time barred by 18 U.S.C. § 3282(a).

7. This Animal Welfare Act license termination proceeding is not time barred by 28 U.S.C. § 2462.

For the foregoing reasons, the following Order is issued.

ORDER

1. Animal Welfare Act license number 41-C-0122 is terminated.

2. Mr. Greenly, his agents and assigns, and any business entity for which Mr. Greenly is an officer, agent, or representative or otherwise holds a substantial business interest, are disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Mr. Greenly.

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In re: LEE MARVIN GREENLY, AN INDIVIDIUAL; SANDY GREENLY, AN INDIVIDUAL; CRYSTAL GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.
Docket No. 11-0072.
Decision and Order.
Filed August 5, 2013.

AWA – Access for inspection – Animal welfare – Civil penalty – Consent decisions and stipulations – Discrimination – Handling – License revocation – Regulations, vagueness of – Sanction policy – Veterinary care – Violations, correction of – Willful.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO LEE MARVIN GREENLY AND MINNESOTA WILDLIFE CONNECTION, INC.

Procedural History

On November 29, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

On April 14, 2011, the Administrator filed an Amended Complaint, which is the operative pleading in this proceeding. The Administrator

alleges: (1) on March 14, 2006 and July 24, 2007, Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. [hereinafter Respondents][1] failed to provide adequate veterinary care to animals in willful violation of 9 C.F.R. § 2.40(a); (2) on March 14, 2006 and July 24, 2007, Respondents failed to establish a mechanism to communicate with Respondents' attending veterinarian in willful violation of 9 C.F.R. § 2.40(b)(3); (3) on March 14, 2006, August 23, 2006, July 24, 2007, November 10, 2008, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to construct housing facilities so the housing facilities are structurally sound and by failing to maintain the housing facilities in good repair in accordance with 9 C.F.R. § 3.125(a); (4) on March 14, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to provide for removal and disposal of food waste in accordance with 9 C.F.R. § 3.125(d); (5) on March 14, 2006 and January 11, 2007, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to store food supplies in a manner that adequately protects the food supplies from contamination in accordance with 9 C.F.R. § 3.125(c); (6) on March 14, 2006, August 23, 2006, November 10, 2008, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to enclose outdoor housing facilities for animals with an adequate perimeter fence in accordance with 9 C.F.R. § 3.127(d); (7) on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents failed to make, keep, and maintain adequate and accurate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b)(1); (8) on August 23, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to enclose an outdoor housing facility for a lemur in accordance with 9 C.F.R. § 3.77(f); (9) on August 23, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to provide environmental enrichment for a lemur in accordance with 9 C.F.R. § 3.81(b); (10) on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow Animal and Plant Health Inspection Service [hereinafter APHIS] officials to inspect Respondents' facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); (11) on February 12, 2009, August 9, 2009, April 22, 2010, August 14, 2010, and

[1] On April 9, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] entered a Consent Decision and Order as to Sandy Greenly, and, on May 2, 2012, the Chief ALJ entered a Consent Decision and Order as to Crystal Greenly; thereby, concluding this proceeding as it relates to Sandy Greenly and Crystal Greenly.

October 19, 2010, Respondents failed to handle animals as carefully as possible in a manner that did not cause trauma or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1); and (12) on February 12, 2009, August 6, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents failed to handle animals, during public exhibition, so there was minimal risk of harm to the animals and the public with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1).[2]

On May 5, 2011, Respondents filed an Amended Answer in which they denied the material allegations of the Amended Complaint, except the allegation in paragraph 18 of the Amended Complaint that, on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents' facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).

On May 1-2, 2012, the Chief ALJ conducted a hearing in Minneapolis, Minnesota.[3] Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Larry D. Perry, Knoxville, Tennessee, represented Respondents. The Administrator called 12 witnesses and Respondents called seven witnesses.[4] The Administrator introduced 51 exhibits that were admitted into evidence,[5] and Respondents introduced 48 exhibits that were admitted into evidence.[6]

On August 22, 2012, after the parties submitted post hearing briefs, the Chief ALJ filed a Decision in which he: (1) concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19,

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[2] Am. Compl. at 3-8 ¶¶ 6-27.

[3] On January 14, 2011, Respondents had filed a motion to consolidate this proceeding with *Greenly*, AWA Docket No. 11-0073. On January 19, 2011, the Chief ALJ granted Respondents' motion and consolidated this proceeding with *Greenly*, AWA Docket No. 11-0073, for the purposes of hearing (Chief ALJ's Summary of Teleconference and Order filed January 19, 2011).

[4] References to the transcript of the May 1-2, 2012 hearing are indicated as "Tr." and the page number.

[5] The Administrator's exhibits are identified as "CX" and the exhibit number.

[6] Respondents' exhibits are identified as "RX" and the exhibit number.

2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm; (2) concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals, during public exhibition, so there was minimal risk of harm to the animals and the public, with sufficient distance or barriers between the animals and the public to assure the safety of the animals and the public; (3) concluded that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to construct housing facilities so the housing facilities are structurally sound and by failing to maintain the housing facilities in good repair; (4) concluded that, on March 14, 2006, and August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose outdoor housing facilities for animals with an adequate perimeter fence;[7] (5) concluded that, on August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.77(f) by failing to enclose an outdoor housing facility for a lemur with an adequate perimeter fence; (6) concluded that, on January 11, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store food in a manner that adequately protects the food from contamination; (7) concluded that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) by failing to make, keep, and maintain adequate records of the acquisition and disposition of animals; (8) concluded that, on June 12, 2007, February13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 9 C.F.R. § 2.126(a) by failing to allow APHIS officials to inspect their facilities, animals, and records; (9) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (10) revoked Mr. Greenly's Animal Welfare Act license (Animal Welfare Act license number 41-C-0122).[8]

[7] The Chief ALJ also concluded Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) on November 10, 2008, and June 29, 2009, as alleged in paragraph 24 of the Amended Complaint; however, the Chief ALJ's findings of fact do not support that conclusion. *See* Chief ALJ's Decision at 20, 22 (Findings of Fact ¶ 10, Conclusions of Law ¶ 8).

[8] Chief ALJ's Decision at 21-23.

On September 27, 2012, Respondents filed an Appeal Petition, and, on November 2, 2012, the Administrator filed Complainant's Response to Respondents' Petition for Appeal. On November 7, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the Chief ALJ's Decision; except that, I conclude that, on December 19, 2006, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), and I assess Respondents a $11,725 civil penalty.

DECISION

Statutory and Regulatory Framework

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Exhibitors must also allow inspection by APHIS officials to assure the provisions of the Animal Welfare Act and the Regulations are being followed. 7 U.S.C. § 2146(a). Violations of the Animal Welfare Act or the Regulations by Animal Welfare Act licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149.

The Regulations include requirements for veterinary care, housing, disposal of food waste, storage of food supplies, perimeter fences, recordkeeping, humane handling of animals, and the inspection of facilities, animals, and records.

Discussion

1. ***The Respondents***

Mr. Greenly is an individual who operates a photographic educational game farm near Sandstone, Minnesota (CX 23; Tr. 382). Mr. Greenly is a licensed exhibitor, holding Animal Welfare Act license number 41-C-0122. Mr. Greenly has trained animals for approximately 28 years and had experience at a zoo in Hinckley, Minnesota, prior to opening his own facility (Tr. 416). Mr. Greenly's Animal Welfare Act license renewal forms list as many as 190 animals that are maintained at Respondents' facility (CX 2).

Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of the State of Minnesota. Minnesota Wildlife Connection, Inc.'s address is the same as Mr. Greenly's address. Although Mr. Greenly suggests that Minnesota Wildlife Connection, Inc. is a marketing company, the record contains ample evidence that its activities and Mr. Greenly's activities are essentially identical and Minnesota Wildlife Connection, Inc.'s checks have been used to renew Mr. Greenly's Animal Welfare Act license. (CX 2, CX 5, CX 11, CX 23, CX 39-CX 40, CX 45-CX 46, CX 52, and RX 75.)

2. *Handling Requirements*

The Administrator alleges that, on February 12, 2009, August 9, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents failed to handle animals as carefully as possible in a manner that does not cause trauma or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1).[9] The Administrator also alleges that, on or about those same dates, 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, in willful violation of 9 C.F.R. § 2.131(c)(1).[10]

The evidence establishes that, on February 12, 2009, Respondents allowed two wolves to run free during a photographic shoot on property owned by Leo Gardner. Following the photographic shoot, the wolves went onto property owned by Linda and Carlyle Ziegler and attacked and

[9] Am. Compl. at 7 ¶ 26.
[10] Am. Compl. at 7-8 ¶ 27.

killed the Ziegler's dachshund. (Tr. 52-58, 78-83, 439-40.) As Ms. Ziegler watched, one wolf scooped up the dog and the two wolves then ripped the dog in half (Tr. 55-56). Mr. Greenly accepted responsibility for the incident and compensated the Zieglers for their loss by purchasing a replacement animal (Tr. 84-85, 439-44).

On April 22, 2010, during an outing at Respondents' facility for students from the Range Academy of Technology and Science, Respondents exhibited Blue, a 19 or 20 year-old bear (Tr. 488-91). During the exhibition, the students and school employees were allowed to feed the bear "Gummi Worms," with the students putting candy in their mouths and letting the bear take the candy from their mouths (Tr. 490). During the feeding session, Blue bit Denise Jensen, Mr. Greenly's cousin, and then a school employee who had accompanied the students. A couple of days after the bite, Ms. Jensen began to experience pain. After an emergency room visit, Ms. Jensen was admitted to the hospital and was discharged after a 5-day stay (Tr. 120-21). As she declined to have the bear euthanized and tested for rabies, Ms. Jensen later underwent the prophylactic series of inoculations for rabies (Tr. 122).

On August 14, 2010, at the request of APHIS veterinary medical officer Debra M. Sime, Kimberly Miller, an APHIS inspector, attended the Quarry Days celebration in Sandstone, Minnesota (Tr. 272-74). While at the event, Ms. Miller attended Respondents' show and observed the public having direct contact with and handling raccoons, a possum, and foxes without any distance or barriers between the animals and the public (Tr. 275-76; CX 41). Although Respondents' show was performed from an elevated stage, only a short distance separated the stage from the public seating area and no barrier separated the stage and the public seating area (Tr. 276; CX 41). Ms. Miller also observed Mr. Greenly standing in the area between the stage and the public seating area with a mountain lion or cougar in his arms (Tr. 276-79; CX 41). An adult wolf was exhibited on stage by two adolescent girls, and two or three wolf cubs were brought through the audience and the audience was allowed to pet the wolves (Tr. 277-78). Ms. Miller prepared a report of her inspection on September 7, 2010 (CX 20).

The record establishes that, on October 19, 2010, Respondents were at or near Banning State Park for a photographic shoot when Respondents' unleashed adult wolf came into contact with and injured five year-old Johnna "Johnny" Mae Kenowski (Tr. 10-16, 478, 522; CX 45-CX 46). The child's aunt, Maja Dockal, testified that the wolf attacked her niece, and the record contains photographs of bloodied areas on Johnny's face, scalp, and arm and puncture wounds on the child's face and scalp (Tr. 12, 14, 19, 24-25, 478-80; CX 45). As a result of this incident, the wolf was euthanized and tested for rabies (Tr. 47).

Based upon this evidence, the Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1) on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010. Respondents contend the Chief ALJ's conclusions that they violated 9 C.F.R. § 2.131(b)(1) and (c)(1), are erroneous. Respondents advance numerous arguments regarding each of the violations found by the Chief ALJ. (Respondents' Appeal Pet. at 7-18.)

Based upon a careful consideration of the record, I find the Administrator proved by much more than a preponderance of the evidence that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1). None of the arguments advanced by Respondents has merit. Therefore, I reject Respondents' contention that the Chief ALJ erroneously concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1).

The Chief ALJ dismissed the allegations that, on August 9, 2009, Respondents willfully violated 9 C.F.R. § 2.131(b)(1)[11] and that, on August 6, 2009, Respondents willfully violated 9 C.F.R. § 2.131(c)(1)[12] (Chief ALJ's Decision at 8, 22). The Administrator contends the Chief ALJ's failure to find that Respondents violated 9 C.F.R. § 2.131(b)(1), on August 9, 2009, and that Respondents violated 9 C.F.R. § 2.131(c)(1), on August 6, 2009, is error (Complainant's Response to Respondents' Pet. for Appeal at 38-39).

[11] Am. Compl. at 7 ¶ 26.
[12] Am. Compl. at 8 ¶ 27b.

The Administrator offers as proof of these allegations a photocopy of a picture of Mr. Greenly with a bear which is in direct contact with an unidentified person. This picture appeared in the Thursday, August 6, 2009 edition of the *Pine County Courier*. Directly below this picture is the caption: "The Minnesota Wildlife's Connection involvement in Quarry Days is always popular. This year they will perform at noon to 1:30 p.m. on Saturday." (CX 39 at 1.) The Administrator did not offer any evidence that this picture was taken on August 6, 2009, did not offer any evidence that the unidentified person in the picture was a member of the public rather than one of Respondents' employees, and failed to explain the relevance of a picture printed in the Thursday, August 6, 2009 edition of the *Pine County Courier* to the allegation in paragraph 26 of the Amended Complaint that Respondents violated 9 C.F.R. § 2.131(b)(1) on August 9, 2009. Moreover, the testimony relied upon by the Administrator (Tr. 188-90, 195, 458-60, 463-464, 473-475, 492, 514-15) does not support a finding that, on August 9, 2009, Respondents violated 9 C.F.R. § 2.131(b)(1) or a finding that, on August 6, 2009, Respondents violated 9 C.F.R. § 2.131(c)(1). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on August 9, 2009, Respondents willfully violated 9 C.F.R. § 2.131(b)(1), is error, and I reject the Administrator's contention that the Chief ALJ's failure to find that, on August 6, 2009, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) is error.

3. *Veterinary Care Requirements*

The Administrator alleges that, on March 14, 2006, and July 24, 2007, Respondents failed to provide adequate veterinary care to animals, in willful violation of 9 C.F.R. § 2.40(a) and failed to establish a mechanism to communicate with their attending veterinarian, in willful violation of 9 C.F.R. § 2.40(b)(3).[13] The Chief ALJ found the Administrator's evidence of the March 14, 2006, violations equivocal; found the evidence of the July 24, 2007, violations in equipoise; and dismissed the allegations that Respondents violated 9 C.F.R. § 2.40(a) and(b)(3) (Chief ALJ's Decision at 10-11, 21). The Administrator contends the Chief ALJ erroneously dismissed the allegations that, on March 14, 2006, and July 24, 2007, Respondents willfully violated

[13] Am. Compl. at 3, 6 ¶¶ 6-7, 21-22.

9 C.F.R. § 2.40(a) and (b)(3) (Complainant's Response to Respondents' Pet. for Appeal at 32-35).

I have carefully reviewed the Administrator's evidence of Respondents' violations of 9 C.F.R. § 2.40(a) and (b)(3) (CX 25, CX 30; Tr. 203-04, 217-18) and Respondents' evidence refuting the Administrator's allegations (Tr. 384-86, 426-27). I find the Administrator failed to prove by a preponderance of the evidence that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. § 2.40(a) and (b)(3). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. § 2.40(a) and (b)(3) is error.

4. *Housing Facility Requirements*

The Administrator alleges that, on March 14, 2006, August 23, 2006 (two violations), July 24, 2007, November 10, 2008, and June 29, 2009, Respondents failed to construct housing facilities so that the housing facilities are structurally sound and failed to maintain the housing facilities in good repair, in willful violation of 9 C.F.R. § 3.125(a).[14]

On March 14, 2006, Dr. Sime observed a piece of wood with exposed nails in the fisher enclosure (Tr. 205; CX 25 at 1-2). Mr. Greenly testified that the fisher enclosure had a board that had split exposing two or three screws. When this violation of 9 C.F.R. § 3.125(a) was brought to Mr. Greenly's attention, he corrected the violation while Dr. Sime was still at Respondents' facility. (Tr. 387-88.)

Dr. Sime's July 24, 2007, inspection of Respondents' facility revealed that a woodchuck enclosure had an area of wire fatigue of sufficient space that two juvenile woodchucks escaped (CX 30 at 2). Mr. Greenly acknowledged that the woodchucks had been able to escape, but stated they had not been able to breach the perimeter fence (Tr. 428-29). When the area of wire fatigue was brought to Mr. Greenly's attention, he corrected the violation of 9 C.F.R. § 3.125(a) at the time of the inspection (CX 30 at 2).

[14] Am. Compl. at 3-7 ¶¶ 8, 13-14, 23-24.

Based upon this evidence, the Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 3.125(a) on March 14, 2006, and July 24, 2007 (Chief ALJ's Decision at 11-12, 22).

The Chief ALJ found the Administrator failed to prove by a preponderance of the evidence the allegations that Respondents violated 9 C.F.R. § 3.125(a) on August 23, 2006 (two violations), November 10, 2008, and June 29, 2009 (Chief ALJ's Decision at 11-12, 22). The Administrator contends the Chief ALJ erroneously failed to conclude that, on November 10, 2008, Respondents failed to construct a structurally sound housing facility for eight wolves and failed to maintain the housing facility in good repair to protect and contain the wolves, in willful violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 24 of the Amended Complaint (Complainant's Resp. to Resp'ts' Pet. for Appeal at 37-38).

Based upon a careful consideration of the record, I find Respondents' photographs of the housing facility in question (RX 47) refute the Administrator allegation that, on November 10, 2008, Respondents willfully violated 9 C.F.R. § 3.125(a). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on November 10, 2008, Respondents willfully violated 9 C.F.R. § 3.125(a), is error.

5. *Perimeter Fence Requirements*

The Administrator alleges that, on March 14, 2006, August 23, 2006, November 10, 2008, and June 29, 2009, Respondents failed to enclose outdoor housing facilities for animals with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d),[15] and on August 23, 2006, Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence in willful violation of 9 C.F.R. § 3.77(f).[16]

[15] Am. Compl. at 4-7 ¶¶ 11, 15, 24.
[16] Am. Compl. at 5 ¶ 16.

The record establishes that Respondents willfully violated 9 C.F.R. § 3.127(d) on March 14, 2006, and Dr. Sime gave Respondents until September 14, 2006, to correct this perimeter fence violation (Tr. 206-08; CX 25 at 2-3). Despite the September 14, 2006, time limit for correction of Respondents' perimeter fence violation, Respondents were cited for violating the perimeter fence requirement on August 23, 2006 (Tr. 208-09; CX 43 at 2). Mr. Greenly admits there was no perimeter fence when Dr. Sime inspected Respondents' premises but testified that he had the perimeter fence violations corrected by September 14, 2006 (Tr. 393-94). The absence of a citation for violating the perimeter fence requirements during the next inspection, January 11, 2007, supports Mr. Greenly's testimony that he corrected the perimeter fence violations (CX 38). Nonetheless, I find the Administrator proved by a preponderance of the evidence that, on March 14, 2006, and August 23, 2006, Respondents failed to enclose outdoor housing facilities for animals with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d), and on August 23, 2006, Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.77(f).

The Chief ALJ found the allegations in paragraph 24 of the Amended Complaint that, on November 10, 2008, and June 29, 2009, Respondents failed to enclose outdoor housing facilities for eight wolves with an adequate perimeter fence, were refuted by Respondents' photographs (Chief ALJ's Decision at 20).[17] An examination of these photographs reveals a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom (RX 47). Therefore, I find the Administrator failed to prove by a preponderance of the evidence that Respondents violated 9 C.F.R. § 3.127(d) on November 10, 2008, and June 29, 2009.

6. *Food Storage and Food Waste Requirements*

The Administrator alleges that, on March 14, 2006, Respondents failed to store food supplies (unprocessed cow carcasses) in manner that adequately protects the food supplies from contamination and failed to provide for the removal and disposal of food waste, in willful violation

[17] *See supra* note 7.

of 9 C.F.R. § 3.125(c) and (d).[18] The Administrator also alleges that, on January 11, 2007, Respondents failed to store food supplies (three cans of uncovered feed and three bags of canine food stored on the floor) in manner that adequately protects the food supplies from contamination, in willful violation of 9 C.F.R. § 3.125(c).[19]

The Chief ALJ found the Administrator failed to prove by a preponderance of the evidence the March 14, 2006, violations of 9 C.F.R. § 3.125(c) and (d) (Chief ALJ's Decision at 13-14, 22). After reviewing the Administrator's evidence (Tr. 205-06; CX 25 at 2) and Mr. Greenly's explanation of the circumstances that gave rise to this allegation (Tr. 389-92), I find the Administrator failed to prove the March 14, 2006, violations of 9 C.F.R. § 3.125(c) and (d) by a preponderance of the evidence.

As for the January 11, 2007, violation of 9 C.F.R. § 3.125(c), Dr. Sime inspected Respondents' facility and prepared a report citing the violation and testified that the violation occurred (CX 38; Tr. 216-17). Moreover, Mr. Greenly admitted he had three cans of uncovered feed and three bags of canine food stored on the floor and testified that, since January 11, 2007, when Dr. Sime cited him for this violation of 9 C.F.R. § 3.125(c), he has stored food on pallets (Tr. 418-22). I find the Administrator proved by a preponderance of the evidence that, on January 11, 2007, Respondents stored food supplies in a manner did not adequately protect the food supplies from contamination, in willful violation of 9 C.F.R. § 3.125(c), as alleged in paragraph 19 of the Amended Complaint.

7. *Recordkeeping Requirements*

The Administrator alleges that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b)(1).[20] The Chief ALJ found that the Administrator proved by a preponderance of the evidence each of the

[18] Am. Compl. at 4 ¶¶ 9-10.
[19] Am. Compl. at 6 ¶ 19.
[20] Am. Compl. at 4, 6-7 ¶¶ 12, 20, 25.

alleged violations of 9 C.F.R. § 2.75(b)(1). Respondents contend the Chief ALJ's findings, are error (Respondents' Appeal Pet. at 2-5).

Dr. Sime's August 23, 2006, July 24, 2007, and June 29, 2009, inspection reports (CX 7 at 1, CX 30 at 1, CX 43 at 1), Dr. Sime's testimony (Tr. 210-11, 218, 221-24), and the photographs of Respondents' records taken by Dr. Sime on June 29, 2009 (CX 8), clearly establish that Respondents violated 9 C.F.R. § 2.75(b)(1) on the dates alleged. Therefore, I find the Administrator proved by a preponderance of the evidence that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1), and I reject Respondents' contention that the Chief ALJ's findings that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) are error.

8. ***Environmental Enrichment Requirements***

The Administrator alleges that, on August 23, 2006, Respondents failed to provide environmental enrichment for a lemur housed in an outdoor hutch in willful violation of 9 C.F.R. § 3.81(b).[21] During the hearing, the Administrator withdrew this allegation (Tr. 408-09).

9. ***Access Requirements***

The Administrator alleges that, on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents' facilities, animals, and records, during normal business hours, in willful violation 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).[22]

The record establishes that Dr. Sime attempted to gain access to Respondents' place of business on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, but was unable to gain access (Tr. 200-02; CX 3, CX 10, CX 14, CX 28, CX 37). Mr. Greenly testified that, on December 19, 2006, he was ill, had a doctor's appointment, and could not stay for an inspection, and on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009,

[21] Am. Compl. at 5 ¶ 17.
[22] Am. Compl. at 5 ¶ 18.

he did not deny Dr. Sime access to Respondents' place of business, but rather Dr. Sime's inability to gain access resulted from Mr. Greenly's absence from the place of business. Mr. Greenly explained he is a sole proprietor and has neither the staff nor the funds to have someone in the office from 9:00 a.m. to 5:00 p.m. Mr. Greenly also testified he was frequently out of town, he had given APHIS officials his cell phone number, and, in the past, some APHIS officials had called prior to inspection to ensure that someone would be present at Respondents' place of business. (Tr. 413-16.)

The Chief ALJ dismissed the allegation that, on December 19, 2006, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), but found Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009 (Chief ALJ's Decision at 15-16, 22). The Administrator contends the Chief ALJ's failure to find that, on December 19, 2006, Respondents did not allow APHIS officials to inspect their facilities, animals, and records, is error (Complainant's Response to Respondents' Pet. for Appeal at 30-32). Respondents contend the Chief ALJ erroneously concluded that, on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Respondents contend the evidence establishes that no one was present at Respondents' place of business when APHIS officials arrived to conduct inspections on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009. (Resp'ts' Appeal Pet. at 5-7.)

As an initial matter, Respondents admit they violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, as alleged in paragraph 18 of the Amended Complaint (Am. Answer at 7 ¶ 18). Moreover, the requirement that exhibitors allow APHIS officials access to and inspection of facilities, property, records, and animals, during business hours, as provided in 9 C.F.R. § 2.126(a), is unqualified and contains no exemption. The fact that no one was at Respondents' place of business to allow APHIS officials access to the facilities, property, records, and animals is not a defense. Therefore, I reject Respondents' contention that the Chief ALJ's conclusion that, on June 12, 2007,

February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), is error.

Moreover, the record establishes that, on December 19, 2006, when Dr. Sime attempted to conduct an inspection at Respondents' place of business, Mr. Greenly informed Dr. Sime that he was ill and had to leave for a doctor's appointment (Tr. 413). According to an interview log prepared by APHIS investigator Leslie Vissage, Dr. Sime told Mr. Greenly that "she would return another day to do the inspection" (CX 37). The Chief ALJ declined to find Respondents violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) on December 19, 2006, based upon Dr. Sime's agreement to return another day (Chief ALJ's Decision at 15).

Nothing in the Animal Welfare Act or the Regulations excuses an exhibitor from compliance with 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), even if the APHIS official offers to return to conduct the inspection at another time. Therefore, I find Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on December 19, 2006, as well as on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, and I find the Chief ALJ's failure to conclude that Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on December 19, 2006, is error.

Respondents' Appeal Petition

Respondents raise four issues in their Appeal Petition, which are not discussed in this Decision and Order, *supra*. First, Respondents suggest that 9 C.F.R. § 2.131(b)(1) and (c)(1) are unconstitutionally vague (Resp'ts' Appeal Pet. at 17).

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.[23]

[23] Thomas v. Hinson, 74 F.3d 888, 889 (8th Cir. 1996); Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1004-05 (11th Cir. 1994); Throckmorton v. NTSB, 963 F.2d 441, 444 (D.C. Cir. 1992); Great Am. Houseboat Co. v. United States, 780 F.2d 741, 746 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

I have reviewed 9 C.F.R. § 2.131(b)(1) and (c)(1) and find they are not unconstitutionally vague.[24] Nonetheless, difficulty may arise when defining certain regulatory terms, such as "unnecessary discomfort" found in 9 C.F.R. § 2.131(b)(1) and "minimal risk of harm" found in 9 C.F.R. § 2.131(c)(1), and applying those terms to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[25] Therefore, I reject Respondents' suggestion that 9 C.F.R. § 2.131(b)(1) and (c)(1) are void for vagueness.

Second, Respondents contend they have been singled out for enforcement (Respondents' Appeal Pet. at 18-20).

I find nothing in the record to support Respondents' contention that the Administrator has singled out Respondents for enforcement of the Animal Welfare Act and the Regulations. Respondents bear the burden of proving they are the target of selective enforcement. Persons claiming selective enforcement must demonstrate the enforcement policy had a discriminatory effect and the enforcement policy was motivated by a discriminatory purpose.[26] In order to prove their selective enforcement claim, Respondents must show one of two sets of circumstances. Respondents must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution

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[24] I have previously rejected vagueness doctrine challenges to the handling regulations. *See* Tri-State Zoological Park of W. Md., Inc., No. 11-0222, 72 Agric. Dec. ___, slip op. at 5-7 (U.S.D.A. July 12, 2013) (Order Den. Resp'ts' Pet. for Recons.) (finding 9 C.F.R. § 2.131(c)(1) is not unconstitutionally vague); Int'l Siberian Tiger Found., No. 01-0017, 61 Agric. Dec. 53, 78-79 (U.S.D.A. Feb. 15, 2002) (concluding 9 C.F.R. § 2.131(b)(1) (2000) provides the respondents with adequate notice of the manner in which the respondents' animals are to be handled during public exhibition); Davenport, No. 97-0046, 57 Agric. Dec. 189, 214, 1998 WL 300096 (U.S.D.A. 1998) (concluding 9 C.F.R. § 2.131(a)(1) (1998) is not unconstitutionally vague), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

[25] Great Am. Houseboat Co. v. United States, 780 F.2d 741, 747 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

[26] United States v. Armstrong, 517 U.S. 456, 465 (1996); Wayte v. United States, 470 U.S. 598, 608 (1985).

was initiated with discriminatory intent.[27] Respondents have not shown that they are members of a protected group; that, in a similar situation, no disciplinary proceeding would be instituted against others that are not members of the protected group; or that this proceeding was initiated with discriminatory intent. In the alternative, Respondents must show: (1) they exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondents for exercise of the protected right.[28] Respondents have not shown any of these circumstances. Therefore, I reject Respondents' unsupported assertion that the Administrator singled out Respondents for enforcement of the Animal Welfare Act and the Regulations.

Third, Respondents contend, in light of the less severe sanctions imposed in other Animal Welfare Act proceedings which were resolved with stipulations or consent decisions, the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error (Resp'ts' Appeal Pet. at 18-19).

Respondents' reliance on stipulations and consent decisions is misplaced. A consent decision is a signed agreement by the parties in the form of a decision that must be entered by the administrative law judge, unless an error is apparent on the face of the agreement (7 C.F.R. § 1.138). Generally, stipulations and consent decisions do not come before the Judicial Officer and none of the proceedings referenced by Respondents came before the Judicial Officer.

I have long held that sanctions in consent decisions, which involve respondents other than the respondents before me, are given no weight in

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[27] *See* Futernick v. Sumpter Twp., 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied sub nom.* Futernick v. Caterino, 519 U.S. 928 (1996); United States v. Anderson, 923 F.2d 450, 453 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom.* McNeil v. United States, 500 U.S. 936 (1991).

[28] *See* Futernick v. Sumpter Twp., 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied sub nom.* Futernick v. Caterino, 519 U.S. 928 (1996); United States v. Anderson, 923 F.2d 450, 453-54 (6th Cir. 1991), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom.* McNeil v. United States, 500 U.S. 936 (1991).

determining the sanction in a litigated case.[29] The former Judicial Officer, Donald A. Campbell, briefly articulated the reasons for this position, as follows:

> Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

Worsley, 33 Agric. Dec. 1547, 1569 (U.S.D.A. 1974).

Unlike the stipulations and consent decisions referenced by Respondents, this proceeding was fully litigated and Respondents were found to have committed serious violations of the Animal Welfare Act and the Regulations. Therefore, I do not find that the stipulations and consent decisions referenced by Respondents support Respondents' contention that the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license is error.

Fourth, Respondents contend the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error because revocation

[29] Syverson, No. D-05-0005, 69 Agric. Dec. 1500, 1506, 2010 WL 10078382 (U.S.D.A. Nov. 16, 2010) (Decision on Remand), *aff'd*, 666 F.3d 1137 (8th Cir. 2012); Thompson, No. 89-55, 50 Agric. Dec. 392, 407, 1991 WL 290575 (U.S.D.A. Mar. 6, 1991) (Decision as to Darrell Moore); Rodman, No. 6607, 47 Agric. Dec. 1400, 1416, 1988 WL 242700 (U.S.D.A. Sept. 22, 1988); Blackfoot Livestock Comm'n Co., No. 6107, 45 Agric. Dec. 590, 636, 1986 WL 74695 (U.S.D.A. Mar. 7, 1986); Worsley, No. 4716, 33 Agric. Dec. 1547, 1569 (U.S.D.A. Nov. 12, 1974).

deprives Mr. Greenly of his ability to earn a livelihood for himself and his family; deprives the public and educational organizations of access to one of the finest photographic and educational game farms in the country; destroys one of the few businesses in Sandstone, Minnesota; and forces Respondents to destroy all of their animals (Resp'ts' Appeal Pet. at 19-20).

Even if I were to find that revocation of Mr. Greenly's Animal Welfare Act license would have the unfortunate collateral effects identified by Respondents, those collateral effects would not constitute mitigating circumstances to be considered when determining the sanction to be imposed for Respondents' violations of the Animal Welfare Act and the Regulations.[30] Therefore, I reject Respondents' contention that the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error because of the collateral effects identified by Respondents.

The Administrator's Response to Respondents' Petition for Appeal

In addition to the Administrator's response to Respondents' Appeal Petition, the Administrator raises three issues in Complainant's Response to Respondents' Petition for Appeal, which are not discussed in this Decision and Order, *supra*. First, the Administrator contends the Chief ALJ found a number of the violations alleged in the Amended Complaint, but erroneously treated those violations as "non-violations"

[30] *See* Animals of Mont., Inc., No. D-05-0005, 68 Agric. Dec. 92, 108, 2009 WL 624354 (U.S.D.A. Mar. 10, 2009) (stating the collateral effect of termination of Animals of Montana, Inc.'s Animal Welfare Act license on Mr. Hyde's career is not relevant to the determination of whether Animals of Montana, Inc. is unfit to be licensed); Vigne, No. 07-0174, 67 Agric. Dec. 1060, 1069, 2008 WL 8120958 (U.S.D.A. Nov. 18, 2008) (stating the collateral effect of termination of Ms. Vigne's Animal Welfare Act license on her ability to retain possession of and breed ocelots is not relevant to the determination of whether Ms. Vigne is unfit to be licensed); Shaffer, 60 Agric. Dec. 444, 477 (U.S.D.A. 2001) (stating the respondent's need for income to support himself is not a defense to his violations of the Animal Welfare Act and the Regulations or a mitigating circumstance to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations); Huchital, No. 97-0020, 58 Agric. Dec. 763, 815-16, 1999 WL 33314045 (U.S.D.A. Nov. 4, 1999) (stating collateral effects of a civil penalty on a respondent's business and family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations).

because Respondents corrected the violations (Complainant's Resp. to Resp'ts' Pet. for Appeal at 35-37).

The Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint;[31] however, the Chief ALJ found Respondents had corrected each of these violations and stated "no further action is required." (Chief ALJ's Decision at 22 (Conclusions of Law ¶¶ 6, 8)).

I disagree with the Administrator's contention that the Chief ALJ treated the violations in question as "non-violations." The Chief ALJ explicitly concluded Respondents willfully violated 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint. While not without doubt, I infer the Chief ALJ's statement that "no further action is required" means that the Chief ALJ imposed no sanction for the violations in question.

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.[32] Nonetheless, Respondents' corrections of their Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed. While I disagree with the Chief ALJ's determination that no sanction should be imposed on Respondents for the violations in question, I take Respondents' corrections into account and impose only a cease and desist order for

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[31] *See supra* note 7.

[32] Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. ___, slip op. at 63 (U.S.D.A. Mar. 22, 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, No. 04-0014, 63 Agric. Dec. 623, 643, 2004 WL 2619832 (U.S.D.A. Oct. 28, 2004); Parr, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, No. 99-0036, 59 Agric. Dec. 97, 112 n.1, 2000 WL 523166 (U.S.D.A. May 1, 2000); Huchital, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); Stephens, No. 97-0020, 58 Agric. Dec. 149, 184-85, 1999 WL 33314045 (U.S.D.A. Nov. 4, 1999).

Respondents' violations of 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint.

Second, the Administrator contends the Chief ALJ's comments regarding the Administrator's litigation decisions are unwarranted (Complainant's Resp. to Resp'ts' Pet. for Appeal at 39-41).

The Chief ALJ's comments regarding the Administrator's litigation decisions have no bearing on the disposition of this proceeding; therefore, I decline to make a determination regarding the justification for the Chief ALJ's comments on the Administrator's litigation decisions.

Third, the Administrator contends the Chief ALJ's failure to assess Respondents a civil penalty, is error (Complainant's Resp. to Resp'ts' Pet. for Appeal at 41-47).

The Chief ALJ based his decision not to assess Respondents a civil penalty on the significant financial impact that revocation of Mr. Greenly's Animal Welfare Act license would have on Respondents (Chief ALJ's Decision at 17). Nothing in the Animal Welfare Act provides that revocation of an Animal Welfare Act license precludes assessment of a civil penalty. The Secretary of Agriculture has assessed civil penalties, in addition to ordering revocation of Animal Welfare Act licenses, in numerous cases.[33]

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved; (2) the gravity of the

[33] *See, e.g.*, Mazzola, 68 Agric. Dec. 822, 852 (U.S.D.A. 2009) (revoking Animal Welfare Act license number 31-C-0065 and assessing a $21,000 civil penalty), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, No. 02-0020, 68 Agric. Dec. 685, 736, 2009 WL 8382858 (U.S.D.A. July 13, 2009) (revoking Animal Welfare Act license number 31-C-0034 and assessing a $93,975 civil penalty); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1106 (U.S.D.A. 2007) (revoking Animal Welfare Act license number 58-C-0816 and assessing a $13,750 civil penalty), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009).

violations; (3) the person's good faith; and (4) the history of previous violations.[34] The financial impact of revocation of an Animal Welfare Act license is not one of the factors considered by the Secretary of Agriculture when determining the amount of the civil penalty. Therefore, the Chief ALJ's consideration of the financial impact of revocation of Mr. Greenly's Animal Welfare Act license when determining the amount of the civil penalty to be assessed against Respondents is error.

Based upon the number of animals which Respondents held during the period 2005 through 2008, I find Respondents operate a large business.[35] The gravity of Respondents' violations is great. Respondents' violations of 9 C.F.R. § 2.131(b)(1) and (c)(1) resulted in the death of two animals and injuries to the public. Moreover, an exhibitor's failure to allow APHIS officials to enter the exhibitor's place of business to conduct inspections, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations.

Respondents have not shown good faith. Despite the death of animals and injuries to the public, Respondents continued to handle their animals in a manner which risked harm to their animals and the public. Finally, Respondents have a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).

The United States Department of Agriculture's sanction policy is set forth in *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):

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[34] 7 U.S.C. § 2149(b).

[35] Respondents reported holding 49 animals in 2008, 178 animals in 2007, 190 animals in 2006, and 121 animals in 2005 (CX 2).

> [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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[36]

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I assess Respondents at least a $25,000 civil penalty for their violations of the Animal Welfare Act and the Regulations (Complainant's Resp. to Resp'ts' Pet. for Appeal at 46).

I conclude Respondents committed 22 violations of the Animal Welfare Act and the Regulations during the period March 14, 2006, through October 19, 2010. However, for the reasons explained in this Decision and Order, *supra*, I assess no civil penalty for Respondents' violations of 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the

[36] Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Amarillo Wildlife Refuge, Inc., No. 07-0077, 68 Agric. Dec. 77, 89, 2009 WL 248415 (U.S.D.A. Jan. 6, 2009); Alliance Airlines, No. 04-0009, 64 Agric. Dec. 1595, 1608, 2005 WL 1649008 (U.S.D.A. July 5, 2005); Williams, No. 04-0023, 64 Agric. Dec. 364, 390, 2005 WL 1649011 (U.S.D.A. June 29, 2005) (Decision as to Deborah Ann Milette); Geo. A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); Bourk, No. 01-0004, 61 Agric. Dec. 25, 49, 2002 WL 10518 (U.S.D.A. Jan. 4, 2002) (Decision as to Steven Bourk and Carmella Bourk).

Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint; therefore, I assess Respondents a civil penalty for only 17 of their violations of the Animal Welfare Act and the Regulations. Respondents could be assessed a maximum civil penalty of $132,500 for the 17 violations of the Animal Welfare Act and the Regulations.[37] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude a $11,725 civil penalty for 17 of Respondents' violations of the Animal Welfare Act and the Regulations is appropriate and necessary to ensure Respondents' 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 thereby fulfill the remedial purposes of the Animal Welfare Act.[38]

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[37] Prior to June 18, 2008, the Animal Welfare Act, authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture may assess Respondents a civil penalty of not more than $3,750 for each of Respondents' six violations of the Animal Welfare Act and the Regulations that occurred before June 18, 2008, and a civil penalty of not more than $10,000 for each of Respondents' 11 violations of the Animal Welfare Act and the Regulations that occurred after June 18, 2008.

[38] I assess Respondents a $1,000 civil penalty for each of their four violations of 9 C.F.R. § 2.131(b)(1); a $1,000 civil penalty for each of their four violations of 9 C.F.R. § 2.131(c)(1); a $1,000 civil penalty for each of their two post-June 18, 2008 violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); a $375 civil penalty for each of their three pre-June 18, 2008 violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); a $100 civil penalty for their violation of 9 C.F.R. § 3.125(c); a $100 civil penalty for each of their two pre-June 18, 2008 violations of 9 C.F.R. § 2.75(b)(1); and a $300 civil penalty for their post-June 18, 2008 violation of 9 C.F.R. § 2.75(b)(1).

Based upon the record before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Greenly is an individual residing in the State of Minnesota.

2. At all times material to this proceeding, Mr. Greenly was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Greenly held an Animal Welfare Act license (Animal Welfare Act license number 41-C-0122).

4. Mr. Greenly exhibits wild and exotic animals to the public at his photographic educational game farm near Sandstone, Minnesota, and at other locations (Tr. 439-40).

5. Minnesota Wildlife Connection, Inc., is a corporation organized and existing under the laws of the State of Minnesota.

6. Minnesota Wildlife Connection, Inc., has the same address for its registered office as Mr. Greenly's address. The affairs of Minnesota Wildlife Connection, Inc., and Mr. Greenly are sufficiently intertwined that they cannot be separated. (CX 2, CX 5, CX 11, CX 23, CX 39-CX 40, CX 45-CX 46, CX 52, and RX 75.)

7. On February 12, 2009, Respondents allowed two wolves to run free during a photographic shoot on property owned by Leo Gardner following which the wolves went onto property belonging to Linda and Carlyle Ziegler and attacked and killed the Ziegler's dachshund (Tr. 52-58, 78-83, 439-40).

8. On April 22, 2010, during an outing at Respondents' facility for students from East Range Academy of Technology and Science, Respondents exhibited a bear (Tr. 488-91). During the exhibition, the students and school employees were allowed to feed the bear "Gummi

Worms," with the students putting candy in their mouths and letting the bear then take the candy from their mouths (Tr. 490). During the feeding session, the bear bit Denise Jensen, Mr. Greenly's cousin and a school employee, who had accompanied the students (Tr. 120-22).

9. On August 14, 2010, during the Quarry Days celebration in Sandstone, Minnesota, Respondents allowed the public to have direct contact with and handle raccoons, a possum, and foxes without any distance or barriers between the animals and the public (Tr. 272-76; CX 41). Respondents performed a show from an elevated stage with chairs for the public in front of the stage a short distance away, but without any barrier between the stage and the public seating area (Tr. 276). Mr. Greenly stood in the area between the stage and the public seating area with a mountain lion or cougar in his arms (Tr. 276-79; CX 41). Two adolescent girls exhibited an adult wolf on the stage and two or three wolf cubs were brought through the audience, which was allowed to pet the wolves (Tr. 277-78).

10. On October 19, 2010, Respondents were at or near Banning State Park for a photographic shoot when Respondents' unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski (Tr. 10-16, 478, 522; CX 45-CX 46). The contact between the wolf and Johnny resulted in bloodied areas on Johnny's face, scalp, and arm and puncture wounds on Johnny's face and scalp (Tr. 12, 14, 19, 24-25, 478-80; CX 45). As a result of this incident, the wolf was euthanized and tested for rabies (Tr. 47).

11. On March 14, 2006, Respondents failed to construct a housing facility so that the housing facility was structurally sound and failed to maintain the housing facility in good repair. Specifically, the enclosure housing a fisher had a perch with separated wood exposing two or three screws, which could injure the fisher. (CX 25 at 1-2; Tr. 205, 387-88.)

12. On July 24, 2007, Respondents failed to construct a housing facility so that the housing facility was structurally sound and failed to maintain the housing facility in good repair. Specifically, the enclosure housing two juvenile woodchucks had an area of wire

fatigue large enough to allow the woodchucks to escape from their enclosure. (CX 30 at 2; Tr. 428-29.)

13. On March 14, 2006, Respondents failed to enclose outdoor housing facilities for adult wolves with an adequate perimeter fence (CX 25 at 2-3; Tr. 206-08).

14. On August 23, 2006, Respondents failed to enclose outdoor housing facilities for 13 wolves, 2 coatimundi, 5 beaver, and 4 bear with an adequate perimeter fence (CX 43 at 2; Tr. 208-09).

15. On August 23, 2006, Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence (CX 43 at 2; Tr. 208-09).

16. On January 11, 2007, Respondents failed to store three cans of feed and three bags of canine food in a manner that adequately protected the food from contamination (CX 38; Tr. 216-17, 418-22).

17. On August 23, 2006, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least 15 animals at Respondents' facility (CX 43 at 1; Tr. 210-11).

18. On July 24, 2007, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least 17 animals at Respondents' facility (CX 30 at 1; Tr. 218).

19. On June 29, 2009, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least three bears and a bobcat at Respondents' facility (CX 7 at 1, CX 8; Tr. 221-24).

20. On December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents' facilities, property, animals, and records, during normal business hours (CX 3, CX 10, CX 14, CX 28, CX 37; Tr. 200-02).

Conclusions of Law

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

2. On February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm.

3. On February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) 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.

4. On March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to construct housing facilities so that the housing facilities were structurally sound and by failing to maintain housing facilities in good repair.

5. On March 14, 2006, and August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose outdoor housing facilities for animals with adequate perimeter fences.

6. On August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.77(f) by failing to enclose an outdoor housing facility for a lemur with an adequate perimeter fence.

7. On January 11, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store three cans of feed and three bags of canine food in a manner that adequately protected the food from contamination.

8. On August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) by failing to make, keep, and maintain adequate records of the acquisition and disposition of animals at Respondents' facility.

9. On December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) by failing to allow APHIS officials to inspect Respondents' facilities, property, animals, and records, during normal business hours.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

   a. failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm;

   b. failing to handle animals, during public exhibition, so there is 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;

   c. failing to construct housing facilities so that the housing facilities are structurally sound;

   d. failing to maintain housing facilities in good repair;

   e. failing to enclose outdoor housing facilities for animals with adequate perimeter fences;

   f. failing to store food in a manner that adequately protects the food from contamination;

   g. failing to make, keep, and maintain adequate records of the acquisition and disposition of animals; and

h. failing to allow APHIS officials to inspect their facilities, property, animals, and records, during normal business hours.

Paragraph 1 of this Order shall become effective upon service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.

2. Mr. Greenly's Animal Welfare Act license (Animal Welfare Act license number 41-C-0122) is revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Lee Marvin Greenly.

3. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., are assessed, jointly and severally, a $11,725 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, Regulatory, and Food Safety 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, Ms. Carroll within sixty (60) days after service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 11-0072.

Right to Judicial Review

Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., must seek judicial review within 60 days after entry of

the Order in this Decision and Order.[39] The date of entry of the Order in this Decision and Order is August 5, 2013.

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[39] 7 U.S.C. § 2149(c).

In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.
Docket No. 05-0026.
Decision and Order.
Filed September 6, 2013.

AWA – Animal welfare – Civil penalty – Inspections – Interference with APHIS officials – Preponderance of evidence – Records – Sanction policy – Willful.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO CRAIG A. PERRY AND PERRY'S WILDERNESS RANCH & ZOO, INC.

Procedural History

On July 14, 2005, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Administrator alleges, during the period September 10, 2000, through June 15, 2005, Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter PWR] willfully violated the Animal Welfare Act and the Regulations.[1] On August 8, 2005, Mr. Perry and PWR filed an Answer in which they denied the material allegations of the Complaint.[2]

[1] Compl. at 4-18 ¶¶ 10-12, 14-25, 27, 29-36s. The Administrator also alleges Le Anne Smith, American Furniture Warehouse, Jeff Burton, and Shirley Stanley willfully violated the Animal Welfare Act and the Regulations. On April 21, 2006, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] entered a Consent Decision and Order as

On November 16-20, 2009 and December 7-11, 2009, in Chicago, Illinois, and on January 11-13, 2010, in Cedar Rapids, Iowa, the ALJ conducted a hearing. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Larry J. Thorson, Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, Iowa, represented Mr. Perry and PWR.[3]

On March 29, 2012, after the parties submitted post hearing briefs, the ALJ filed a Decision and Order: (1) concluding Mr. Perry and PWR willfully violated the Regulations, as alleged in paragraphs 12, 14-18, 27, 29-30, 33-36g, and 36i-36r of the Complaint; (2) concluding the Administrator failed to prove Mr. Perry and PWR willfully violated the Regulations, as alleged in paragraphs 10-11, 19-25, 31-32, 36h, and 36s of the Complaint; (3) ordering Mr. Perry and PWR to cease and desist from violations of the Animal Welfare Act and the Regulations; (4) assessing Mr. Perry and PWR, jointly and severally, a $6,750 civil penalty; and (5) assessing Mr. Perry an additional $500 civil penalty.[4]

On July 5, 2012, the Administrator filed Complainant's Petition for Appeal of Initial Decisions and Orders [hereinafter Appeal Petition], and, on July 26, 2012, Mr. Perry and PWR filed Respondents' Response to Complainant's Appeal and Respondents' Brief.[5] On August 3, 2012, the

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to American Furniture Warehouse; thereby, concluding this proceeding as it relates to American Furniture Warehouse. On June 5, 2007, the ALJ amended the case caption by deleting the reference to American Furniture Warehouse (ALJ's Order Amending Case Caption). On November 16, 2009, the ALJ issued a Decision and Order as to Jeff Burton and Shirley Stanley. Neither Mr. Burton nor Ms. Stanley appealed the ALJ's November 16, 2009, Decision and Order as to Jeff Burton and Shirley Stanley, which is now final. Therefore, this proceeding, as it relates to Mr. Burton and Ms. Stanley, is concluded. On April 19, 2010, the ALJ amended the case caption by deleting the references to Mr. Burton and Ms. Stanley (ALJ's Order Amending Case Caption and Revising Post-Hearing Schedule).

[2] Answer for Craig A. Perry, Perry's Wilderness Ranch & Zoo, Inc., and Leann [sic] Smith, Req. for Hearing and Further Req. the Hearing be Held at or Near Cedar Rapids, Iowa [hereinafter "Answer"].

[3] Mr. Thorson also represented Ms. Smith.

[4] ALJ's Decision and Order at 4-24, 74 ¶¶ 12-20, 54-55.

[5] On March 30, 2012, the ALJ issued a Decision and Order as to Ms. Smith. The Administrator's Appeal Petition and Respondents' Response to Complainant's Appeal and Respondents' Brief apply to the ALJ's March 29, 2012, Decision and Order as to

Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the ALJ's Decision and Order as to Mr. Perry and PWR; except that, in addition to the violations found by the ALJ, I also conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), as alleged in paragraph 20 of the Complaint, and 9 C.F.R. § 2.131(b)(1) (2004[6]), as alleged in paragraph 23 of the Complaint, and I increase the civil penalties assessed by the ALJ from $7,250 to $14,600.[7]

DECISION

Statutory and Regulatory Framework

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Exhibitors must also allow inspection of their places of business, facilities, animals, and records by the Secretary of Agriculture. 7 U.S.C. § 2146(a). Violations of the Animal Welfare Act or the Regulations by an exhibitor may result in assessment of a civil penalty, issuance of a cease and desist order, and suspension or revocation of the exhibitor's Animal Welfare Act license. 7 U.S.C. § 2149.

The Regulations include requirements for veterinary care, humane handling, enclosures for transportation, feeding, food storage, disposal of

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Mr. Perry and PWR and to the ALJ's March 30, 2012, Decision and Order as to Ms. Smith.

[6] Effective August 13, 2004, 9 C.F.R. § 2.131(a), (b), (c), and (d) were redesignated 9 C.F.R. § 2.131(b), (c), (d), and (e), respectively. 69 Fed. Reg. 42,089, 42,101 (July 14, 2004).

[7] References in this Decision and Order as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. to the transcript are indicated as "Tr." and the page number. The Administrator's exhibits are identified as "CX" and the exhibit number.

waste, sanitation of enclosures, shade for animals housed outdoors, housing, elimination of excess water, recordkeeping, and inspection of facilities, animals, and records by Animal and Plant Health Inspection Service [hereinafter APHIS] officials.

Discussion

1. *Mr. Perry and PWR*

Mr. Perry is an individual whose business address is in Center Point, Iowa. PWR was incorporated in 1993 under the laws of the State of Iowa. Mr. Perry is the director, president, vice president, secretary, and treasurer of PWR (CX 67). During the period September 10, 2000, to June 20, 2002, Mr. Perry was licensed as an Animal Welfare Act exhibitor and held Animal Welfare Act license number 42-C-0101. During the period June 20, 2002, through June 15, 2005, PWR was licensed as an Animal Welfare Act exhibitor and held Animal Welfare Act license number 42-C-0101 (CX 1).

Mr. Perry is liable for his acts, omissions, and failures under the Animal Welfare Act, and, while acting for PWR, Mr. Perry's acts, omissions, and failures under the Animal Welfare Act are deemed the acts, omissions, and failures of PWR, as well as the acts, omissions, and failures of Mr. Perry. 7 U.S.C. § 2139.

2. *The Administrator's Appeal of the ALJ's Conclusions of Law*

The ALJ concluded that Mr. Perry and PWR violated the Regulations, as alleged in paragraphs 12, 14-18, 27, 29-30, 33-36g, and 36i-36r of the Complaint. None of the parties appealed the ALJ's conclusions that Mr. Perry and PWR violated the Regulations. Therefore, I adopt the ALJ's findings of fact and conclusions of law that are related to the allegations in paragraphs 12, 14-18, 27, 29-30, 33-36g, and 36i-36r of the Complaint.

The ALJ concluded the Administrator failed to prove that Mr. Perry and PWR violated the Regulations, as alleged in paragraphs 10-11, 19-25, 31-32, 36h, and 36s of the Complaint. The Administrator contends the ALJ's conclusions that the Administrator failed to prove that

Mr. Perry and PWR violated the Regulations, as alleged in paragraphs 10 and 19-23 of the Complaint, are error (Appeal Pet. at 17-40).

The Administrator contends the ALJ erred in failing to conclude that, on December 29, 2004, Mr. Perry interfered with and threatened APHIS officials in the course of carrying out their duties, in willful violation of 9 C.F.R. § 2.4, as alleged in paragraph 10 of the Complaint (Appeal Pet. at 17-23).

The Regulations prohibit Animal Welfare Act licensees from interfering with or threatening APHIS officials, as follows:

> **§ 2.4. Non-interference with APHIS officials.**
>
> A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

9 C.F.R. § 2.4.

I have carefully reviewed the evidence of Mr. Perry's December 29, 2004, telephone conversation with APHIS investigator Katherine L. Lies, during which Mr. Perry is alleged to have interfered with and threatened APHIS officials (Tr. 280-98; CX 40, CX 50). I find very little evidence that Mr. Perry's telephone conversation with Ms. Lies interfered with APHIS officials and find the Administrator failed to prove by a preponderance of the evidence that Mr. Perry threatened APHIS officials during this telephone conversation. Therefore, I reject the Administrator's contention that the ALJ's failure to conclude that Mr. Perry violated 9 C.F.R. § 2.4, as alleged in paragraph 10 of the Complaint, is error.

The Administrator contends the ALJ erred in failing to conclude that, on February 8, 2005, Mr. Perry and PWR failed to make, keep, and maintain records in willful violation of 9 C.F.R. § 2.75(b)(1), as alleged in paragraph 19 of the Complaint (Appeal Pet. at 27-38).

The Regulations require exhibitors to make, keep, and maintain records, as follows:

> **§ 2.75. Records: Dealers and exhibitors.**
>
> . . . .
>
> (b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals . . . 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 . . . 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 driver's license number (or photographic identification card for nondrivers issued by a State) 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.

9 C.F.R. § 2.75(b)(1).

I have carefully reviewed the evidence of Mr. Perry and PWR's violation of 9 C.F.R. § 2.75(b)(1) alleged in paragraph 19 of the Complaint. While the Administrator introduced evidence that Mr. Perry and PWR violated 9 C.F.R. § 2.75(b)(1), I agree with the ALJ that the Administrator failed to prove the violation by a preponderance of the evidence.

The Administrator contends the ALJ erred in failing to conclude that, on January 20, 2005, at 10:00 a.m., Mr. Perry and PWR did not allow APHIS officials access to enter Mr. Perry and PWR's place of business to conduct an inspection, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), as alleged in paragraph 20 of the Complaint (Appeal Pet. at 23-27).

The Animal Welfare Act authorizes the Secretary of Agriculture to conduct investigations and inspections and requires exhibitors to allow access for those purposes, as follows:

> **§ 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.

> The Secretary shall inspect each research facility at least once a year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.

7 U.S.C. § 2146(a).

The Regulations require all exhibitors to allow APHIS officials to conduct inspections, as follows:

> **§ 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.
>
> (b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be

> extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

9 C.F.R. § 2.126.

As an initial matter, Mr. Perry and PWR admit that, on January 20, 2005, they did not allow APHIS officials to conduct an inspection, as follows:

> 20. Respondents admit that Perry's asked the inspectors if they could come back another time because they were loading animals in preparation for a trip which an itinerary was already given to the APHIS officials . . . and the veterinarian was on his way there with proper health papers to transport the animals. The Respondents further state that this was not normal business hours at the location where the inspection was taking place because this location was not open for business at that time. See C.F.R. § 2.126(a) "during business hours".

Answer at 7 ¶ 20. The evidence establishes that Dr. Steven Bellin, an APHIS veterinary medical officer, and David Watson, an APHIS investigator, attempted to conduct an inspection of Mr. Perry and PWR's place of business, facilities, property, animals, and records on Thursday, January 20, 2005, at 10:00 a.m., as alleged in paragraph 20 of the Complaint. Although Mr. Perry was present, he did not make himself available to accompany Dr. Bellin and Mr. Watson on the inspection and did not make another responsible person available to accompany Dr. Bellin and Mr. Watson on the inspection (CX 58; Tr. 498-508). Mr. Perry and PWR are not excused from their failure to allow inspection merely because inspection on January 20, 2005, would have been inconvenient (Answer). Dr. Bellin's and Mr. Watson's availability to conduct the inspection on another date (CX 58 at 2) does not excuse Mr. Perry and PWR from their failure to allow inspection.[8]

[8] *See* Greenly, 72 Agric. Dec. ___, slip op. at 23 (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly & Minnesota Wildlife Connection, Inc.) (stating an exhibitor is

Moreover, I reject Mr. Perry and PWR's contention that Dr. Bellin and Mr. Watson did not attempt to conduct an inspection during "business hours," as that term is used in 9 C.F.R. § 2.126, merely because Mr. Perry and PWR's business was not open to the public at the time Dr. Bellin and Mr. Watson attempted to conduct the inspection. The time of the attempted inspection was 10:00 a.m., Thursday, January 20, 2005, which was not a holiday, and Mr. Perry was present loading animals to be moved to La Crosse, Wisconsin, for exhibition (CX 58 at 2). I find, under these circumstances, Dr. Bellin and Mr. Watson attempted to conduct an inspection of Mr. Perry and PWR's business during business hours, even though the business was not open to the public at that time. Therefore, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on January 20, 2005, and I find the ALJ's failure to conclude that Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), as alleged in paragraph 20 of the Complaint, is error.

The Administrator contends the ALJ erroneously failed to conclude that, on September 10, 2000, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(a)(1) (2004), as alleged in paragraphs 21 and 22 of the Complaint, and willfully violated of 9 C.F.R. § 2.131(b)(1) (2004), as alleged in paragraph 23 of the Complaint (Appeal Pet. at 38-40).

The Regulations impose requirements for handling animals, as follows:

> **§ 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.
>
> . . . .

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not excused from compliance with 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), even if the APHIS official offers to return to conduct the inspection at another time).

> (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 animals and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(a)(1), (b)(1) (2004). The evidence establishes that on September 10, 2000, at the New Mexico State Fair, Mr. Perry and PWR conducted numerous photo shoots by placing felids in direct contact with the public (CX 2, CX 4, CX 13-CX 13a; Tr. 62-73, 77-81). Richard Namm, one of Mr. Perry and PWR's patrons, was injured by a tiger during a photo shoot when the tiger, held by Mr. Namm, bit Mr. Namm's arm (CX 2-CX 3, CX 5-CX 11; Tr. 65, 73-77, 81-86). Based on this evidence, I conclude the Administrator proved by a preponderance of the evidence that, on September 10, 2000, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(b)(1) (2004), as alleged in paragraph 23 of the Complaint, and I reverse the ALJ. However, I do not find the Administrator's evidence strong enough to reverse the ALJ's conclusions that the Administrator failed to prove by a preponderance of the evidence that Mr. Perry and PWR handled animals in willful violation of 9 C.F.R. § 2.131(a)(1) (2004), as alleged in paragraphs 21 and 22 of the Complaint.

3. *The Administrator's Appeal of the ALJ's Analysis of Violations*

The Administrator contends the ALJ erroneously analyzed violations of the Regulations alleged in the Complaint as torts (Appeal Pet. at 40-41). The ALJ apportioned responsibility for the death of three tiger cubs finding Mr. Perry was only about one percent responsible for their deaths.[9] However, I find nothing in the ALJ's Decision and Order indicating that the ALJ was under the misapprehension that this proceeding is a tort action or that the ALJ found that Mr. Perry and PWR engaged in tortious conduct.

[9] ALJ's Decision and Order at 8-10 ¶ 13(c).

4. *The Administrator's Appeal of the ALJ's Credibility Determination*

The Administrator contends the ALJ erroneously found Mr. Perry a credible witness (Appeal Pet. at 41-42).

The ALJ found Mr. Perry was a "very credible witness[.]"[10] 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).[11] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision,

[10] ALJ's Decision and Order at 51 ¶¶ 32-33.

[11] *See also* KOAM Produce, Inc., No. 01-0032, 65 Agric. Dec. 1470, 1474, 2006 WL 2439000 (U.S.D.A. Aug. 21, 2006) (Order Den. Pet. to Reconsider); S. Minn. Beet Sugar Coop., No. 03-0001, 64 Agric. Dec. 580, 605, 2005 WL 1222860 (U.S.D.A. May 9, 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon, 60 Agric. Dec. 527, 560 (U.S.D.A. 2001) (Decision as to Jerry W. Graves and Kathy Graves), *appeal dismissed sub nom.* Graves v. U.S. Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1271-72 (U.S.D.A. 1995), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom.* Heimann v. Department of Agric., 522 U.S. 951 (1997).

> 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.[12]

[12] KOAM Produce, Inc., No. 01-0032, 65 Agric. Dec. 1470, 1476, 2006 WL 2439000 (U.S.D.A. Aug. 21, 2006) (Order Den. Pet. to Reconsider); Bond, No. 04-0024, 65 Agric. Dec. 1175, 1183, 2006 WL 2006163 (U.S.D.A. July 6, 2006) (Order Den. Pet. to Reconsider); G&T Terminal Packing Co., 64 Agric. Dec. 1839, 1852 (U.S.D.A. 2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006), *cert. denied*, 552 U.S. 814 (2007); S. Minn. Beet Sugar Coop., 64 Agric. Dec. 580, 608 (U.S.D.A. 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy,

I have examined the record and find no basis to reverse the ALJ's credibility determination with respect to Mr. Perry. Therefore, I reject the Administrator's contention that the ALJ's credibility determination regarding Mr. Perry, is error.

5. *The Administrator's Appeal of the ALJ's Assessment of a $7,250 Civil Penalty*

The Administrator contends the ALJ's assessment of a $6,750 civil penalty against Mr. Perry and PWR, jointly and severally, and an additional $500 civil penalty against Mr. Perry, is error. The Administrator contends, in addition to the cease and desist order issued by the ALJ, the appropriate sanction is an order revoking Animal Welfare Act license number 42-C-0101 or, in the alternative, an order assessing Mr. Perry and PWR, jointly and severally, an $85,000 civil penalty. (Appeal Pet. at 11-17.)

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary

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61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon, 60 Agric. Dec. 527, 561-62 (U.S.D.A. 2001) (Decision as to Jerry W. Graves and Kathy Graves), *appeal dismissed sub nom.* Graves v. U.S. Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Sunland Packing House Co., No. 96-0532, 58 Agric. Dec. 543, 602, 1999 WL 92441 (U.S.D.A. Feb. 17, 1999); Zimmerman, 57 Agric. Dec. 1038, 1055-56 (U.S.D.A. 1998); Goetz, No. 94-0001, 56 Agric. Dec. 1470, 1510, 1997 WL 730378 (U.S.D.A. Nov. 3, 1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); Saulsbury Enters., No. 94-2, 56 Agric. Dec. 82, 89, 1997 WL 41360 (U.S.D.A. Jan. 29, 1997) (Order Den. Pet. for Recons.); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (U.S.D.A. 1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); White, 47 Agric. Dec. 229, 279 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); King Meat Packing Co., No. 5579, 40 Agric. Dec. 552, 553, 1981 WL 31730 (U.S.D.A. May 1, 1981); Thornton, 38 Agric. Dec. 1425, 1426 (U.S.D.A. 1979) (Remand Order); Unionville Sales Co., 38 Agric. Dec. 1207, 1208-09 (U.S.D.A. 1979) (Remand Order); Beech, 37 Agric. Dec. 869, 871-72 (U.S.D.A. 1978); Nat'l Beef Packing Co., 36 Agric. Dec. 1722, 1736 (U.S.D.A. 1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); Whaley, 35 Agric. Dec. 1519, 1521 (U.S.D.A. 1976); Davis, 35 Agric. Dec. 538, 539 (U.S.D.A. 1976); Am. Commodity Brokers, Inc., 32 Agric. Dec. 1765, 1772 (U.S.D.A. 1973); Dishmon, 31 Agric. Dec. 1002, 1004 (U.S.D.A. 1972); Sy B. Gaiber & Co., 31 Agric. Dec. 474, 497-98 (U.S.D.A. 1972); Romoff, 31 Agric. Dec. 158, 172 (U.S.D.A. 1972).

of Agriculture is required to give due consideration to four (4) factors: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.[13]

The ALJ found Mr. Perry and PWR's business to be "medium in size, not highly profitable[.]"[14] I disagree with the ALJ's finding that Mr. Perry and PWR's business is medium in size, and I disagree with the ALJ's reliance on the profitability of Mr. Perry and PWR's business to determine the size of their business. The evidence establishes that, during the period 2000 through 2005, Mr. Perry and PWR held as few as fifty-six (56) animals and as many as eighty-three (83) animals (CX 1 at 5-6, 8, 10, 12, 14). Based upon the number of animals held by Mr. Perry and PWR, I find they operate a moderately large business.[15]

The ALJ states she kept in mind the gravity of Mr. Perry and PWR's violations. I agree with the ALJ that Mr. Perry and PWR's violations of the Animal Welfare Act and the Regulations are grave. I find particularly grave Mr. Perry and PWR's violations of the handling regulations (9 C.F.R. § 2.131) and the veterinary care regulations (9 C.F.R. § 2.40) because those violations thwarted the Secretary of Agriculture's efforts to protect the health and well-being of exhibited animals.[16] Mr. Perry and PWR's violations of the handling regulations and the veterinary care regulations resulted in the very harm these regulations are designed to prevent; namely, the death of animals and injuries to members of the public.

Moreover, an exhibitor's failure to allow APHIS officials to enter his or her place of business to conduct an inspection, in violation of 7 U.S.C.

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[13] 7 U.S.C. § 2149(b).

[14] ALJ's Decision and Order at 24 ¶ 21.

[15] *See* Huchital, No. 97-0020, 58 Agric. Dec. 763, 816-17, 1999 WL 33314045 (U.S.D.A. Nov. 4, 1999) (finding the respondent, who held approximately 80 rabbits, operated a large business); Browning, 52 Agric. Dec. 129, 151 (U.S.D.A. 1993) (finding the respondent, who held 75-80 animals, operated a moderately large business), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994) (Table).

[16] *See* Davenport, 57 Agric. Dec. 189, 240 (U.S.D.A. 1998) (stating the respondent's violations are very serious because they thwart the United States Department of Agriculture's efforts to protect the health and well-being of exhibited exotic species), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

§ 2146(a) and 9 C.F.R. § 2.126(a), is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations.

The ALJ states Mr. Perry's good faith is obvious to her. The ALJ bases her finding of good faith on the length of time Mr. Perry has held an Animal Welfare Act license, the successes Mr. Perry has had which benefitted animals and people, Mr. Perry's courage and expertise in caring for animals, Mr. Perry's efforts to comply with the Animal Welfare Act and the Regulations, and Mr. Perry's instructions to his employees to comply with the Animal Welfare Act and the Regulations.[17]

The record does not support the ALJ's assessment of Mr. Perry's good faith. I do not find the length of time that Mr. Perry held an Animal Welfare Act license or Mr. Perry's courage, expertise, and success establish his good faith. Efforts to comply with the Animal Welfare Act and the Regulations and instructions to employees to comply with the Animal Welfare Act and the Regulations are relevant to good faith. However, the record establishes that Mr. Perry repeatedly violated the Animal Welfare Act and the Regulations during the period September 10, 2000, through June 15, 2005. Moreover, Mr. Perry was a respondent in a previous Animal Welfare Act enforcement proceeding. In that proceeding, Mr. Perry entered into a consent decision in which he neither admitted nor denied the allegations that he violated the Animal Welfare Act and the Regulations.[18] While a consent decision does not prove a prior violation, a consent decision can be used to determine the sanction necessary to deter a respondent from future violations of the Animal Welfare Act.[19]

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[17] ALJ's Decision and Order at 24 ¶ 21.

[18] Perry, 55 Agric. Dec. 1118 (U.S.D.A. 1996) (Consent Decision and Order) (CX 61).

[19] Davenport, 57 Agric. Dec. 189, 240 (U.S.D.A. 1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); Delta Air Lines, Inc., No. 91-13, 53 Agric. Dec. 1076, 1085, 1994 WL 657125 (U.S.D.A. Nov. 9, 1994).

Finally, Mr. Perry and PWR have a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).

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 (U.S.D.A. 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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[20]

[20] Greenly, 72 Agric. Dec. ___, slip op. at 33-34 (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly and Minn. Wildlife Connection, Inc.); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); Williams, 64 Agric. Dec. 364, 390 (U.S.D.A. 2005) (Decision as to Deborah Ann Milette); Geo. A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re* Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); Bourk, 61 Agric. Dec. 25, 49 (U.S.D.A. 2002) (Decision as to Steven Bourk and Carmella Bourk).

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I revoke Animal Welfare Act license number 42-C-0101 or, in the alternative, assess Mr. Perry and PWR, jointly and severally, an $85,000 civil penalty for their violations of the Animal Welfare Act and the Regulations (Appeal Pet. at 11; Complainant's Proposed Findings of Fact, Conclusions of Law, Br. and Proposed Order at 56). Based upon the record before me, I agree with the ALJ that revocation of Animal Welfare Act license number 42-C-0101 is not necessary to ensure Mr. Perry's and PWR'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 thereby fulfill the remedial purposes of the Animal Welfare Act. However, I find a civil penalty is warranted in law and justified by the facts.

I conclude Mr. Perry and PWR committed forty-seven (47) violations of the Animal Welfare Act and the Regulations during the period September 10, 2000, through June 15, 2005.[21] Mr. Perry and PWR could be assessed a maximum civil penalty of $129,250 for forty-seven (47) violations of the Animal Welfare Act and the Regulations.[22] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude a $14,600 civil penalty

[21] The Animal Welfare Act provides that each violation and each day during which a violation continues shall be a separate offense. 7 U.S.C. § 2149(b).

[22] Prior to June 18, 2008, the Animal Welfare Act, authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. In 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). This maximum civil penalty was in effect during the period September 10, 2000, through June 15, 2005, when Mr. Perry and PWR committed violations of the Animal Welfare Act and the Regulations. Thus, the Secretary of Agriculture is authorized to assess Mr. Perry and PWR a civil penalty of not more than $2,750 for each of their 47 violations of the Animal Welfare Act and the Regulations.

is appropriate and necessary to ensure Mr. Perry's and PWR'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 thereby fulfill the remedial purposes of the Animal Welfare Act.[23]

Based upon the record before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Perry is an individual whose business address is in Center Point, Iowa.

2. At all times material to this proceeding, Mr. Perry was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. During the period September 10, 2000, to June 20, 2002, Mr. Perry was licensed as an Animal Welfare Act exhibitor and held Animal Welfare Act license number 42-C-0101.

4. PWR was incorporated in 1993 under the laws of the State of Iowa.

5. At all times material to this proceeding, PWR was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

6. Mr. Perry is the director, president, vice president, secretary, and treasurer of PWR.

[23] I assess Mr. Perry and PWR: (1) a $500 civil penalty for each of their nine violations of 9 C.F.R. § 2.40(b); (2) a $500 civil penalty for each of their four violations of 9 C.F.R. § 2.40(a); (3) a $500 civil penalty for each of their five violations of 9 C.F.R. § 2.40(a)(1); (4) a $300 civil penalty for their violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); (5) a $500 civil penalty for each of their three violations of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1); (6) a $500 civil penalty for each of their four violations of 9 C.F.R. § 2.131(a)(1) (2004); (7) a $500 civil penalty for their violation of 9 C.F.R. § 2.131(b)(3) (2004); (8) a $500 civil penalty for their violation of 9 C.F.R. § 2.131(c)(1) (2004); and (9) an $800 civil penalty for their violations of 9 C.F.R. §§ 2.100(a), 3.125(a), 3.125(c), 3.125(d), 3.127(a), 3.127(c), 3.129(a), 3.131(a), and 3.137(a).

7. During the period June 20, 2002, through June 15, 2005, PWR was licensed as an Animal Welfare Act exhibitor and held Animal Welfare Act license number 42-C-0101.

8. On October 26, 2002, at Fort Collins, Colorado, Mr. Perry and PWR failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel or on-site personnel capable of discerning when an animal was in need of veterinary care. Specifically, Mr. Perry and PWR delegated to untrained persons the responsibility of handling lions in exhibition to the public.

9. From February 19, 2003, through February 22, 2003, Mr. Perry and PWR failed to have a veterinarian provide adequate veterinary care to three unweaned infant tigers, born February 11, 2003. Instead, Mr. Perry and PWR transported the three (3) infant tigers (two of which had not opened their eyes), by truck, from Iowa to Colorado, to work in photo shoots at American Furniture Warehouse, in Thornton, Colorado, on February 21, 2003, and continued to withhold veterinary medical care, despite clear signs that the tigers were in distress and in need of veterinary medical care.

10. From February 19, 2003, through February 22, 2003, Mr. Perry and PWR failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that included a written program of veterinary care. Specifically, Mr. Perry and PWR had no program for emergency care.

11. On or about February 27, 2003, and March 10, 2003, Mr. Perry and PWR failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that included a written program of veterinary care and regularly scheduled visits to a facility that provided emergency care for animals.

12. From on or about February 19, 2003, through February 27, 2003, in Thornton, Colorado, Mr. Perry and PWR 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, Mr. Perry and PWR failed to establish a plan for emergency

veterinary medical care or a plan for obtaining veterinary care while traveling and failed to obtain any veterinary care for three unweaned infant tigers, all of whom died on February 22, 2003. Instead, Mr. Perry and PWR turned for assistance to their attending veterinarian in Iowa, who was unavailable.

13. On February 25, 2003, Mr. Perry and PWR, in Jackson, Minnesota, failed to have a veterinarian provide adequate veterinary care to two unweaned infant tigers, born February 18, 2003. Instead, Mr. Perry and PWR transported the tigers to Colorado on February 26, 2003, without having obtained any health examination.

14. On January 20, 2005, at 10:00 a.m., at Center Point, Iowa, Mr. Perry and PWR failed to allow APHIS officials access to enter their place of business, during business hours, and conduct an inspection of their facilities, animals, and records.

15. On September 10, 2000, at the New Mexico State Fair, in Albuquerque, New Mexico, Mr. Perry and PWR repeatedly failed to handle animals, during public exhibition, so there was minimal risk of harm to 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 the animals and the public. Specifically, Mr. Perry and PWR exhibited a four-month-old tiger and two lions to the public (including toddlers) without any barriers or distance between the animals and the public to prevent the public from coming into contact with the animals.

16. From February 19, 2003, through February 22, 2003, Mr. Perry and PWR 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, Mr. Perry and PWR: (i) acquired three (3) infant tiger cubs from Ohio on February 19, 2003; (ii) transported the infant tigers from Iowa to Colorado; (iii) discontinued use of the infant tigers' formula; (iv) removed the infant tigers from a heated enclosure and exhibited the infant tigers in an unheated warehouse in photo shoot sessions; (v) used the three (3) infant tigers for photo shoots with the general public, although the tigers' immune systems had not yet fully developed and the tigers had not been properly weaned; and (vi) failed to obtain veterinary care for the three (3) infant

tigers, despite their obvious ill health, which was demonstrated by vomiting and listlessness.

17. On February 21, 2003, Mr. Perry and PWR exposed young or immature animals to excessive public handling and exhibited the animals for periods of time that would be detrimental to the animals' health or well-being. Specifically, Mr. Perry and PWR used three (3) infant tigers, which had not been properly weaned and were only ten (10) days old, for up to ten (10) hours of photo shoots with the general public. The animals were too young for any public handling.

18. On February 21, 2003, Mr. Perry and PWR exhibited animals for periods of time that were inconsistent with the animals' good health and well-being. Specifically, Mr. Perry and PWR used three (3) infant tigers, which were ten (10) days old, had not been properly weaned, and whose immune systems had not been fully developed, for approximately nine (9)hours of photo shoots with the general public.

19. On August 1, 2004, at the Lake County Fair, in Grayslake, Illinois, Mr. Perry and PWR 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, Mr. Perry and PWR allowed the public to handle and feed lion cubs and, as a result of the handling, a lion cub injured a member of the public and the lion cub was quarantined for rabies testing.

20. On August 1, 2004, at the Lake County Fair, in Grayslake, Illinois, Mr. Perry and PWR failed to handle animals, during public exhibition, so there was minimal risk of harm to 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 the animals and the public. Specifically, Mr. Perry and PWR exhibited a lion cub to the public without any barriers or distance between the animal and the public to prevent the public from coming into contact with the animal, and, as a result of the handling, the lion cub injured a member of the public and was quarantined for rabies testing.

21. On or about December 27, 2004, at the Thunder Mountain Harley Davidson Dealership, in Loveland, Colorado, Mr. Perry and PWR

repeatedly failed to handle animals, during public exhibition, so there was minimal risk of harm to 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 the animals and the public. Specifically, Mr. Perry and PWR exhibited tigers to the public using a fire pit as a barrier.

22. On October 11, 2000, Mr. Perry and PWR transported animals to the East Texas State Fair, in Beaumont, Texas, in a two-story aluminum cattle trailer the side of which was corroded.

23. On June 13, 2001, Mr. Perry and PWR 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 the animals. Specifically, Mr. Perry and PWR failed to repair the cattle panels in the front area of the enclosures housing Texas Longhorn cattle and Scottish Highlander cattle.

24. On June 13, 2001, Mr. Perry and PWR failed to provide for removal and disposal of animal waste and bedding. Specifically, Mr. Perry and PWR failed to remove an excessive buildup of excreta mixed with bedding materials from the enclosure housing Texas Longhorn cattle and Scottish Highlander cattle.

25. On June 13, 2001, Mr. Perry and PWR failed to provide sufficient shade, by natural or artificial means, to allow animals kept outdoors to protect themselves from direct sunlight when sunlight is likely to cause overheating or discomfort. Specifically, Mr. Perry and PWR failed to provide adequate shade to an adult lion housed outdoors, when the weather was sunny and the temperature was ninety (90) degrees Fahrenheit.

26. On June 13, 2001, Mr. Perry and PWR failed to provide a suitable method to rapidly eliminate excess water. Specifically, Mr. Perry and PWR: (i) failed to eliminate standing water and mud in exotic hoofstock enclosures; (ii) failed to eliminate standing water and mud in calf enclosures; (iii) failed to eliminate standing water and mud in camel enclosures; (iv) failed to eliminate standing water and mud in sheep enclosures; (v) failed to eliminate standing water and mud in goat

enclosures; and (vi) failed to eliminate standing water and mud in coyote enclosures.

27. On June 13, 2001, Mr. Perry and PWR failed to provide wholesome, palatable, and uncontaminated food of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, Mr. Perry and PWR: (i) failed to feed large felids a balanced diet and, instead, fed the large felids a diet consisting of chicken and red muscle meat, some of which was store-bought and bore expiration dates from at least April 2001; (ii) failed to feed large felids a balanced diet and, instead, fed the large felids a diet consisting of chicken and red muscle meat, with no nutritional supplements provided, except to newborn or infant felids; and (iii) failed to ensure that food was wholesome, palatable, and free from contamination and failed to thaw frozen food in a refrigerator, but, instead, used igloo-type coolers.

28. On June 13, 2001, Mr. Perry and PWR failed to remove excreta from the primary enclosure housing Texas Longhorn cattle and Scottish Highlander cattle as often as necessary to prevent contamination of the animals contained in the primary enclosure, to minimize disease hazards, and to reduce odors.

29. On February 27, 2003, and March 10, 2003, Mr. Perry and PWR failed to establish a program for feeding wholesome, palatable, and uncontaminated food of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, Mr. Perry and PWR had no feeding protocol for young tiger cubs.

30. On February 8, 2005, Mr. Perry and PWR failed to provide for removal and disposal of animal waste from primary enclosures housing tigers, wolves, lions, leopards, coyote, zebra, camels, llamas, sheep, goats, audad, water buffalo, and Brahma cattle.

31. On February 8, 2005, Mr. Perry and PWR 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 the animals. Specifically, Mr. Perry and PWR failed to repair the east metal wall of the enclosure housing camels.

32. On February 8, 2005, Mr. Perry and PWR 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 the animals. Specifically, Mr. Perry and PWR failed to repair the shade tarps above the enclosure housing the male lion.

33. On February 8, 2005, Mr. Perry and PWR 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 the animals. Specifically, Mr. Perry and PWR failed to repair the shade tarps above the enclosure housing wolves.

34. On February 8, 2005, Mr. Perry and PWR failed to store supplies of food in facilities that adequately protected the supplies of food against deterioration, molding, and contamination by vermin. Specifically, Mr. Perry and PWR stored open packages of meat in an outdoor feed shed.

35. On February 8, 2005, Mr. Perry and PWR failed to provide wholesome, palatable, and uncontaminated food of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, Mr. Perry and PWR: (i) had no fewer than four unopened bags of Purina primate chow with milling dates of May 17, 2004; and (ii) failed to feed large felids a balanced diet, fed no supplements, and, instead, fed the large felids a diet consisting of chicken and beef that had been exposed to the elements, pests, and vermin.

36. On February 8, 2005, Mr. Perry and PWR failed to remove excreta, snow, ice, and food waste from primary enclosures housing tigers, wolves, lions, coyote, zebra, camels, llamas, sheep, goats, audad, water buffalo, and Brahma cattle as often as necessary to prevent contamination of the animals contained in the primary enclosures, to minimize disease hazards, and to reduce odors.

37. On June 15, 2005, Mr. Perry and PWR failed to provide for removal and disposal of food waste from the enclosure housing two adult tigers. Specifically, Mr. Perry and PWR failed to provide for removal and disposal of the rear quarter of a calf and other uneaten portions of the calf.

38. On June 15, 2005, Mr. Perry and PWR failed to provide a suitable method to rapidly eliminate excess water. Specifically, Mr. Perry and PWR: (i) failed to eliminate standing water in enclosures housing tigers; (ii) failed to eliminate standing water in enclosures housing camels; (iii) failed to eliminate standing water in enclosures housing sheep; (iv) failed to eliminate standing water in enclosures housing goats; and (v) failed to eliminate standing water in enclosures housing cattle.

Conclusions of Law

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

2. On October 26, 2002, and, from February 19, 2003, through February 27, 2003, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.40(b) by failing to establish and maintain a program of adequate veterinary care.

3. From February 19, 2003, through February 22, 2003, and on February 25, 2003, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.40(a) by failing to have an attending veterinarian provide adequate veterinary care to their animals.

4. From February 19, 2003, through February 22, 2003, on February 27, 2003, and on March 10, 2003, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.40(a)(1) by failing to employ an attending veterinarian under formal arrangements.

5. On January 20, 2005, Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) by failing to allow APHIS officials to inspect Mr. Perry and PWR's facilities, property, animals, and records, during business hours.

6. On September 10, 2000, and August 1, 2004, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(b)(1) (2004) and on December 27, 2004, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(c)(1) 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.

7. From February 19, 2003, through February 22, 2003, and on August 1, 2004, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(a)(1) (2004) by failing to handle animals as carefully as possible in a manner that does not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

8. On February 21, 2003, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(b)(3) (2004) by exposing young or immature animals to excessive public handling and exhibiting the animals for periods of time that would be detrimental to their health or well-being.

9. On February 21, 2003, Mr. Perry and PWR willfully violated 9 C.F.R. § 2.131(c)(1) (2004) by exhibiting animals for periods of time that were inconsistent with their good health and well-being.

10. On October 11, 2000, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.137(a) by failing to transport animals in a primary enclosure constructed in such a manner that the structural strength of the primary enclosure was sufficient to contain the animals and to withstand the normal rigors of transportation.

11. On June 13, 2001, and February 8, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to maintain housing facilities so that the housing facilities were structurally sound and by failing to maintain housing facilities in good repair.

12. On June 13, 2001, February 8, 2005, and June 15, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(d) by failing to provide for removal and disposal of animal waste, food waste, and bedding.

13. On June 13, 2001, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(a) by failing to provide sufficient shade, by natural or artificial means, to allow animals kept outdoors to protect themselves from direct sunlight when sunlight is likely to cause overheating or discomfort.

14. On June 13, 2001, and June 15, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(c) by failing to provide a suitable method to rapidly eliminate excess water.

15. On June 13, 2001, February 27, 2003, March 10, 2003, and February 8, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.129(a) by failing to provide wholesome, palatable, and uncontaminated food of sufficient quantity and nutritive value to maintain all animals in good health.

16. On June 13, 2001, and February 8, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.131(a) by failing to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the primary enclosures, to minimize disease hazards, and to reduce odors.

17. On February 8, 2005, Mr. Perry and PWR willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store supplies of food in facilities that adequately protected the supplies of food against deterioration, molding, and contamination by vermin.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Perry and PWR, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

a. failing to establish and maintain a program of adequate veterinary care;

b. failing to have a veterinarian provide adequate veterinary care to their animals;

c. failing to allow APHIS officials access to enter their place of business, during business hours, and conduct an inspection of their facilities, animals, and records;

d. failing to handle animals, during public exhibition, so there is minimal risk of harm to 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 the animals and the public;

e. failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, unnecessary discomfort, behavioral stress, or physical harm to the animals;

f. exhibiting animals for periods of time and under conditions inconsistent with the good health and well-being of the animals;

g. failing to transport live animals in primary enclosures that are of sufficient structural strength to contain the animals and to withstand the normal rigors of transportation;

h. failing to maintain housing facilities so that the housing facilities are structurally sound and in good repair sufficient to protect the animals in the facilities from injury and to contain the animals in the facilities;

i. failing to provide for removal and disposal of animal waste, food waste, and bedding;

j. failing to provide sufficient shade, by natural or artificial means, to animals kept outdoors to allow the animals to protect themselves from direct sunlight when sunlight is likely to cause overheating or discomfort;

k. failing to provide a suitable method to rapidly eliminate excess water;

l. failing to provide wholesome, palatable, and uncontaminated food of sufficient quantity and nutritive value to maintain all animals in good health;

m. failing to remove excreta from primary enclosures housing animals as often as necessary to prevent contamination of the animals contained in the primary enclosures, to minimize disease hazards, and to reduce odors; and

n. failing to store supplies of food in facilities that adequately protect the supplies of food against deterioration, molding, and contamination by vermin.

Paragraph 1 of this Order shall become effective upon service of this Order on Mr. Perry and PWR.

2. Mr. Perry and PWR are assessed, jointly and severally, a $14,600 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, Regulatory, and Food Safety 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, Ms. Carroll within sixty (60) days after service of this Order on Mr. Perry and PWR. Mr. Perry and PWR shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0026.

Right to Judicial Review

Mr. Perry and PWR have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Perry and PWR must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[24] The date of entry of the Order in this Decision and Order is September 6, 2013.

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[24] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: ACTION WILDLIFE FOUNDATION, INC.
Docket No. 12-0339.
Decision and Order.
Filed September 23, 2013.

AWA – Civil penalty – License, suspension of – Sanction policy.

Sharlene A. Deskins, Esq. for Complainant.
John R. Williams, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On April 6, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges on March 27, 2007, January 8, 2008, August 19, 2008, and February 3, 2009, Action Wildlife Foundation, Inc., willfully violated the Regulations.[1] On June 8, 2012, Action Wildlife Foundation, Inc., filed an Answer in which Action Wildlife Foundation, Inc. denied the material allegations of the Complaint.[2]

Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing on January 29-30, 2013, in Wallingford, Connecticut. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented the Administrator. John R. Williams, New Haven, Connecticut, represented

[1] Compl. at 2-6 ¶¶ II-V.
[2] Answer to Compl.

Action Wildlife Foundation, Inc. The Administrator called two (2) witnesses and Action Wildlife Foundation, Inc. called four (4) witnesses. The Administrator introduced twelve (12) exhibits, identified as CX 1-CX 12, which the ALJ received in evidence. Action Wildlife Foundation, Inc., introduced 129 exhibits, identified as RX 1-RX 129, which the ALJ received in evidence. Action Wildlife Foundation, Inc., withdrew RX 129 (Tr. 242-43).[3]

On July 29, 2013, the ALJ filed a Decision and Order: (1) concluding Action Wildlife Foundation, Inc. willfully violated the Regulations, as alleged in paragraphs II.A., II.B.1, II.B.2, II.B.3, II.B.4, II.B.5, II.B.6, III.A., III.B.1, III.B.2, III.B.3, III.B.4, III.B.6, III.B.7, III.B.8, III.B.9, IV.A., IV.B., IV.C.2, IV.C.3, V.A., V.B.2, and V.B.3 of the Complaint; (2) concluding the Administrator failed to prove Action Wildlife Foundation, Inc. willfully violated the Regulations, as alleged in paragraphs III.B.5, IV.C.1, and V.B.1 of the Complaint; (3) ordering Action Wildlife Foundation, Inc. to cease and desist from violations of the Animal Welfare Act and the Regulations; (4) assessing Action Wildlife Foundation, Inc. a $30,000 civil penalty; and (5) suspending Action Wildlife Foundation, Inc.'s Animal Welfare Act license (Animal Welfare Act license number 16-C-0057) for sixty (60) days.[4]

On August 22, 2013, Action Wildlife Foundation, Inc., filed an Appeal Petition, and, on September 9, 2013, the Administrator filed Complainant's Opposition to the Respondent's Appeal Petition. On September 13, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Action Wildlife Foundation, Inc.'s Request for Oral Argument

Action Wildlife Foundation, Inc.'s request for oral argument on appeal, which the Judicial Officer may grant, refuse, or limit,[5] is refused

[3] References to the transcript of the January 29-30, 2013 hearing are designated as "Tr." and the page number.
[4] ALJ's Decision and Order at 24-27.
[5] 7 C.F.R. § 1.145(d).

because the issues are not complex and oral argument would serve no useful purpose.

Action Wildlife Foundation, Inc.'s Appeal Petition

Action Wildlife Foundation, Inc. raises two (2) issues in its Appeal Petition. First, Action Wildlife Foundation, Inc. contends the ALJ's assessment of a $30,000 civil penalty is excessive and unduly harsh given the nature of Action Wildlife Foundation, Inc.'s violations and the fact that Action Wildlife Foundation, Inc., is a private charity wholly funded by James Mazzarelli, the founder of Action Wildlife Foundation, Inc. (Appeal Pet. at 1 ¶ 1).

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.[6] The fact that an entity that violates the Animal Welfare Act and the Regulations is a charitable, non-profit institution wholly funded by one (1) individual is not a factor required to be considered by the Secretary of Agriculture when determining the amount of the civil penalty. While Mr. Mazzarelli's generosity (Tr. 77-80) is highly commendable, I find Mr. Mazzarelli's generosity and the fact that Action Wildlife Foundation, Inc., is a charitable, non-profit institution (Tr. 78) irrelevant to the determination of the amount of the civil penalty.

Based upon the number of animals which Action Wildlife Foundation, Inc., held during the period relevant to this proceeding, I find Action Wildlife Foundation, Inc., operates a large business.[7] The gravity of Action Wildlife Foundation, Inc.'s violation of 9 C.F.R. § 3.133, which resulted in multiple deaths of red deer, elk, and four-horned sheep (Tr. 44, 281-84, 290-93, 345, 358-61; CX 7 at 1-2), is great.

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[6] 7 U.S.C. § 2149(b).

[7] Jan Baltrush, an Animal and Plant Health Inspection Service [hereinafter APHIS] animal care inspector who inspected Action Wildlife Foundation, Inc., testified that Action Wildlife Foundation, Inc., held over 200 regulated animals (Tr. 34). Mr. Mazzarelli testified that Action Wildlife Foundation, Inc. held over 100 animals and probably close to 200 animals in 2007 (Tr. 267-68).

Action Wildlife Foundation, Inc. has not shown good faith. Despite the death and injury of animals that resulted from housing incompatible animals in the same enclosures, Action Wildlife Foundation, Inc. continued to house incompatible animals in the same enclosures for an extended period of time, and the record establishes that Action Wildlife Foundation, Inc. repeatedly violated the Regulations during the period March 27, 2007 through February 3, 2009. Finally, Action Wildlife Foundation, Inc. has a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry.

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommended to the ALJ and continues to recommend that Action Wildlife Foundation, Inc., be assessed a $30,000 civil penalty for its violations of the Regulations (Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Br. in

Support Thereof at 22-24; Complainant's Opp'n to Resp't's Appeal Pet. at 2-3).

I conclude Action Wildlife Foundation, Inc. committed twenty-three (23) violations of the Regulations during the period March 27, 2007 through February 3, 2009. Action Wildlife Foundation, Inc. could be assessed a maximum civil penalty of $186,250 for twenty-three (23) violations of the Regulations.[8] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude the $30,000 civil penalty recommended by the Administrator and assessed by the ALJ for Action Wildlife Foundation, Inc.'s violations of the Regulations is appropriate and necessary to ensure Action Wildlife Foundation, Inc.'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 thereby fulfill the remedial purposes of the Animal Welfare Act. I reject Action Wildlife Foundation, Inc.'s contention that the ALJ's assessment of a $30,000 civil penalty for its violations of the Regulations is excessive and unduly harsh.

[8] Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture may assess Action Wildlife Foundation, Inc., a civil penalty of not more than $3,750 for each of Action Wildlife Foundation, Inc.'s seven (7) violations of the Regulations committed before June 18, 2008, and a civil penalty of not more than $10,000 for each of Action Wildlife Foundation, Inc.'s sixteen (16) violations of the Regulations committed after June 18, 2008.

Second, Action Wildlife Foundation, Inc. contends the ALJ's sixty (60) day suspension of Action Wildlife Foundation, Inc.'s Animal Welfare Act license is excessive and unduly harsh given the nature of Action Wildlife Foundation, Inc.'s violations and the importance of Action Wildlife Foundation, Inc. to the semi-rural community which it serves (Appeal Pet. at 1-2 ¶ 2).

The Animal Welfare Act authorizes the Secretary of Agriculture to suspend an exhibitor's Animal Welfare Act license if the exhibitor is determined to have violated the Regulations, as follows:

> **§ 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.

7 U.S.C. § 2149(a). I conclude Action Wildlife Foundation, Inc., committed 23 violations of the Regulations during the period March 27, 2007 through February 3, 2009. The gravity of Action Wildlife Foundation, Inc.'s violation of 9 C.F.R. § 3.133, which resulted in multiple deaths of red deer, elk, and four-horned sheep (Tr. 44, 281-84, 290-93, 345, 358-61; CX 7 at 1-2), is great. Therefore, I reject Action Wildlife Foundation, Inc.'s contention that the ALJ's sixty (60) day suspension of its Animal Welfare Act license for its violations of the Regulations is excessive and unduly harsh.

Moreover, collateral effects of suspension of an Animal Welfare Act license are not relevant to the sanction to be imposed for violations of the

Animal Welfare Act and the Regulations.[9] Thus, even if I were to find that a sixty (60) day suspension of Action Wildlife Foundation, Inc.'s Animal Welfare Act license would have a negative impact on the semi-rural area which Action Wildlife Foundation, Inc. serves, that collateral effect would not constitute a circumstance to be considered when determining the sanction to be imposed for Action Wildlife Foundation, Inc.'s violations of the Regulations.

I affirm the ALJ's Decision and Order, and, based upon my review of the record, I find, except for a modification of the effective dates in the ALJ's order, no change or modification of the ALJ's Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision, as follows:

> **§ 1.145. Appeal to Judicial Officer**
>
> . . . .
>
> (i) *Decision of the judicial officer on appeal*. . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the

[9] *See* Greenly, 72 Agric. Dec. ___, slip op. at 28-29 (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly and Minn. Wildlife Connection, Inc.) (stating collateral effects of revocation of an exhibitor's Animal Welfare Act license, including the destruction of one of the few businesses in Sandstone, Minnesota, are not mitigating circumstances that can be taken into account when determining the sanction to be imposed for violations of the Animal Welfare Act and the Regulations); Animals of Mont., Inc., 68 Agric. Dec. 92, 108 (U.S.D.A. 2009) (stating the collateral effect of termination of Animals of Montana, Inc.'s Animal Welfare Act license on Mr. Hyde's career is not relevant to the determination of whether Animals of Montana, Inc., is unfit to be licensed); Vigne, 67 Agric. Dec. 1060, 1069 (U.S.D.A. 2008) (stating the collateral effect of termination of Ms. Vigne's Animal Welfare Act license on her ability to retain possession of and breed ocelots is not relevant to the determination of whether Ms. Vigne is unfit to be licensed); Shaffer, 60 Agric. Dec. 444, 477 (U.S.D.A. 2001) (stating the respondent's need for income to support himself is not a defense to his violations of the Animal Welfare Act and the Regulations or a mitigating circumstance to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations); Huchital, 58 Agric. Dec. 763, 815-16 (U.S.D.A. 1999) (stating collateral effects of a civil penalty on a respondent's business and family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations).

> 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.
> 7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

1. Action Wildlife Foundation, Inc., its agents, 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. This cease and desist order shall become effective upon service of this Order on Action Wildlife Foundation, Inc.

2. Action Wildlife Foundation, Inc.'s Animal Welfare Act license (Animal Welfare Act license number 16-C-0057) is suspended for a period of sixty (60) days beginning sixty (60) days after service of this Order on Action Wildlife Foundation, Inc.

3. Action Wildlife Foundation, Inc., is assessed a $30,000 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:

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

Payment of the civil penalty shall be sent to, and received by, USDA APHIS GENERAL within sixty (60) days after service of this Order on Action Wildlife Foundation, Inc. Action Wildlife Foundation, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0339.

Right to Judicial Review

Action Wildlife Foundation, Inc., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States

Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Action Wildlife Foundation, Inc., must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[10] The date of entry of the Order in this Decision and Order is September 23, 2013.

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In re: VANISHING SPECIES WILDLIFE, INC., A FLORIDA CORPORATION.
Docket No. 12-0093.
Decision and Order.
Filed July 19, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Barbara Hartmann for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

I. Introduction

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a complaint filed by the United States Department of Agriculture's Administrator of the Animal and Plant Health Inspection Service ("USDA"; "APHIS"; "Respondent") against Vanishing Species Wildlife Inc. ("Respondent"), alleging violations of the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act"). The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act.

Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate

[10] 7 U.S.C. § 2149(c).

regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of APHIS, an agency of USDA.

This matter is ripe for adjudication, and this Decision and Order[1] is based upon the documentary evidence and arguments of the parties.

II. Issue

The primary issue in controversy is whether Respondent violated the AWA and if so, what, if any, sanctions may be imposed.

III. Procedural History

On December 2, 2011, USDA filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ") ("Hearing Clerk"). On December 28, 2011, Respondent filed an answer. Complainant sent Respondent evidence and filed witness and exhibit lists in compliance with my Order of March 9, 2012.

By Order issued on July 9, 2012, I directed Respondent to show cause in writing why a Decision and Order on the record should not be entered. On July 26, 2012, Complainant moved for summary judgment. Respondent did not directly fulfill the instructions of my Order, but on August 21, 2012, filed correspondence disputing the allegations of the complaint and requesting its dismissal. By Order issued August 27, 2012, I deferred ruling on Complainant's motion, and directed Respondent to exchange evidence, and further directed the parties to consult about a hearing date. I granted Respondent's September 20, 2012, motion for an extension by Order issued September 27, 2012. On October 9, 2013, Respondent filed a witness list with the Hearing Clerk, along with a copy of a lease, hereby identified as RX-1.

I held a telephone conference with the parties on January 22, 2013, in which Respondent expressed the desire for a Decision on the Record. I set deadlines for submissions, memorialized in an Order issued January 24, 2013. I set aside the dates of May 8, 2013 and May 9, 2013 for a

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

hearing, in the event that a Decision on the Record was inappropriate. Neither party filed supplemental evidence, and I canceled the hearing dates. By Order issued May 31, 2013, I directed Complainant to file a status report, which was filed on June 28, 2013.

Respondent had been the subject of other complaints and actions initiated by Complainant. An earlier filed complaint was resolved by the entry of a consent decision between USDA and Respondent on February 4, 2009. On March 30, 2010, APHIS issued a notice to Respondent to show cause why Respondent's AWA license should not be terminated for the failure to comply with the terms of the consent decision it had entered into[2]. On August 5, 2010, Chief Administrative Law Judge Peter M. Davenport issued summary judgment in favor of USDA, on the grounds that Respondent admitted that it had failed to comply with the consent decision. Judge Davenport further concluded that Respondent was disqualified from being licensed under the Act for a period of two (2) years. Respondent appealed that determination to the Judicial Officer for USDA, who affirmed Judge Davenport's grant of summary judgment by Decision and Order issued November 3, 2010. CX-20.

All documents attached to Complainant's motion, identified as CX-1 to CX-22, and Respondent's submissions are hereby admitted to the record.

IV. Legal Standards

1. *Waiver of Hearing*

The Rules provide that the "[f]ailure to request a hearing within the time allowed for the filing of an answer shall constitute a waiver of such hearing." 7 C.F.R. § 1.141(a). Respondent did not request a hearing (*see* Answer filed on December 28, 2011). Moreover, in a telephone conference with me on January 22, 2013, supported by written submissions filed on August 21, 2012, Respondent's representative Barbara Hartmann, advised me that she preferred that the case be disposed of by a hearing on the record. I allowed for that possibility, and

[2] I take official notice of the pleadings filed in conjunction with Vanishing Species Wildlife, Inc., AWA Docket No. 10-0194.

since no further evidence has been filed by either party, conclude that Respondent has waived its right to an oral hearing.

2. *Summary Judgment*

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); FED. R. CIV. P. 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

A review of the record establishes that summary judgment may be entered against Respondent with respect to certain allegations that were not materially disputed, and to the extent discussed *infra*, below, Complainant's motion is granted.

V. Discussion of the Undisputed Evidence

Respondent is a Florida corporation licensed by USDA to exhibit animals pursuant to the Act. CX-1; Admissions in Respondent's Answer. As authorized by the Act and its implementing regulations, USDA conducted inspections of Respondent's exhibition, which resulted in the issuance of a complaint that was resolved by the entry of a consent decision between USDA and Respondent on February 4, 2009. *See In re Harrod*, AWA Docket No. 08-0136. CX-2. The terms of the agreement required Respondent to cease and desist from violating the Act, and further amended Respondent's license to permanently remove 8859 North US 27 NW, Palmdale, Florida as a valid location for engaging in activities covered by the Act. Respondent was permitted to retain its single adult bear housed at 1991 SW 136 Avenue, Davie, Florida, but was prohibited from acquiring any additional bear for regulated activities. Respondent further agreed to donate, sell or otherwise remove from its care all juvenile and adult big cats that were housed at the location by not later than July 31, 2009. Respondent was ordered to pay a civil penalty in the amount of $3,750.00. CX-2. APHIS confirmed the terms of the consent decision in an undated letter addressed to Respondent's representative. CX-3.

During the period following the entry of the consent decision, Complainant alleged that Respondent failed to provide access to APHIS officials attempting to inspect Respondent's property on six (6) occasions. CX-4; CX-8; CX-9-10; CX-11; CX-21; CX-22. Complainant also alleged that Respondent failed to make, keep and maintain records of the disposition of animals (CX-5; CX-14) and failed to promptly notify APHIS of an additional site where Respondent housed animals (CX-8 through CX-10).

Although Respondent denied these allegations charged in the complaint at Paragraphs 4, 5 and 6, Respondent provided no evidence or argument in support of its position. In the absence of contrary evidence, I

find that these allegations have been established and that Respondent violated the Act and regulations by failing to allow entry to APHIS inspectors; by failing to maintain required records; and by failing to give required notices to APHIS.

VI. Discussion of Disputed Facts

Complainant alleged that on July 12, 2009, a number of small exotic mammals and domestic pocket pets owned by Respondent died when the air conditioning in the building in which they lived malfunctioned. CX-5; CX-18. In a memorandum written on August 27, 2009, APHIS Inspector Dr. Mary Moore documented that Respondent's employee, "Penny" discussed the problem with an air conditioner failing to automatically re-set itself after a power outage, resulting in animals dying of excessive heat. CX-7. No animals were housed in that building after the deaths. CX-7.

In the Answer filed on December 28, 2011, Respondent explained that "[s]evere storms caused a power outage in the Davie area, which included the Davie property, over which Respondent had no control." In the response filed on August 22, 2012, Respondent's representative disagreed that animals were housed in a structure with no windows or insulation. Ms. Hartmann maintained that the structure was fully insulated, had a window with an air conditioner, had seven fans, and had turbines on the roof. Ms. Hartmann maintained that only a seventeen (17) year old blue tongue skink died.

The evidence is uncontroverted that a power outage led to the death of at least one animal. Even accepting the presence of windows, fans and insulation, Respondent made inadequate arrangements for ventilation in the event of a loss of power, which directly led to the death of at least one animal, by Respondent's admission. Accordingly, I find that Respondent failed to handle animals as carefully as possible in violation of 9 C.F.R. §§ 2.131(b)(1) and (e).

Complainant alleged that Respondent failed to provide adequate veterinary care to a tiger, and failed to maintain a program of veterinary care. In an affidavit signed on May 3, 2010, Dr. Moore stated that she had observed an adult tiger limping during her inspection of

Respondent's facility on February 4, 2010. CX-18. Inspector Moore also stated that Respondent's program of veterinary care was last signed in 2008, and that Ms. [Hartmann-Harrod] could not recall when her premises were last visited by a veterinarian. Id. The veterinarian did not contact Inspector Moore, as was requested, but Dr. Perez provided an affidavit dated April 22, 2010, in which he confirmed that the limping tiger was arthritic and did not require medication. CX-17. Dr. Perez stated that he had served as Respondent's veterinarian for several years and had last inspected the premises in February, 2010.

I accord weight to Dr. Perez' statements, made under oath, and find that Respondent did not fail to provide adequate veterinary care to an arthritic tiger. I find no evidence of record to dispute the conclusion that Respondent did not have a current signed plan of veterinary care, and therefore this violation is established.

After an inspection conducted on February 4, 2010, Respondent was charged with failing to meet minimum housing standards because of defects identified in the bear and skunk enclosures. CX-14; CX-18. Respondent did not deny these allegations, but maintained in the answer filed on December 28, 2011, that "[w]hen the deficiencies were pointed out, appropriate steps were taken to remedy all deficiencies immediately".

As Respondent has admitted to the existence of deficiencies, I find that Complainant has established violations of 9 C.F.R. § 3.125(a). The curing of a violation may mitigate the consideration of a penalty, but does not eradicate the fact that the violation occurred. *Volpe Vito, Inc.*, 56 Agric. Dec. 166 (U.S.D.A. 1997).

VII. Sanctions

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *Zimmerman*, 56 Agric. Dec. 433 (U.S.D.A. 1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *Lee Roach & Pool Laboratories*, 51 Agric. Dec. 252 (U.S.D.A. 1992). Moreover, it has been observed that the AWA is a remedial statute, and the purpose of imposing sanctions is

for deterrence, not punishment. *Zimmerman*, 57 Agric. Dec. 1038 (U.S.D.A. 1997). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *Shepherd*, 57 Agric. Dec. 242 (U.S.D.A. 1998). The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149 (b).

USDA has recommended that Respondent's AWA license be revoked; that Respondent be assessed civil money penalties; and that Respondent be ordered to cease and desist violating the Act and regulations.

In statements filed on August 22, 2012, Respondent's representative, Barbara Hartmann, objected to the imposition of sanctions, maintaining that Respondent suffered economic loss when USDA refused to allow Respondent to lease or finance the Palmdale property to a third party. *See* RX-1; copy of lease. Ms. Hartmann asserted that she believed that the terms of the consent decision would not prevent her from leasing the property. Unfortunately, the consent decision is silent regarding that assertion, but by its terms, Respondent and anyone associated with Respondent, was specifically prohibited from operating a business requiring an AWA license at that site.

Respondent further objected to the civil money penalty of $34,450.00 recommended by USDA. Ms. Hartmann has argued that an additional civil money penalty is unwarranted in that Respondent paid the penalty associated with the consent decision that Respondent had entered into with USDA. I acknowledge that Respondent paid the penalties associated with the consent order, but Complainant now seeks a penalty of $13,000.00 for additional violations that are the subject of the instant cause of action. Obviously, the payment of penalties as part of a consent order did not represent sufficient deterrence to prevent additional violations of the Act, and I therefore conclude that the imposition of civil money penalties would be supported.

Respondent suggested that consideration should be given to the fact that maintenance deficiencies identified on inspection were immediately

corrected. I accord weight to Respondent's assertions, but note that Respondent had ample familiarity with the regulations and continued to violate them, despite paying a penalty through a consent decision and having its license terminated for a period of two years. While corrections may be taken into account when determining whether a sanction should be imposed, even immediate correction of violations does not eliminate the fact that the violations occurred and does not provide a basis for dismissal of the alleged violations. *Volpe Vito, Inc.*, 56 Agric. Dec. at 166.

I reject USDA's proposed sanction of $21,450.00 for Respondent's failure to obey the Secretary's cease and desist Order, as that Order was upheld in a decision by the Judicial Officer, which also affirmed the termination of Respondent's license as the result of its failures. I find the license termination sufficient penalty; however, I agree that a renewed cease and desist Order is appropriate in these circumstances.

Ms. Hartmann also stated that she believed that Respondent's license had "been canceled", and the proposed penalty of revocation of Respondent's license would be a "double action". Respondent's license is currently under a two year suspension, but revocation would result in the permanent disqualification of Respondent from securing a license under the AWA. 9 C.F.R. § 2.11. Accordingly, these are two distinct penalties with very different outcomes, and Respondent's objection is without merit.

A licensee's AWA license may be revoked if the exhibitor has willfully violated any provision of the AWA or its implementing regulations. *Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (U.S.D.A. 1996). The evidence supports that Respondent's actions were willful, considering Respondent's history of entering into a consent decision, and having its license terminated for a period of two years.

In consideration of all of the evidence, I find it appropriate to revoke Respondent's license. I reject Respondent's contention that Complainant's enforcement of the Act and regulations is "vindictive, vengeful and spiteful". If the violations disclosed by inspections were of a purely technical character, such as the failure to have a current signed veterinary plan, Respondent's arguments might have some persuasive

value. However, on six occasions in less than a two year period, no one was at Respondent's facility to allow Inspector Moore access for inspection. Respondent failed to keep required records. Respondent's failure to provide back-up ventilation or otherwise address excessive heat led to animal death, even though storms caused the initial loss of air conditioning. Respondent's failure to abide by the promises it made led to the determination that Respondent was unqualified to be licensed for a period of two years. Respondent's continued willful violations establish that Respondent should not be allowed to hold a license under the AWA.

I further find it appropriate to assess civil money penalties as a deterrent, and hereby impose a penalty of $10,000.00. However, I acknowledge the significant effect of a permanent revocation of Respondent's license, and therefore, shall suspend the payment of the $10,000.00 penalty. Respondent shall not be liable to pay the civil penalty so long as neither Respondent, nor its officers, agents, employees, assignees, or successors refrain from conducting business requiring a license under the AWA, or from applying for an AWA license. A period of ninety (90) days from the effective date of this Decision and Order shall be allowed to Respondent to donate, sell or otherwise find appropriate housing for any animals it wishes to dispose of, before Respondent will be considered to have violated the contingency suspending the civil money penalty described herein.

VII. Findings of Fact

1. Vanishing Species Inc. is a Florida corporation whose registered agent for service of process is Spiegel & Utrera P.A., 1840 S. W. 22nd Street, 4th floor, Miami, Florida 33145.

2. Vanishing Species Inc.'s current mailing address is 2261 S. W. 83rd Terrace, Davie, Florida 33324.

3. Respondent held a valid license under the AWA, license number 58-C-0660, at all times pertinent to this adjudication.

4. During the period under consideration herein, Respondent operated as an exhibitor as that term is used in the Act and regulations, exhibiting

between twelve (12) and seventy-five (75) wild and exotic animals at a facility in Davie, Florida.

5. On February 4, 2009, Respondent executed a consent decision with USDA, which was approved and issued by Chief Administrative Law Judge Peter M. Davenport.

6. Respondent's AWA license was terminated by order of the Secretary of Agriculture, for a period of two (2) years, effective January 8, 2011.

7. On June 2, 2009, October 6, 2009, October 19, 2009, November 5, 2009, March 11, 2010 and July 26, 2010, APHIS inspector Dr. Moore attempted to inspect Respondent's facility, but no one representing Respondent was available to permit inspection.

8. APHIS conducted Inspections of Respondent's facility on August 24, 25, 2009 and February 4, 2010.

9. At the inspections, Respondent failed to produce records documenting the disposition of animals.

10. Respondent housed animals at a site without notifying APHIS of the location.

11. A storm interfered with the air conditioning system that cooled a building that housed animals owned by Respondent, and because the system did not correct itself and Respondent did not provide an alternate cooling system or verify the health of the animals, at least one animal died.

12. Respondent did not have a currently signed program of veterinary care on February 4, 2010.

13. A wooden frame surrounding the water tub in the bear enclosure was in disrepair.

14. The wooden horizontal support beam for the bear enclosure was cracked.

15. The vertical metal support next to the door of the skunk enclosure had exposed jagged edges that were accessible to animals.

IX. Conclusions of Law

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

2. Respondent did not timely file a request for a hearing in compliance with 9 C.F.R. § 2.11(b) and 7 C.F.R. § 1.141(a), and then orally waived its right to a hearing at a telephone conference with the presiding judge and opposing counsel.

3. Some material facts involved in this matter are not in dispute and the entry of summary judgment in favor of Complainant is appropriate with respect to the following matters:

(a) Respondent failed to provide access to APHIS officials attempting to inspect Respondent's property on six (6) occasions in violation of 7 U.S.C. § 2146 (a); 9 C.F.R. § 2.126.

(b) Respondent failed to make, keep and maintain records of the disposition of animals in violation of 9 C.F.R. § 2.75(b)(1).

(c) Respondent failed to promptly notify APHIS of an additional site where Respondent housed animals in violation of 9 C.F.R. § 2.8.

4. Respondent failed to handle animals as carefully as possible in willful violation of 9 C.F.R. §§ 2.131(b)(1), (e) when Respondent failed to promptly repair a malfunctioning air conditioner or provide alternate ventilation to a building housing animals, which led to the death of at least one animal.

5. Respondent failed to maintain a current, signed program of veterinary care in violation of 9 C.F.R. § 2.40 (a).

6. Respondent failed to maintain minimum standards for its facilities in violation of 9 C.F.R. § 3.125(a) in three instances:

(a) The frame around the water tub in the bear enclosure was in disrepair.

(b) The wooden horizontal support beam for the bear enclosure was cracked.

(c) The vertical metal support next to the door of the skunk enclosure had exposed jagged edges accessible to animals.

7. Complainant failed to establish that Respondent did not provide adequate veterinary care to a tiger and that allegation is dismissed.

8. Respondent's violations of the Act and regulations are willful.

9. In order to promote Respondent's compliance with the Act and regulations, Respondent's AWA license #58-C-0660 hereby is revoked.
10. Respondent is assessed a civil penalty of $10,000.00, payment of which is suspended until such time as Respondent or its officers, agents, employees, assignees, or successors conduct business requiring a license under the AWA, or apply for an AWA license.

11. Respondent shall have a period of ninety (90) days after the effective date of this Decision and Order in which to donate, sell or otherwise find housing for animals it wishes to de-acquisition before Respondent would be considered engaging in activity requiring a license under the AWA.

12. An Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

Respondent shall cease and desist violating the Act and its implementing regulations. Respondent's AWA license No. 58-C-0660 is hereby revoked, commencing on 90 days after the date that this Order becomes final. Respondent shall pay a civil money penalty of $10,000.00, which amount is suspended so long as Respondent, its officers, agents, employees, assignees, and successors neither engage in conduct subject to the licensing requirements of the AWA, nor apply for an AWA license. Respondent may have ninety (90) days from the date

this Decision and Order shall be effective to sell, donate, or otherwise find alternate housing for any animals it wishes to dispose of, without jeopardizing the suspension of the civil money penalty.

This Decision and 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.

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

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In re: JOSEPH D. GRABER & RHODA GRABER.
Docket No. 13-0197.
Decision and Order.
Filed August 9, 2013.

AWA.

Brian T. Hill, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

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 Respondents willfully violated the Act and the regulations and standards issued pursuant to the Act (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 by the Hearing Clerk on Respondents on April 1**,** 2013. Respondents were informed in the letter of service that filing an Answer which does not deny the material allegations of the Complaint shall constitute an

admission of those allegations and serve as a waiver of their right to an oral hearing. Respondents filed an Answer in which they substantially admitted the allegations within the Complaint.

There being no factual dispute of substance, no hearing is required and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondents Joseph Graber and Rhoda Graber are individuals whose mailing address is in [redacted].*

2. The Respondents, at all times material herein, were licensed and operating as a dealer as defined in the Act and the regulations.

3. On April 27, 2011, APHIS inspected Respondents' premises and found that they had failed to provide adequate veterinary care to a male Basset Hound.

4. On May 23, 2012, APHIS inspected Respondents' premises and records and found that they had failed to provide adequate veterinary care to 2 male Shih-Tzus.

5. On August 21, 2012, APHIS inspected Respondents' premises and records and found that they had failed to provide adequate veterinary care to at least 4 dogs resulting in at least one of them being euthanized.

6. On August 21, 2012, APHIS inspected the Respondents' facility and found the following willful violations of and the standards specified below:

    a. Housing facilities surfaces were not constructed and maintained in a manner that allowed them to be readily cleaned and sanitized, or removed and replaced when worn or soiled; and

* Redacted by the Editor to protect personally identifiable information under the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(b)(6).

b. Primary enclosures were not sanitized often enough to prevent excessive accumulation of dirt, debris, food waste, excreta, and other disease hazards.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents willfully violated section 2.40(b) of the regulations (9 C.F.R. § 2.40(b)) on the three occasions identified above.

3. Respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and sections 3.1(c) and 3.11(b) of the standards. (9 C.F.R. § 3.1(c) and § 3.11(b).

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 issued thereunder, and in particular, shall cease and desist from:

   (a) Failing to utilize adequate veterinary care;

   (b) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary; and

   (c) Failing to provide for the rapid elimination of excess waste from primary enclosures for animals.

2. The Respondents are jointly and severally assessed a civil penalty of $7,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondents' license is suspended for a period of one year and continuing thereafter until they demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the

Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

4. The provisions of this order shall become effective on the first day after this decision becomes final.

5. 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 and Order shall be served upon the parties.

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In re: HOPE KNAUST, STAN KNAUST, & THE LUCKY MONKEY, A PARTENRSHIP.
Docket No. 12-0552.
Decision and Order.
Filed November 15, 2013.

AWA.

Colleen A. Carroll, Esq. for Complainant.
John D. Nation, Esq. and Andrea L. Nation, Esq. for Respondents.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This matter is before the Administrative Law Judge upon the Motion of the Complainant for Summary Judgment.

This disciplinary action was commenced on July 26, 2012 by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service by filing a Complaint alleging that Respondents had violated the Animal Welfare Act, as amended (AWA or Act), 7 U.S.C. § 2131 *et seq.*, and the regulations and standards issued thereunder, 9 C.F.R. § 1.1 *et seq.* Copies of the Complaint were served upon each of the Respondents by certified mail on August 3, 2012.

An Answer was filed on behalf of all Respondents on August 22, 2012, fully admitting only the allegations identifying the Respondents, (but correcting the mailing address of Stan Knaust), and generally (except as discussed herein) denying the other allegations. On August 27, 2012, an Order was entered requiring the parties to file and exchange exhibit and witness lists and provide to the opposing side copies of any exhibits intended to be introduced at trial. The matter was set for hearing to commence June 4, 2013; however, subsequent to the date being set, the Complainant filed a Motion for Summary Judgment, suggesting that its motion might obviate the need for a hearing and moved to continue the hearing which had been set. On May 30, 2013, with the Motion pending before me, I ordered the hearing cancelled. After being given a brief extension of time, Respondents responded and the matter is now ripe for ruling on the Motion.

The Summary Judgment Standard

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *In re Bauck*, [1] 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987).

While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing FED. R. CIV. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also In re Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim.

[1] *See* Bauck, 68 Agric. Dec. 853, 858-59, nn.6 & 7 (U.S.D.A. 2009) (where the use of summary judgment is discussed in a variety of cases).

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

If a moving party supports its motion,[2] the burden shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial. *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler* 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts, on speculation or suspicions, and may not avoid summary judgment on a hope that something may show up at trial. *Conaway v. Smith*, 853 F2d. 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 158-59 (1970); *Anderson*, 477 U.S. at 254. Although the Respondents filed a Response to Complainant's Motion for Summary Judgment, the Response is abysmally devoid of the type of supporting documentation discussed above, except for references to the Affidavit of Hope Knaust which was prepared not by her attorney, but rather by Morris Smith, an Investigator with USDA's Investigative & Enforcement Service as part of the investigation.

As discussed in *Anderson*, the judge's function is not himself to weigh and determine the truth of the matter but to determine whether

[2] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. The standard to be used mirrors that for a directed verdict under FED. R. CIV. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943), *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Formerly it was held that if there was what was called a scintilla of evidence, a judge was obligated to leave that determination to a jury, but recent decisions have established a more reasonable rule that in every case the question for the judge is not whether there is literally no evidence, but whether there is any upon which the jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872). While administrative proceedings typically do not have juries, the rule's application remains applicable for a judge sitting as a fact finder performing the same function.

Discussion

Applying the foregoing standard to the evidence before me, it is necessary to determine whether the Respondents have established the existence of genuine issues of material fact as to each of the allegations addressed in Complainant's Motion. An evaluation of the evidence supporting the allegations contained in the Complaint follows.

The first three paragraphs of the Complaint deal with the identity of the parties and contain no substantive allegations of violations. Aside from correcting the mailing address of Stan Knaust, Respondents admitted the allegations. The fourth paragraph referred to Respondents' option as a zoo which Respondents denied, despite the fact that the term zoo is included in references contained in the record to the "Lucky Monkey Patting Zoo" and the Application for License Renewal signed by Hope Knaust dated June 11, 2009 which has a check for zoo in block 7. CX-1 at 3. Given that the Animal Welfare Act license granted is a Class C license for an exhibitor, the exact characterization of the

business itself is not material to the allegations and resolution of any semantic disagreement is not required. CX-1 at 2, 5, 7, & 10.

Paragraph 5 of the Complaint alleged that on or about February 11, 2008 Respondents willfully violated 9 C.F.R. § 2.100 of the Regulations by failing to enclose a zebra in an enclosure having a perimeter fence not less than six feet high as required by 9 C.F.R. § 3.127(d). In paragraph 3 of the Statement of Undisputed Facts in Support of Complainant's Motion for Summary Judgment (hereafter referred to as Statement),[3] Complainant referred to the Inspection Report prepared by Animal Care Inspector Don Fox (CX-65) as well as the Respondents' Answer, which indicated: "When the zebra was a baby, the wall was four feet high. As the animal grew, Respondents built a six-foot [high] enclosure." Answer ¶ 5, Docket entry 4.

Perimeter fence requirements are set forth in 9 C.F.R. § 3.127(d), which provides in pertinent part:

> (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…., or **less than 6 feet high for other animals** must be approved by the Administrator.

9 C.F.R. § 3.127(d) (emphasis added).

The Answer admits that the fence was only four feet high and there is no assertion or indication that the Administrator's approval was obtained for a fence less than 6 feet high. Accordingly, a violation is established as to this allegation. CX-4, 7, and 65.

Paragraph 6 of the Complaint alleges that on or about February 10, 2010, Respondents failed to employ an attending veterinarian under formal arrangements, as required, in willful violation of 9 C.F.R. § 2.40(a)(1), and specifically Respondent's arrangements did not include a

[3] Docket Entry No. 16.

current written program of veterinary care with regularly scheduled visits to the facility, none having been made to the facility since sometime in 2008,[4] a period well in excess of a year. Respondents denied the allegation in their Answer, claiming that David Snyder, DVM was the attending veterinarian and believed that he had come to the facility in 2008 for an on-site visit. Answer ¶ 6; Docket entry 4. While Respondents may have considered Dr. Snyder to have been their attending veterinarian, merely entertaining such a belief is not sufficient. *See Conaway*, 853 F2d. at 7899. C.F.R § 2.40(a)(1) requires that in the case of a part-time attending veterinarian or consultant, formal arrangements "shall include a written program of veterinary care and regularly scheduled visits to the premises…." The affidavit of Hope Knaust (CX-7) indicates that Don Fox cited her for not having a written program of veterinary care (PVC) and she was given a week to get a veterinarian and to have the PVC signed.[5] It is thus abundantly clear that at the time of the inspection, a current written program of veterinary care did not exist and formal arrangements had not been reduced to writing. CX-4, 5. The interview of Dr. Snyder confirmed that he last signed a PVC for the facility in 2008 and had not visited the facility, except possibly to sell it some hay in 2009.[6] The protracted hiatus between his professional visits cannot be considered sufficiently regular to comply with the intent of the Regulation to insure adequate veterinary care. Accordingly, the violation has been established.

The Complaint also alleges recurring violations of the same regulation on or about February 17, 2010 (Paragraph 10), February 23, 2010 (Paragraph 12), March 4, 2010 (Paragraph 15), and May 3, 2010 (Paragraph 18). Even without considering the observations recorded in the Inspection Reports,[7] Hope Knaust's affidavit admits the violations on February 10, 2013 and February 17, 2013, by indicating that they were waiting for Dr. Snyder to make a visit to the facility.[8]

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[4] Knaust "thought" that Dr. Snyder had been to the facility in 2009. CX-7 at page 2. Dr. Snyder did confirm that he had sold the facility some hay in 2009 and presumably had been there to deliver the hay. CX-6.

[5] CX-7 at 2.

[6] CX-5 and 6.

[7] CX-2, 9, 13, 25 and 61.

[8] Dr. Snyder did go to the facility at some point before February 19, 2010 but did not go to the residence as he could see from the driveway that the animals were in deplorable shape. CX-6.

> Regarding the PVC, I told Don [Fox] we were still waiting for Dr. Snyder to come out and inspect the property. Dr. Snyder told Stanley he was coming on 02/17/10. Apparently Don went and talked to Dr. Snyder and he told Don he was not going to be our vet. Dr. Snyder called Stanley the next day, on 2/18/10 and said he could not pass or sign our vet plan….

CX-7 at 5.

The violation on February 23, 2010 is also admitted:

> Again, I was first again cited for not having a written program of veterinary care. It is true that Don Fox cited this on his inspection reports dated, 02/10/10 and 02/17/10. I did not know until 03/19/10 that Dr. Snyder was refusing to come back out….[9]

CX-7 at 8.

The same extract implicitly admits the violation on March 4, 2010. The affidavit goes on to relate the inability to secure the services of a veterinarian and that the arrangements for the services of Dr. Tim Holt were not made until March 4 or 5, 2010.[10]

Despite Respondents' professed belief that Dr. Snyder continued to be their veterinarian, the record establishes that Dr. Snyder had advised Stanley Knaust that he could not sign the PVC and was terminating any relationship with the facility prior to February 19, 2010. CX-6. Moreover, a letter dated February 19, 2010 received by APHIS on February 22, 2010 from Dr. Snyder makes it abundantly clear that he had no intention of serving in that capacity for the facility. CX-11. Indeed,

[9] Dr. Snyder had communicated his intention not to continue as the facility's veterinarian to Stanley Knaust; however, if Hope Knaust's affidavit is to be given credence, Stanley Knaust apparently failed to share that critical information with her. CX-6.

[10] CX-7 at 13. Hope Knaust contacted Dr. Holt on March 4, 2010, but he did not visit the facility until March 5, 2010. Even after his visit to the facility, no PVC was adopted. CX-61.

his letter expressly indicated that he could not endorse renewal of their license, citing pain, suffering, and lack of feed concerns and indicating that the operation lacked manpower and funding to keep the animals in a satisfactory health status. Given his five year relationship with the facility, his observation concerning the severe deterioration of conditions at the facility which is consistent with that expressed by Inspector Don Fox lends significant credence to the serious allegations concerning the failure of the Respondents to adequately provide for the welfare and care of the animals at their facility. CX-4, 6, 11.

Paragraph 7 of the Complaint alleges that on or about February 10, 2010, Respondents failed to have an attending veterinarian and to provide adequate veterinary care to a camel in willful violation of 9 C.F.R. § 2.40(a),(b)(2). Respondents denied the allegation, indicating that the animal had been taken to the veterinarian just prior to the date alleged and treated. Answer ¶ 7. Hope Knaust's account that the animal was treated prior to the February 10 inspection appears to be refuted by Dr. Snyder's statement that the camel was not brought to his clinic until February 11, 2010.[11] Moreover, as his account confirms that the camel required veterinary intervention, the violation is established. Because the camel was taken to the vet on February 11, 2010 and received care, I will decline to find a repeat violation as to the camel on February 23, 2010 as alleged in Paragraph 13. Hope Knaust's affidavit attempts to minimize the need for veterinary intervention as to the other animals; however, the Inspection Report prepared by Don Fox and the affidavit of Dr. Jones support the existence of the other violations alleged on this date.[12] Repeat violations were cited on March 4, 2010 for the capybara, a kangaroo and two fallow deer. Absent any factual evidence that the animals were treated, the violations are established. CX-50, 51, 52, 54 and 55. *Cf. Anderson*, 477 U.S. at 242. *See also Adler*, 144 F.3d at 671.

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[11] CX-6. It should be noted that Respondents failed to provide evidence of any earlier veterinary treatment if in fact such treatment had occurred as would be required under *T. W. Electric*, 809 F.2d at 630, *Muck*, 3. F.3d at 1380, *Anderson*, 477 U.S. at 242, and *Adler*, 114 F.3d at 671.

[12] Hope Knaust's affidavit references an opinion purportedly given by Dr. Holt (CX-7 at 9); however, he was not contacted until March 4, 2010 and would not have seen the animals until the following day. CX-7 at 13 & 17. The lack of adequate veterinary care was confirmed when the animals were subsequently examined and treated following their confiscation by APHIS on March 5, 2010. CX-50, 51, 52, 54, & 55.

Paragraph 8 of the Complaint alleges that on or about February 10, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of animals, as required, in willful violation of 9 C.F.R. § 2.75(b). Respondents' Answer denies the allegation, but Hope Knaust's affidavit inconsistently states that the records were "immediately" corrected on the date of the inspection. Answer, ¶ 8, CX-2. Given that the affidavit concedes that corrections were made, Respondents have admitted the existence of deficiencies and the violation. While the curing of a violation may mitigate, or in some circumstances entirely obviate the need for a penalty, it does not alter the fact that a violation occurred. *See In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (U.S.D.A. 1997).

Paragraph 9 of the Complaint alleges that on or about February 10, 2010, Respondents failed to meet the minimum general facility standards of 9 C.F.R. §§ 3.125, 3.127, and 3.75 in willful violation of 9 C.F.R. § 2.100(a). Respondents' Answer contains a denial averring that the facilities had been cleaned consistent with existing seasonal conditions. Answer ¶ 9. Hope Knaust's affidavit admits the existence of uninstalled cabinets in the primate building, the fencing violation for the camel and Axis deer fences, the failure to have a heat source for the capyberas which was corrected the same day and the lack of shelter for the eight alpacas. CX-7. The affidavit affirms the content of the Answer and will be considered sufficient to reasonably raise a genuine issue of material fact as to the remaining violations, and additional evidence will be required if the other violations are to be established as has been alleged.

Additional standards violations are contained in Paragraphs 11, 14, 17 and 20 for the inspections conducted on February 17, February 23, March 4, and May 3, 2010.[13] Hope Knaust's affidavit admits certain of the violations cited on February 17, 2010, including the existence of tools in the food storage building, and the fact that the facility's only full time employee had departed and not been replaced, leaving the burden for caring for the significant number of animals primarily upon her, with only limited assistance from Stanley Knaust who no longer resided on the premises.[14] CX-7.

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[13] CX-9, 13, 25, & 61.

[14] Respondent's Answer ¶ 2. Dr. Snyder commented on the deterioration at the facility after "Stanley and Hope split up." CX-6.

The same insufficiency of staff was again cited on February 23, 2010, however, Hope Knaust's affidavit indicates that by that date a number of the animals had been sold and a new employee had been hired. While the affidavit admits the existence of the horse carcass, it indicates that the animal had died only the night before and that the inspectors arrived before they had had time to remove it. The February 23, 2010 Inspection Report also cited Respondents with failing to provide sufficient food for the animals. CX-13. Respondents deny the allegation; however, given the malnourished condition of the animals confiscated on March 5, 2010, the only logical conclusion that can be reached is that they were not being fed adequate amounts of feed. CX-50, 51, 52, 54, 55, & 112.

The violations cited on March 4, 2010 include an allegation that the primate structure was not constructed in a manner to provide adequate heat. That allegation appears to be inartfully focused as the evidence indicates that rather than the problem being in the structure's construction, it was the lack of fuel for the heating element which had to be replenished to raise the temperature to an acceptable level. Hope Knaust's affidavit admits that a pig and llama had escaped their enclosures and that the llama shelter violation was corrected that day. CX-7. The other violations are contested and I will decline to find that those have been established. The failure to provide sufficient food was also cited and will again be established by the examination of the animals following their confiscation on March 5, 2010. CX-50, 51, 52, 54, 55, & 112.

The Respondents failed to submit any factual evidence concerning the violations cited in the May 3, 2010 or September 7, 2010 Inspections, and in their Response to the Motion rely solely upon pleadings. *See T. W. Electric*, 809 F.2d at 630. Consistent with the burden shifting requirements set forth in *T. W. Electric, Muck, Anderson* and *Adler*, as discussed *supra*, the violations cited on those dates will be deemed established.

The above discussion and the evidence in the record compel the only possible conclusion as being that the Respondents lacked sufficient resources both in funding and personnel for continued operation or correction of the conditions at the facility. The conditions observed reflect an appalling lack of adequate and necessary veterinary care or

husbandry practices despite repeated citations, serious overall deterioration in the standard of care of the animals and the physical facilities themselves and repeated deficiencies at the facility not existing previously during prior observations. The seriousness of the conditions at the facility ultimately resulted in confiscation of certain of the animals at the Respondents' facility on March 5, 2010, including Hobo, a monkey that provided Hope Knaust with her main source of income.[15] The subsequent evaluation of those animals reflects unacceptable neglect in their care, with many observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites. CX-50, 51, 52, 54, & 55.

The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, 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.

S.S. Farms Linn County, 50 Agric. Dec. 476, 497 (1991).

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.[16] While

[15] Confiscation was undertaken under 7 U.S.C. § 2146 which permits confiscation of any animal "found to be suffering as a result of a failure to comply with any provision" of the Act "or any regulation or standard issued thereunder."

[16] Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); Williams, No. 04-0023, 64 Agric. Dec. 364, 390, 2005 WL 1649011 (U.S.D.A. June 29, 2005) (Decision as to Deborah Ann Milette); George A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug 31, 2004); Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), *enforced as modified*, 397 F. 3d 1285 (10th Cir. 2005); Bourk, No.

the Complainant asked for a civil penalty in addition to revocation of Respondents' license, I will decline to do so, finding that such an imposition is unnecessary under the circumstances, given the confiscation of certain of the animals, and the sanctions imposed herein. On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Hope Knaust and Stanley (Stan) Knaust are individuals residing in the State of Texas and are partners operating The Lucky Monkey, a general partnership also sometimes known as The Lucky Monkey Petting Zoo. Hope Knaust lives at the facility in Terrell, Texas. Stanley Knaust lives in Irving, Texas.

2. Hope and Stan Knaust hold a Class C Exhibitor's Animal Welfare Act License No. 74-C-0388. CX-1.

3. On or about February 11, 2008, Respondents failed to enclose facilities for a zebra with a fence not less than six feet high. Answer ¶ 5; CX-4, 65.

4. Inspections of the partnership facility conducted on February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010 established that Respondents failed to employ an attending veterinarian under formal arrangements, that their arrangements with their part-time veterinarian did not include a current written program of veterinary care, that regularly scheduled visits had not been made by the veterinarian and that the veterinarian had not conducted an on-site visit to the facility since 2008. The violations continued until at least May 5, 2010. CX-2, 4, 5, 6, 7, 9, 13, 25, & 61.

5. On February 10, 2010, Respondents failed to provide adequate veterinary care to a camel with extensive hair loss and visibly red and irritated skin, later diagnosed to have external parasites and a secondary infection. CX-2, 4, & 6.

01-0004, 61 Agric. Dec. 25, 49, 2002 WL 10518 (U.S.D.A. Jan. 4, 2002) (Decision as to Steven Bourk and Carmella Bourk).

6. On or about February 10, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of the animals at the facility. Upon being apprised of the deficiency, the records were corrected that same day. CX-2, 4, 7.

7. On or about February 10, 2010, Respondents' nonhuman primate building contained uninstalled cabinets, the enclosure housing the camel and Axis deer were in disrepair, the enclosure for the capyberas lacked a heat source, and the enclosure for eight alpacas lacked adequate shelter. A heat source was provided for the capyberas that same day. CX-2, 7.

8. On or about February 17, 2010, Respondents food storage building contained tools and Respondents failed to employ a sufficient number of trained personnel to care for the nonhuman primates and to provide minimally acceptable husbandry to the other animals. CX-4, 7, 9, & 10.

9. On or about February 23, 2010, Respondents failed to provide adequate veterinary care to a capybara, a kangaroo, two fallow deer, and a sheep. CX-13. The failure to provide adequate veterinary care to the capybara, kangaroo, and the two fallow deer continued at least until March 4, 2010. CX-25, 50, 51, 52, 54, & 55.

10. On or about February 23, 2010, Respondents' food storage building contained clutter, Respondents failed to provide sufficient food for the animals, and failed to remove a bloated equine carcass from the area adjacent to the llama enclosure. CX-7, 13, 14, 50, 51, 52, 54, & 55.

11. On or about March 4, 2010, Respondents failed to adequately maintain fencing in an adequate state of repair, allowing a pig and llama to escape their enclosures, failed to provide sufficient food for the animals, and failed to provide adequate shelter from inclement weather for llamas. CX-7, 25, 50, 51, 52, 54, & 55.

12. Conditions observed on March 4, 2010 resulted in confiscation of certain animals by APHIS on March 5, 2010. Subsequent examination of the animals reflected unacceptable neglect in their care, with many being observed as being malnourished, and requiring immediate veterinary care for anemia, lice and parasites, CX-50, 51, 52, 54, & 55.

13. On or about May 3, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of animals at the facility. CX-61.

14. On or about September 7, 2010, Respondents failed to provide APHIS officials access to the facility. CX-39.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents violated 9 C.F.R. §§ 2.100(a) and 3.127 by failing to enclose a zebra in an enclosure with a fence not less than six feet high.

3. Respondents violated 9 C.F.R. § 2.40(a)(1) of the Regulations by failing to employ an attending veterinarian under formal arrangements, their arrangements with their part-time veterinarian did not include a current written program of veterinary care, and regularly scheduled visits had not been made by the veterinarian.

4. Respondents violated § 2.40(b)(2) of the Regulations by failing to provide adequate veterinary care to their animals visibly exhibiting the need for veterinary intervention on February 10, 2010, February 23, 2010 and March 4, 2010.

5. Respondents violated 9 C.F.R § 2.75(b) on February 10, 2010.

6. Respondents' facility failed to meet the minimum Standards on February 10, 2010, specifically 9 C.F.R §§ 3.75, 3.125, and 3.127(b).

7. Respondents' facility failed to meet the minimum Standards on February 17, 2010, specifically 9 C.F.R §§ 3.75(b), 3.85, and 3.132.

8. Respondents' facility failed to meet the minimum Standards on February 23, 2010, specifically 9 C.F.R §§ 3.129 and 3.131(c).

9. Respondents' facility failed to meet the minimum Standards on March 4, 2010, specifically 9 C.F.R §§ 3.75(b), 3.75(e), 3.125(a), 3.127(b), and 3.129.

10. Respondents violated 9 C.F.R § 2.75(b) on March 4, 2010.

11. Respondents violated 7 U.S.C. § 2146(a) and 9 C.F.R § 2.126 on September 7, 2010.

12. Except as provided herein, genuine issues of material facts exist as to the other violations alleged in the Complaint.

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 or the Regulations and Standards issued thereunder.

2. AWA License Number 74-C-0388 is revoked. Revocation will be deferred and become effective ninety (90) days after this decision becomes final to allow Respondents to transfer or dispose of any animals they elect not to keep for personal enjoyment.

3. This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

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

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In re: DAVID DeMARCE & SHERRY CARNEY.
Docket No. 12-0465.
Decision and Order.
Filed November 25, 2013.

AWA.

Petitioners, pro se.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

The above-captioned matter involves a petition for review of the denial of a license by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Respondent"), filed by David DeMarce and Sherry Carney ("Petitioners"). Petitioners contend that APHIS' decision to deny them a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), was unfounded.

The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

I. Issues

1. Whether Respondent's determination denying Petitioners a license under the Act should be upheld.

II. Statement of the Case

1. *Procedural History*

[1] In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]." Petitioners' evidence shall be denoted as "PX-[exhibit #]" and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record *sua sponte* shall be denoted as "ALJX-[exhibit number]".

On June 8, 2012, Petitioners filed a request for review of a determination issued on May 23, 2012, which denied their application for a license under the Act. On July 9, 2012, Respondent filed a response to the petition, maintaining that a hearing was not necessary, and proposing disposition of the matter by summary judgment. By Order issued July 13, 2012, I directed the Petitioners to show cause why a Decision should not be issued on the record and directed Respondent to file evidence. On July 24, 2012, Petitioners responded with their reasons for holding a hearing. Petitioners also filed a request for subpoena, to which Respondent objected. Respondent requested an extension of time to submit its documents, and I granted the motion by Order issued August 1, 2012.

On August 12, 2012, Respondent filed a motion for summary judgment, with supporting documentation. On September 5, 2012, Petitioners requested additional time to respond to the motion, which I granted by motion filed September 7, 2012. Petitioners requested additional time by motion filed September 27, 2012. On October 17, 2012, I issued an Order deferring ruling on Respondent's motion pending Petitioner's filings.

On December 12, 2013, Petitioners moved to withdraw from the appeal, but the pleadings were not clear, and I held a telephone conference with the parties. At the conference, Petitioners made it clear that they did not have too much evidence, but wanted the reasons for the license denial explained to them. A hearing date was set, but for reasons beyond the parties' control, was continued to August 13, 2013. The parties filed supplemental submissions, and convened on the scheduled date. The hearing commenced by audiovisual connection between Somerset, New Jersey, where I attended; Washington, D.C.; and Atlanta, Georgia.

At the hearing, I admitted to the record Respondent's exhibits, most of which were filed with the motion for summary judgment. I entered RX-1 through RX-25 to the record. I admitted all written submissions from Petitioners. Testimony was given by several witnesses for Respondent and Petitioners made statements under oath. I advised the parties that the written brief in support of summary judgment submitted by Respondent's counsel and Petitioners' statements would serve as

closing argument. I closed the record, except for the entry of the transcript of the hearing, which has been received and is of record.

2. *Statutory and Regulatory Authority*

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); FED. R. CIV. P. 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

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

Pursuant to 9 C.F.R. § 2.11(a), a license shall not be issued to any applicant who:

> (5) Is or would be operating in violation or circumvention of any federal, State or local laws; or (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department of other government agencies, or has pled *nolo contendre* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §§ 2.11(a)(5) and (6).

3. *Summary of the Evidence*

A. *Documentary Evidence*

RX-1 Affidavit of Sam O'Neal

RX-1(a) Copy of Georgia Statute O.C.G.A. § 27-5-4

RX-2 Sample Special Permit Unit ("SPU") wild animal license application

RX-3	Information about and sample SPU license renewal forms
RX-4	SPU license for Sherry Carney d/b/a Fascinating Felines ("Carney")
RX-5	SPU license for Carney
RX-6	SPU renewal application from Carney dated 3/28/2011
RX-7	Notice of deficiency from SPU to Carney
RX-8	Dempsey Inspection Report
RX-9	Notice of State License denial
RX-10	Decision and Order of State Administrative Law Judge
RX-11	Order of State Superior Court
RX-12	Request for Admissions and discovery
RX-13	Records from Carroll County Animal for Carney
RX-14	Duplicate copy of SPU license ending 3/31/2011
RX-15	SPU Application from David DeMarce
RX-16	Copy of APHIS AWA license (date indecipherable)
RX-17	Affidavit of Sherry Carney
RX-18	APHIS letter dated 8/27/2010 denying Carney renewal application
RX-19	Carney letter dated 9/13/2010 requesting reconsideration by APHIS
RX-20	APHIS letter dated 9/29/2010 denying reconsideration

RX-21	Carney application for AWA license dated 11/8/2010
RX-22	APHIS denial dated 2/22/2011 and letter from Carney dated 4/7/2011
RX-23	Responses to Request for Admissions and certificates of service
RX-24	Declaration of Elizabeth Goldentyer
RX-25	Decision of Georgia Court of Appeals
RX-26	Copy of Docket Sheet
PX-1	Letter denying application for an exhibitor's license, dated 5/23/2012

B. *Testamentary Evidence*

Lieutenant Sam O'Neal (Tr. at 22-75)

Lt. O'Neal works in the Law Enforcement Division of the State of Georgia's Department of Natural Resources ("DNR"). His primary duties are to investigate matters involving the state's resources, including wildlife. His duties include reviewing special licenses for people to breed or exhibit exotic animals, which he defined as animals that are not indigenous to Georgia. Individuals may possess such animals only after approval of a license application. Licensees are required to keep records of acquisition and disposition of animals, and inform the DNR of the addition or disposal of animals.

The DNR does not routinely inspect premises of licensees, but does conduct an inspection before licensing and when licensees seek to add a different species to their inventory of animals. However, when the Law Enforcement Division of the DNR assumed responsibility for special licenses in September, 2010, it decided to inspect all licensees. Petitioner Carney held a wild animal license at that time, and her facility was inspected by Corporal (now Sergeant) Rick Dempsey. Sgt. Dempsey

reported that records were not complete and the facility did not meet standards for security. Two lynx, a caracal and a serval were present. There was no evidence of breeding, and there was evidence that the animals were at times kept in a residence, and not in a secured enclosure. In cases where people hold licenses as breeders, the State would expect to see offspring in years following the issuance of the license.

Sgt. Dempsey consulted Lt. O'Neal and inspectors from USDA, and DNR concluded that a search warrant was warranted to see what other animals were on Ms. Carney's property. The search warrant was executed in November, 2011, and the four cats were present. All but one of the cats was male, and they were all housed in separate enclosures. The DNR investigators concluded that no breeding was taking place, and the cats were confiscated. In addition, Ms. Carney did not have a valid license because she did not have a valid AWA license from USDA. Ms. Carney was cited for having animals without a license, because her license had not been renewed. Another citation was issued for failing to secure animals properly. They were in a chain link enclosure without a lock securing a gate.

Lt. O'Neal explained that even if Respondent had a valid USDA license, her Georgia license had expired, and would not have been renewed, because she was obviously not breeding or exhibiting animals. There was no documentation or pictures of offspring, and nothing to show that offspring had been sold or otherwise transferred since Ms. Carney's license was issued in 1999. There was no documentation of exhibitions, or any evidence showing that Respondent had a business exhibiting the animals. Lt. O'Neal concluded that the cats were Ms. Carney's pets, which is against Georgia law.

Lt. O'Neal also testified that there were discrepancies in Ms. Carney's application for Georgia license renewal dated March 28, 2011, which listed that she had three lynx and a caracal. When the premises were inspected in July, 2012, two lynx, a caracal and a serval were on site. There was no record that Ms. Carney had notified the DNR that a lynx had died or that she had acquired a serval, though she admitted these facts to Sgt. Dempsey. Individuals with licenses are required to notify the state within a reasonable time of the birth or acquisition of an additional animal, and also of the disposition of an animal by any means.

Sergeant Rick Dempsey (Tr. at 77-110)

Sgt. Dempsey was recently promoted from Corporal, which was his rank when he conducted his inspection of Petitioners' location. He conducted 37 inspections of licensees when the Law Enforcement Division took over the responsibility for wild animal licenses, including Ms. Carney's facility. Sgt. Dempsey and a wildlife technician visited Ms. Carney on July 28, 2011. He had no previous knowledge of her or Mr. DeMarce. When he arrived at Ms. Carney's facility, Sgt. Dempsey saw two lynx and a serval in an unlocked enclosure made of tall chain link fencing next to a garage. He saw a caracal on cement in an enclosure under a carport. Mr. DeMarce answered the door to Sgt. Dempsey's knock, and advised that Ms. Carney was at work. Sgt. Dempsey noted on an inspection report that the fence was not locked, and he made arrangements to meet with Ms. Carney on another day.

When he met with Ms. Carney, Sgt. Dempsey had with him a copy of her application for renewal that was due on March 31, 2011. It was dated March 28, 2011, but received by the DNR on April 22, 2011. The animals owned by Ms. Carney were listed on the application as two male and one female lynx and one male caracal. At his inspection, Sgt. Dempsey found two male lynx, one male caracal and a female serval. When he met with Ms. Carney, she told him that her female lynx had died, but did not say when. Ms. Carney said that she had obtained the serval from an individual in October, 2010. She did not have a current Georgia wild animal license or an APHIS AWA license, but she said that the APHIS license was pending.

Sgt. Dempsey consulted with the wildlife technician when he completed the inspection report he prepared, and both signed it. He was particularly concerned that he had found the animals' enclosure unsecure and accessible by anyone. He also was concerned that Ms. Carney had no documentation about the lynx' death, or records of births, and had not reported ownership of the serval. He thought the serval did not look well, but Ms. Carney assured him that it liked to be alone.

Sgt. Dempsey reported his findings to Lt. O'Neal, and they decided to issue a search warrant to look for records and to seize the animals, as

they had not been kept in a secure enclosure. Sgt. Dempsey was not concerned that Ms. Carney did not have a USDA license because he believed she had not met requirements for a Georgia license. He never did see records or documentation to support that Ms. Carney had exhibited or bred the animals. He did see photographs of the animals that appeared to be taken in Ms. Carney's residence, and she told him she considered them her "babies". He concluded from her statements that the cats were Ms. Carney's pets. The Georgia rules prohibit exotic animals from being in a residence.

Sgt. Dempsey was not aware that an employee of the DNR had advised Ms. Carney that her Georgia license renewal application was being held pending the results of the USDA application. In Sgt. Dempsey's opinion, the fact that the enclosure that held the cats was not locked made it an unsecure enclosure within the definition of the law. He recalled that Ms. Carney had told him that one of the cats had had kittens, which had died, but he could not say whether it was the lynx or the serval.

Rhudy Ralph Ayers (Tr. at 114-137)

Mr. Ayers had worked as an inspector for USDA for 37 years until his retirement in January, 2013. He routinely inspected Petitioners' facility and had never found problems with their care of animals. Ms. Carney did not have an exhibitor license, but he could not recall what class dealer license she held. His last inspection was conducted about one year before the Georgia inspection took place. He generally found the facility locked, and usually had to call Ms. Carney to let him in. He did not recall any complaints about Petitioners' facility. Mr. Ayers was not familiar with Georgia's requirements for issuing state licenses. He had a good relationship with Georgia inspectors at one time, but the relationship had eroded sometime before he retired. No one from Georgia contacted him about Petitioners, and he was not aware if anyone else with USDA had been consulted by Georgia officials.

Mr. Ayers was aware of other facilities that held a Georgia license but no USDA license. He recalled talking with Ms. Carney about serval kittens dying or being bottle fed in another state, but he could not remember the conversation. He wrote an email to other USDA

employees about the serval kittens, and Mr. Ayers confirmed that whatever he said at that time would have accurately reflected his understanding of the situation at that time. He had reported seeing a serval at Petitioner's facility on his last inspection, but no kittens. He never saw veterinary documentation of the birth of kittens. Mr. Ayers confirmed that lynx don't always breed well, particularly in cold weather.

Mr. Ayers explained that he conducted inspections by applicants for APHIS AWA licenses, and in his experience, if applicants passed the inspection, their applications were approved. He was not involved in making the decisions regarding approving licenses or license renewals. Mr. Ayers did not conduct an inspection in conjunction with the license application that APHIS had denied. He did not know why Petitioners' license application was denied, but was aware that they had applied for an exhibitor's license in 2010 or 2011.

Elizabeth Goldentyer (Tr. at 141-162: RX-15)

Dr. Goldentyer has been the Regional Director, Animal Care, Eastern Division for APHIS since 1997. RX-15. Dr. Goldentyer testified that Petitioners' April 26, 2012, application for an exhibitor's license was denied because Petitioners were not abiding by Georgia law and because Ms. Carney made false statements in the license renewal application she filed with the State of Georgia. Ms. Carney did not provide accurate information about the animals she owned. Dr. Goldentyer was aware that the State had denied her state license in part because she did not have a USDA license. Dr. Goldentyer had been provided a transcript of a Georgia court proceeding in which Ms. Carney had admitted that she had failed to report her acquisition of a serval. In addition, Dr. Goldentyer relied upon emails from Mr. Ayers which she thought showed that Ms. Carney had lied about having kittens bottle fed out of state, because Ms. Carney admitted in later statements that kittens had died. Neither births nor deaths were reported to the State or USDA. The witness was not aware of the conclusions of a pre-approval inspection of Ms. Carney's premises by USDA inspectors.

After Ms. Carney's license application was denied, Mr. DeMarce applied for licenses in his name, which APHIS denied. Petitioner

DeMarce could not demonstrate that he was engaged in activity for which an AWA license would be issued. Dr. Goldentyer also took issue with the fact that Petitioner used various business names on the applications, which she found was not an ordinary business practice.

Petitioner Carney's AWA breeder's license had expired in the summer of 2010 because she had not timely applied for renewal. According to USDA regulations, if a licensee fails to renew a license, it is cancelled, and the licensee would need to apply for a new license. Ms. Carney had then applied for a new license as a dealer, but she was not approved because she was not engaged in breeding or dealing business activity.

Dr. Goldentyer acknowledged speaking with Ms. Carney about her applications on several occasions, but did not recall advising her that she should apply for an exhibitor's license or get a pair of breeding servals. The witness stated that USDA issued licenses to businesses where appropriate. She stated, "It's a matter of what you're actually doing. It's not a matter of trying to find a way to get a license." (Tr. at 146). Dr. Goldentyer testified that some businesses have licenses to broker and transport animals, but are not breeders. However, if the stated purpose of a business is breeding, and there is no breeding taking place, then a license would not be approved.

Dr. Goldentyer did not know whether a ruling by the Superior Court of Georgia would have returned Ms. Carney's cats to her if she had been able to secure her USDA license.

Sherry Carney (Tr. at 163-171)

Ms. Carney testified that Dr. Goldentyer had advised her to get a breeding pair of servals, and she went to Florida and brought back a female who was pregnant. The kittens all died. Ms. Carney asserted that she told Mr. Ayers that they had died. After she read statements he had written, Ms. Carney called him to dispute his remarks about kittens being bottle fed. Mr. Ayers agreed that he may have misheard her. Ms. Carney further testified that she was attempting to breed her cats, but Canadian lynx are difficult breeders. She was saving to purchase a female caracal, and meanwhile hoped to breed the serval with the male caracal. She

thought that the serval may have been pregnant when the cats were confiscated, because the cat had gained weight.

Ms. Carney explained that although her fences are not locked, they are latched, and cannot be opened by animals. She admitted that people could gain access to the animals. However, she explained, a gate that gives access to her driveway is usually locked, which prevents people from getting near the animals.

Ms. Carney testified that she inadvertently left the serval off of her application. She also did not know that she needed to inform state officials about animal deaths and acquisitions. She did not consider the omissions outright falsehoods. Ms. Carney told Brooke Smith of the DNR that she had applied for an APHIS AWA exhibitor's license, and Ms. Smith agreed to hold her Georgia application pending USDA's approval.

Ms. Carney had no warning that the State would confiscate her cats, and she learned that two of them have since died. She believed that if USDA had worked with her and issued her a license, her cats would not have died.

David DeMarce (Tr. at 171-176)

Mr. DeMarce did not understand why his applications for an AWA license from USDA were not approved. He believed that he and Ms. Carney were unfairly treated, and that despite a good record of caring for animals, their animals were confiscated and given to a facility that had been cited with many violations of the AWA. He did not think that Ms. Carney's recordkeeping violations should have resulted in confiscation of the animals. He further believed that he and Ms. Carney should have been given notice of the confiscation and been allowed an opportunity to place the animals with facilities that they were familiar with. Mr. DeMarce was concerned that there appeared to be little regard for the welfare of the confiscated animals.

III. Discussion

The preponderance of the evidence before me demonstrates that Petitioners made good faith, but ultimately unsuccessful, efforts to breed exotic cats under the auspices of a valid State license and a valid APHIS AWA dealer license. I fully credit Ms. Carney's testimony that a serval she brought from Florida gave birth to kittens that died. It is consistent with an affidavit she signed on May 11, 2011, and with her answers to discovery. *See* RX-17 and RX-23. I give limited weight to the testimony of Mr. Ayers about kittens being bottle-fed, as his recall was not reliable and he admittedly has a hearing impairment. I credit his testimony that Petitioners' animals were well cared for, as he had inspected the premises many times in the fifteen or so years that Ms. Carney held a license.

Despite the evidence of breeding efforts, Ms. Carney allowed her original APHIS AWA dealer license to lapse, and it became clear that applications for a new dealer license would not be approved by USDA. *See* RX-18 through RX-23. At the same time, Petitioners were subjected to an inspection of the cats' housing by the State DNR, which was an unusual event. Discussions with the state inspectors brought the need for a USDA license into sharp focus, as renewal of the State license relied, at least in part, on Petitioners' holding a valid APHIS AWA license. In an attempt to comply with the state mandate, Ms. Carney and Mr. DeMarce applied for an APHIS AWA exhibitor's license individually and jointly. APHIS returned several applications as incomplete and eventually denied a joint application for several reasons.

Dr. Goldentyer testified, consistent with the denial letter of May 23, 2012 (attached to the Petition), that APHIS concluded that Petitioners had made false statements on their applications to DNR by not identifying all of their animals and then further violated state law by failing to report the acquisition and deaths of animals. Although I credit Ms. Carney's testimony that the omission of the serval from the application was inadvertent, she also continued to list three lynx, despite full knowledge that one had died. Regardless of Ms. Carney's intentions, she certified to the accuracy of the information, and the need for accurate records is more than a trivial requirement for the DNR. In the absence of routine inspections, reports by licensees were the primary manner by which the state assured compliance. I therefore find sufficient evidence

to support USDA's denial of Petitioners' application on the grounds of false statements about animal inventory.

I also credit Ms. Carney's testimony that kittens had died, and further find that she did not lie to Mr. Ayers about the whereabouts of the kittens. This conclusion does not weaken APHIS' reasons for denying the license application, however, because APHIS relied on the state's determination, which concluded that Ms. Carney had failed to report the deaths of the kittens and the lynx, and had not accurately listed her inventory of animals. Ms. Carney's assertion that she did not know she had to report deaths of animals is not entirely credible, as she held a license with the DNR for many years and should have been familiar with that agency's requirements, which accompany application renewals. *See* RX-2, RX-3. Her contentions are undermined by the fact that she affirmatively reported on her DNR application that she owned three lynx, despite the death of one.[2]

APHIS further found that Ms. Carney willfully made a false statement to DNR personnel by telling them that her application for an APHIS AWA license was pending. Several applications by Petitioners had been returned as incomplete and it is not inconceivable that Ms. Carney equated incomplete applications as "pending" because APHIS had not made determinations in those. However, the preponderance of the evidence establishes that there was no active license application with APHIS at the time of her meeting with DNR.

In its letter of May 23, 2012, as additional grounds for denying the exhibitor license APHIS considered the fact that Petitioners had no Georgia license. I appreciate the "chicken and egg" aspect of Petitioners' dilemma in that both agencies required that Petitioners be licensed. I even sympathize with Ms. Carney's frustrated hopes that APHIS could give her a license that would allow her to keep her animals. Without a USDA AWA dealer or exhibitor license, Petitioners could not keep exotic mammals under Georgia law.

[2] I decline to give nay weight to the evidence regarding the integrity of the enclosures for Petitioners' cats, as APHIS did not rely upon the state's conclusions on that issue in its decision to deny the license application.

Georgia law requires persons who want to possess any wild animal to obtain a wild animal license from the Georgia DNR. O.C.G.A. §§ 27-5-1, 27-5-4(a), 27-5-5. Wild animal licenses may be granted "only to persons engaged in the wholesale or retail wild animal business or persons exhibiting wild animals to the public." O.C.G.A. § 27-5-4(b). In addition, only individuals with a license from USDA APHIS, or who have obtained a written exemption from such, may hold a Georgia wild animal license for mammals. O.C.G.A. § 27-5-4-b. RX-1(a). Lt. O'Neal testified that Petitioners' cats are considered wild animals because they are not native species of Georgia. Tr. at 31.

The record corroborates Dr. Goldentyer's testimony that USDA did not approve a dealer's license because Petitioners did not appear to be breeding animals as a dealer. RX-8. Ms. Carney had allowed her license to lapse. Even assuming that I would find that Petitioner had filed complete applications and reports with DNR, thereby impugning APHIS' reliance upon DNR's conclusions and overturning its determination, Petitioners produced no evidence of a business plan to use the animals in an exhibit. It is clear from the record before me that Petitioners were not engaged in a business for which an APHIS AWA license would be granted. Without that license, Petitioners did not qualify for a Georgia wild animal license.

Reviewing all the evidence in the light most favorable to Petitioners, I must conclude that there is no dispute of material fact regarding false statements made by Ms. Carney on her DNR applications and to DNR personnel[3]. It is further uncontroverted that Petitioners did not have a Georgia wild animal license, and would be ineligible for one without an APHIS license. Although it is regrettable that Petitioners were not provided advance notice of the confiscation of their animals, those determinations by the Georgia DNR are outside the scope of my authority.[4]

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[3] Respondent has submitted evidence and made argument alleging that Petitioner Carney violated law and regulations involving transporting animals across state lines. I have given no weight to this evidence and argument because the determination letter denying Petitioners' joint application for an AWA license issued May 23, 2012 does not refer to that allegation as grounds for denial. *See* PX-1.

[4] Petitioners pursued their remedies before an Administrative Law Judge for the State of Georgia (RX-10), Georgia's Superior Court (RX-11), and then before the Georgia

Accordingly, Respondent's motion for summary judgment is hereby GRANTED.

IV. Findings of Fact

1. Petitioners are individuals with a mailing address in [redacted].*

2. From 2003 to August 1, 2010, Petitioner Carney held APHIS AWA dealer's license # 57-B-0157, d/b/a "Fascinating Felines".

3. Ms. Carney attempted to breed exotic cats but was not successful.

4. On or about July 26, 2009, Ms. Carney's AWA license renewal application stated that she had acquired one animal and had earned no money from activities regulated by the AWA in the previous year.

5. Ms. Carney's AWA license was renewed for a period due to expire August 1, 2010.

6. On August 16, 2010, Ms. Carney submitted a renewal application to APHIS, which stated that she had neither acquired nor sold any animals, nor had earned any money from regulated activities.

7. On August 27, 2010, APHIS advised Petitioner Carney that the license had been canceled upon a determination that she did not engage in activities covered by the AWA.

8. In October 2010, Petitioner Carney acquired a female serval from a licensed dealer in Florida, and kittens born to that serval later died.

9. On November 8, 2010, Petitioner Carney applied for a new AWA dealer's license which noted the acquisition of a serval on loan.

State Court of Appeals (RX-25). Despite the outcome of that litigation, for the reasons stated herein, Petitioners are not qualified to be licensed as exhibitors under the AWA.

* Redacted by the Editor to protect personally identifiable information under the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(b)(6).

10. On February 22, 2011, APHIS returned the application without a determination on the grounds that the agency was unable to confirm that Ms. Carney was engaged in activities covered by the Act.

11. On January 27, 2012, Petitioner David DeMarce applied for a new AWA dealer's license for a business identified as "Crazy Cats" that used the same address as Ms. Carney's.

12. On February 22, 2012, APHIS returned the application as incomplete, noting that Mr. DeMarce owned the property jointly with Ms. Carney, and advising that no regulated activity had been described.

13. On March 14, 2012, Petitioner David DeMarce applied for an AWA exhibitor's license for "Krazy Kats" at the same address as Ms. Carney's enterprise.

14. On April 3, 2012, APHIS returned the application as incomplete, again noting that no regulated activity had been described.

15. On April 26, 2012, Petitioners filed a joint application for an exhibitor's license for a partnership named "Critter Crazy," identifying nine animals.

16. On May 23, 2012, APHIS denied the application on the grounds that Petitioners were unfit to be licensed by APHIS.

17. Petitioners sought review of APHIS' decision.

18. Neither Petitioner possessed a Georgia wild animal license at the time of the APHIS denial.

19. Petitioner Carney's Georgia license application was initially not processed because she had not provided a copy of an APHIS AWA license, and then was denied for failure to report the acquisition and demise of animals, and failure to breed or exhibit animals.

20. Petitioner Carney's application to Georgia did not accurately identify the animals in her inventory.

21. Petitioner Carney's statements to the DNR that an application was pending approval by USDA is not accurate, as the record shows applications were returned as incomplete.

22. Petitioner Carney did not have a valid APHIS AWA license since April, 2010.

23. There is no evidence of record establishing that Petitioner DeMarce ever held an AWA license.

24. On November 16, 2011, the State of Georgia confiscated Petitioner Carney's animals for violations of its wild animal statute and regulations.

25. Petitioner Carney sought review of Georgia's actions in Georgia courts.

V. Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. There is no factual dispute involving the material issue in this matter, and summary judgment in favor of Respondent is appropriate.

3. The laws and regulations of the State of Georgia pertaining to the possession of a wild animal require that Petitioners hold a valid APHIS AWA license.

4. Petitioner Carney's omissions on a certified application for a Georgia wild animal license, failure to report deaths and acquisition of animals, and assertions that an application for an AWA license were pending at APHIS constitute false statements that support the denial of an AWA license.

ORDER

The APHIS Administrator's determination of May 23, 2012, is supported by the preponderance of the evidence. Petitioners' application

for an exhibitor's license under the Animal Welfare Act is hereby DENIED.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

___

In re: JAMES G. WOUDENBERG, d/b/a R&R RESEARCH.
Docket No. 12-0538.
Decision and Order.
Filed December 20, 2013.

AWA.

Sharlene Deskins, Esq. for Complainant.
Nancy Kahn, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

The above-captioned matter involves administrative disciplinary proceedings brought by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant") against James G. Woudenberg, d/b/a R&R Research ("Respondent"). Complainant alleges that Respondent violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.* ("the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1 *et seq.* ("Regulations and Standards"). The instant decision[1] is based upon consideration of the record evidence;

[1] In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]." Complainant's evidence shall be denoted as "CX-[exhibit #]"and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record sua sponte shall be denoted as "ALJX-[exhibit number]".

the pleadings, arguments and explanations of the parties; and controlling law.

I. Issues

1. Whether Respondent violated the Animal Welfare Act; and if so

2. Whether sanctions should be imposed against Respondent;

3. Whether evidence should have been excluded from the record, consistent with the Jencks Act, 18 U.S.C. § 3500, pursuant to 7 C.F.R. § 1.141(h)(1)(iii);

4. Whether my denial of Complainant's motion to recuse myself is supported.

II. Statement of the Case

1. *Procedural History*

On July 20, 2012, Complainant filed a complaint against Respondent, charging Respondent with five counts of obtaining animals from a source that the regulations do not permit the respondent to utilize as a source in willful violation of 9 C.F.R. § 2.132(a). On August 9, 2012, after the grant of an extension of time, Respondent filed an Answer. By Order issued August 21, 2012, I set deadlines for the exchange of evidence and filing of lists. Complainant exchanged submissions and filed lists.[2] On October 26, 2012, Respondent filed submissions which were supplemented on November 8, 2012. Subsequently, a hearing was set to commence in July, 2013 in Detroit, Michigan.

On June 17, 2013, Respondent moved for the grant of summary judgment in its favor. On June 27, 2013, Complainant objected to the entry of summary judgment. By Order issued June 28, 2013, I denied the motion.

[2] I denied Respondent's motion to exclude Complainant's evidence as untimely filed.

The hearing commenced on July 10, 2013 and continued until July 11, 2013. At the hearing, I admitted to the record Complainant's and Respondent's exhibits. I agreed to hold the record open in order to allow Respondent to attempt to locate a witness that Respondent's counsel sought to subpoena, Mr. Tom Rippy. Mr. Rippy is employed as an investigator by the Investigative Enforcement Service ("IES") of APHIS, and counsel could not locate him to effect service. Counsel for the Complainant made it clear that she would not assist Respondent to identify where Mr. Rippy could be served. Tr. at 317-318. Before I closed the hearing, Respondent decided against serving the subpoena. Tr. at 432-435.

I ruled on Respondent's motion for the production of an investigative report by APHIS IES employee Harry Dawson, pursuant to the Jencks Act, 18 U.S.C. § 3500 and 7 C.F.R. § 1.141(h)(1)(iii) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, USDA, ("the Rules of Practice"). Complainant objected that the statement was not subject to the Jencks Act, and also by privileges and privacy issues. Tr. at 193-201; 243-260; 302-310. After a long discussion in which I invited counsel for Complainant to redact those portions of the report that raised concerns, and following a recess for the parties to research the issue, I excluded Mr. Dawson's testimony from the record[3]. Testimony at Tr. 167-193; 201-225; Discussion at Tr. 193- 201; 243-260; 302-310. Complainant's counsel specifically declined an offer for an *in camera* inspection of the statement. Tr. at 256.

I also denied Complainant's counsel's motion to recuse myself from the proceedings for bias.[4] Tr. at 310-314.

Respondent raised the issue of whether USDA's policies unfairly discriminated against his business. I admitted to the record testimony and evidence on this issue to preserve it, and agreed to further consider its relevance to my adjudication. I conclude that I am not authorized by

[3] I shall revisit this ruling herein, as the testimony was preserved, and Complainant has addressed the issue in written closing argument.

[4] I shall discuss this ruling further herein, because counsel for Complainant advised that Complainant would appeal my ruling to the Judicial Officer for the Secretary of Agriculture (Tr. at 314).

either the Administrative Procedures Act, 5 U.S.C. § 551, or by specific delegation from the Secretary of Agriculture, to review policy decisions of the Secretary.

The written transcript of the hearing has been submitted to the record. I granted a motion from Complainant's counsel for additional time to file written closing arguments, which have been filed and considered. The record in this matter is now closed.

2. *Statutory and Regulatory Authority*

A. *Animal Welfare Act*

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

Any person who "for compensation or profit delivers for transportation, or transports…buys, or sells, or negotiates the purchase of" regulated animals to facilities for research is considered a "dealer" under the AWA. 7 U.S.C. § 2132(f). A retail pet store is not considered a dealer unless it sells animals to a research facility, an exhibitor, or a dealer (7 U.S.C. § 2132(f)(i)), nor is "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". 7 U.S.C. § 2132(f)(ii).

Dealers are required to obtain a license upon demonstration that their facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of the Act. 7 U.S.C. § 2133. "[A]ny retail pet store or other person who derives less than a substantial portion of his

income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor". *Id.*. However, the AWA authorizes the Secretary to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors as defined by the AWA "upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of [the AWA] and the regulations promulgated by the Secretary…" 7 U.S.C. § 2133.

No dealer "shall buy, sell, offer to buy or sell, transport or offer for transportation in commerce. . . to or from another dealer . . . any animals unless and until such dealer shall have obtained a license from the Secretary. . ." 7 U.S.C. § 2134.

9 C.F.R. § 2.132 establishes standards for the procurement of dogs, cats, and other animals by dealers, and states that a class "B" dealer may obtain live random source dogs and cats only from other dealers who are licensed under the Act; from State, county, or city owned and operated animal pounds or shelters; and from legal entities organized under the laws of the State in which they are located, such as humane shelters. 9 C.F.R. § 2.132(a)(1)-(3). Further, "[n]o person shall obtain live dogs, cats, or other animals by use of false pretenses, misrepresentation, or deception. 9 C.F.R. § 2.132(b). [9 C.F.R. § 2.132(c) omitted as not relevant.]

9 C.F.R. § 2.132(d) provides:

> No dealer or exhibitor shall knowingly obtain any dog, cat, or other animal from any person who is required to be licensed but who does not hold a current, valid, and unsuspended license. No dealer or exhibitor shall knowingly obtain any dog or cat from any person who is not licensed, other than a pound or shelter, without obtaining a certification that the animals were born and raised on that person's premises and, if the animals are for research purposes, that the person has sold fewer than 25 dogs and/or cats that year, or, if the animals are

> for use as pets, that the person does not maintain more than three breeding female dogs and/or cats.

(Approved by the Office of Management and Budget under control number 0579-0254) [54 Fed. Reg. 36147 (Aug. 31, 1989) (as amended at 69 Fed. Reg. 42102 (July 14, 2004))].

B. *Jencks Act*

Pursuant to the Rules of Practice:

> After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the limitations prescribed in the Jencks Act (18 U.S.C. § 3500).

7 C.F.R. § 1.141(h)(1)(iii).

The Jencks Act states:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement

relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

C. *Recusal*

The Rules of Practice address the disqualification of a Judge and provide that "[a]ny party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both." 7 C.F.R. § 1.144 (b)(1). "A judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying." 7 C.F.R. § 1.144 (b)(2).

The United States has codified the standard for disqualification of justice, judge or magistrate at 28 U.S.C. § 455, which states:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization

> only if the outcome of the proceeding could substantially affect the value of the interest;
>
> (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.
>
> (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
>
> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455.

Further, a judge shall withdraw from a case where bias or prejudice of a judge against a party is established. 18 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the

> judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

18 U.S.C. § 144.

Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;…

3. *Summary of the Evidence*

A. *Documentary Evidence*

CX-1 through CX-30

RX-1, RX-4, RX-5, RX-11, RX-13, RX-17, RX-19, RX-20, RX-24, RX-27, RX-28, RX-30, RX-32, RX-33, RX-34

B. *Admissions*

James G. Woudenberg is a federally licensed Class B Dealer operating in Michigan under the name R & R Research and was such at all times relevant to this adjudication.

C. *Factual Summary of the Testimony*

Carrie Bongard (Tr. at 57-132)

Ms. Bongard is a licensed veterinary technician who has worked with USDA as an animal care inspector since 2002. Her job duties require her to inspect facilities throughout Michigan, including Respondent's facility. Her quarterly inspections of "random source dealers" such as Respondent include a review of records of acquisition and disposition of animals. Ms. Bongard traces back the source of animals donated to Respondent by reviewing certifications signed by the donors, and then documents the results of her trace. CX-4 and CX-13.

Ms. Bongard could not specifically recall doing the trace backs that she recorded on CX-1, CX-2, and CX-12, but she spoke with the donors and made notes of her discussions. CX-13; CX-4. Her notes reflect that both donor Hawley and donor Castle told Ms. Bongard that they had not raised from birth the dogs they donated to Respondent. Ms. Bongard recalled speaking with Kate Snyder, who told her that she had bought the dog that she had donated to Respondent seven or eight years before she donated it.

When Ms. Bongard learned that individuals donated animals that they had not raised from birth, she cited Respondent for violating the regulations. RX-1. Initially, Ms. Bongard thought that she would charge Respondent with violating the regulation that states that a licensed B dealer such as Respondent cannot knowingly accept an animal unless it is born and raised on the donor's property (9 C.F.R. § 1.132(d)). However, after consulting her supervisors, it was determined that because the donors surrendered animals that they hadn't raised, then they were considered brokers who should have been licensed, and that Respondent had violated 9 C.F.R. § 1.132(a). Ms. Bongard believed that

the situation with the donations was not specifically provided for by the regulations, but was clearly not permitted.

Sandra Castle (Tr. at 37-57)

Ms. Castle went to R & R Research on August 28, 2008, and gave her cat to a woman. Ms. Castle did not know where the cat was born, but she got it when it was two years old.. She thought that she had reported that she had not raised the cat, but she could not recall. She received no payment for the cat. Ms. Castle signed some papers that she could not read because she did not have her glasses. She confirmed that the document identified as CX-18 was a copy of the form she had signed.

Kate Snyder (Tr. at 135-151)

Ms. Snyder donated one dog to Respondent in November, 2008, according to paperwork documenting the transaction. She purchased the dog for about $75.00 in 2002 when it was about six (6) weeks old. She recalled telling Mr. Woudenberg that she had purchased the dog. When Ms. Snyder donated her dog to Mr. Woudenberg, she signed a form that she identified as CX-25. Ms. Snyder was subsequently visited by a female employee of USDA who interviewed her and summarized her statements, which Ms. Snyder signed. Ms. Snyder remembered talking only to a female USDA employee, but she acknowledged that the statement that she had provided is witnessed with a man's name. See, CX-25.

Ms. Snyder could not explain why the written affidavit she signed did not disclose that she told Mr. Woudenberg that she had purchased the donated dog and had not raised it from birth. Ms. Snyder acknowledged that she signed a statement for Respondent that stated that she had bred and raised the dog she donated, but she was very upset about needing to give her dog away.

Max Hawley (Tr. at 153- 166)

Mr. Hawley donated a dog to Mr. Woudenberg, but could not recall when. Mr. Hawley agreed that the date marked on a form that he signed was the date of the donation. Mr. Hawley did not breed and raise the dog,

but got it from outside of a grocery store. He had the dog for about a year before he donated it to Respondent.

Mr. Hawley did not recall Mr. Woudenberg asking where the dog came from, but Mr. Hawley signed the form provided by Mr. Woudenberg. Mr. Hawley remembered talking to someone from USDA about his donation, but did not recall when, or who, the USDA employee was. He thought he was interviewed only once, but he conceded it may have been more than once. He did not deny that the date of his signed affidavit was the date of the conversation. He testified that the information in his statements to USDA were correct. Mr. Hawley acknowledged that the form that he had signed asserted that he had bred the dog, but he had not.

Beth Woudenberg (Tr. at 263-269)

Ms. Woudenberg is married to Mr. Woudenberg. She is not employed by R&R Research, and has only infrequently helped with chores at the business. Ms. Woudenberg believed that Respondent had a female employee at one time, but not in or after 2008. She guessed that the company last employed a female in 2004 or 2005. Anyone who surrenders an animal must deal with Mr. Woudenberg. Ms. Woudenberg denied accepting an animal from Ms. Castle. She observed that the certification form that Ms. Castle signed indicated that the animal was accepted by her husband, as she recognized his handwriting. She has never accepted an animal from a donor, as her husband wants to accept all animals.

James Woudenberg (Tr. at 227-241; 320-411)

R & R Research was started in 1969 by Mr. Woudenberg's parents. The primary source of animals for the company has been animal shelters and people who had raised animals from their birth. He sells animals to research facilities and medical and veterinary schools. Random source animals provide a unique research subject and are desirable to many institutions.

When people donate animals to Respondent, Mr. Woudenberg asks them to sign a document that he created to comply with regulations

requiring certification that the animal was bred and raised by the donors. *See, e.g.*, CX-1. Mr. Woudenberg asks donors whether the animal was born and raised on their premises, and if people respond in the affirmative, he gives them his form to complete. Mr. Woudenberg verifies the information on the form by comparing it with the donor's driver's license. If a form is incomplete, or if the information does not match the donor's identification, Respondent does not accept a donation.

Mr. Woudenberg follows the same procedure with each donation, and always asks if the animal was "born or raised on [the donor's] premises". Tr. at 240. Mr. Woudenberg did not consider it necessary to witness the people signing the document, as he verifies their identification and address. He had no reason to doubt that the donors at issue herein raised the animals they donated, as his business is located in a rural area where many residents raise animals.

Mr. Woudenberg used the form that was signed by the donors involved in this matter for a number of years until he replaced it in 2009. When he created it, he imported the language "bred and raised" from the regulations in use at the time. In 2009 he changed the form to read "born and raised" in conformity with the extant regulations, but he considers the terms interchangeable.

Mr. Woudenberg has discussed the language on his form with APHIS inspector Bongard. He wanted to avoid situations where people certify that the animal they donated was bred and raised by them, but later tell USDA officials that they had not raised the animal from birth. Ms. Bongard recommended that he ask people "where did you get the animal", and he incorporated that question into his form. Mr. Woudenberg has used three different forms over the years, which he discussed with Ms. Bongard, who did not make any specific criticisms or recommendations about his language. He asked for feedback from investigators, and Mr. Dawson suggested that he consult his attorney, which he did. Mr. Woudenberg sent the form with a request for input to APHIS Director Kevin Shea, with a copy to Regional Director Dr. Goldentyer, but received no response.

When Mr. Woudenberg learned that Mr. Dawson was assigned to investigate the instant case, he contacted Mr. Dawson to show his

cooperation. Mr. Woudenberg signed an affidavit after his interview by Investigator Tom Rippy. Mr. Rippy had advised Mr. Woudenberg that he would recommend that APHIS cite the people who made the dishonest certifications to him.

Mr. Woudenberg did not specifically recollect the donations discussed herein, but he averred that Ms. Castle's memory about surrendering her animal to a woman was wrong. "I absolutely know she's mistaken because I'm the only person that would accept an animal for release since the year 2000 because I want – my name is on the license. I want to make sure that it was followed in the same procedure each and every time." Tr. at 344. Mr. Woudenberg notated on the form that he received the animal. He also assigns the animal a number, and describes it in accordance with USDA regulations.

Over the years, Mr. Woudenberg has observed that USDA has implemented policies designed to reduce, if not eliminate, Class "B" dealers who sell random source animals for research. His business also has been pressured by animal rights activists. He experienced loss of business due to the complaint that USDA filed against his company.

III. Discussion

1. *Violations*

The complaint brought against Respondent alleges five counts of violating standards set forth at 9 C.F.R. § 2.132(a), which provides:

> (a) A class "B" dealer may obtain live random source dogs and cats only from:
>
> (1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;
>
> (2) State, county, or city owned and operated animal pounds or shelters; and
>
> (3) A legal entity organized and operated under the laws of the State in which it is located as an animal

> pound or shelter, such as a humane shelter or contract pound.

9 C.F.R. § 2.132(a).

Respondent is admittedly a licensed Class "B" dealer. Random trace inspections of Respondent's business in 2008 identified four individuals who donated five animals to Respondent. The donors were not dealers licensed under the Act, and were not humane shelters or animal pounds. In an attempt to support the charges of violations of 7 C.F.R. § 1.132(a), the government posited that the donors in this matter should have been licensed. Ms. Bongard testified that she and her supervisors concluded that although the regulation did not specifically address the circumstances of donation of animals, the individuals who donated animals that they had not raised from birth were acting as unlicensed brokers. Tr. at 89.

This conclusion is not supported by the plain language of the AWA, which specifically excludes from the definition of "dealer" "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". 7 U.S.C. § 2132(f)(ii). Because the donors at issue herein were not compensated for the animals, and because the record fails to demonstrate that they derived income from the sale of other animals, the AWA does not anticipate that they would need to be licensed. Therefore, the allegations charged in the complaint are unsupported.

However, I am unable to dismiss the complaint outright, where the evidence addressed, a fortiori, 7 C.F.R. § 1.132(d), which permits Class "B" dealers to obtain animals from some unlicensed sources[5]. Pursuant to § 1.132(d), Class "B" dealers may accept animals from persons who need no license upon their certification that they raised the animals from birth at their premises.

There is no dispute that the donors in this case gave pets that they had not bred and raised from birth to Respondent, although they certified that

[5] This is the regulation provision that Ms. Bongard believed that Respondent had violated.

they had.[6] Accordingly, Respondent accepted animals from sources not sanctioned by § 1.132. The government argues that "[i]t is irrelevant whether or not the Respondent knew that animals were not born and raised by the individuals who provided the animals to him [sic]." Complainant's brief at page 5.

I decline to apply the government's somewhat convoluted interpretation of the strict liability implied by § 1.132(a) to circumstances where a Class "B" dealer obtained required certifications from individuals who falsely signed, or authorized a signature on, written certifications that they had bred and raised the donated animals. The government's interpretation of the regulatory scheme is contrary to the plain language of the regulation, and contrary to its intent. The language, "[n]o dealer shall **knowingly** obtain any dog or cat from any person who is not licensed, other than a pound or a shelter, **without obtaining a certification that the animals were born and raised on that person's premises**..." [emphasis added] (9 C.F.R. § 2.132(d)), prohibits Class "B" dealers from accepting an animal from an unlicensed source without a certification that the animal was born and raised on the source's premises. The "knowingly" language pertains to the dealer's obligation to secure a certification, which was the conclusion reached in the case Complainant cited in support of its argument. *See In re: Baird*, 57 Agric. Dec. 127, 146 (U.S.D.A. 1998). (In that case, the Secretary affirmed Administrative Law Judge James Hunt's conclusion that the Respondent violated § 2.132 by acquiring random source dogs without a certification and without even asking whether the animals had been bred and raised by the individuals who relinquished them).

The uncontroverted evidence demonstrates that the donors sighed certifications attesting that they had bred and raised the animals.[7] Although the evidence establishes that the donors did not breed and raise the animals, there is no credible evidence that Respondent knew or should have known that they had not bred and raised the animals. I credit

[6] Affidavits provided by Mr. Beemer, who donated two dogs, reflect that he or his wife signed the certification form produced by Mr. Woudenberg. Mr. Beemer was incompetent to testify due to a medical condition.

[7] I find little substantive distinction between the language "born" and "bred" and credit Mr. Woudenberg's testimony that he adopted current regulatory language into his certification. I note that Ms. Snyder admitted that she understood "bred" to mean "born".

Mr. Woudenberg's testimony that he asked all of the donors at issue herein whether they had bred and raised the animals. The testimony of the donors does not merit substantial weight.

Mr. Hawley admitted that he had signed the certification without understanding what he was signing. Ms. Castle testified credibly that she signed the certification without reading it. Although she believed that she surrendered her cat to a woman, I credit the testimony of Mr. Woudenberg and his wife that no woman accepted animals during the period when Ms. Castle made her donation. Mr. Woudenberg's signature on the certification undermines Ms. Castle's recollection.

Ms. Snyder testified that she told Mr. Woudenberg that she had purchased her dog, but nevertheless signed a certification stating that she had bred and raised the animal. Ms. Snyder realized that she had misrepresented herself later, but did not do anything to rectify that problem. Ms. Snyder's recollection of her conversation with Mr. Woudenberg conflicts with her signed certification, and with an affidavit she gave closer in time to the event, which omits the conversation. Ms. Snyder's recall about the affidavit is suspect, as she did not recall speaking to a male investigator, whose signature appears on the affidavit. Her recollection about her conversation on the date of the donation is also unreliable because she was very upset on the day she surrendered her dog.

Mostly, I find it implausible that Mr. Woudenberg would accept an animal whose owner told him that it was not born and raised on the owner's premises. Mr. Woudenberg was aware that APHIS traced back donations to owners, and, given his concern about the precarious longevity of his business, I decline to credit Ms. Snyder's recollection about her conversation.

I accord substantial weight to Mr. Woudenberg's testimony regarding his procedure for accepting donated animals. I find it reasonable to conclude that it was not unusual for people in a rural area to relinquish animals that they had bred and raised. I credit Mr. Woudenberg's concerns about the risks of losing his AWA license, and the preponderance of the evidence shows a marked decline in Class "B" dealers. I make no correlation between APHIS's policies and the

reduction in Class "B" dealers. It is axiomatic that APHIS has authority to make policy regarding its enforcement powers. However, given the undisputed evidence that very few Class "B" dealers remain licensed by APHIS, I conclude that Mr. Woudenberg would have made every effort to comply with regulations governing his business and would not have overtly defied them.

Complainant suggests that Respondent had an affirmative duty to confirm the reliability of the certifications offered by the donors. Complainant cites to no precedent supporting that conclusion, and provides no stated USDA policy holding Class "B" dealers strictly liable for false statements made by animal donors in their certifications. I accord little weight to Dr. Goldentyer's instructions that APHIS should seek permanent revocation of Respondent's license (RX-33), as they are conclusory. I find no support for the government's position.

The regulation requires dealers to secure a certification, and does not further provide that false certifications by animal donors shall be imputed to dealers. If the regulation was meant to impose a strict liability standard on dealers who accept animals from unlicensed persons, then it would require **dealers** to certify that the animals were born and raised on the premises of persons who surrendered them, rather than require dealers to **obtain** a certification. In addition, a strict liability standard would render superfluous the prohibition on a dealer **knowingly** obtaining a certification from unlicensed persons relinquishing animals.

Even if I were to find merit in the government's argument, it would be mere speculation to conclude that investigation by Respondent would have revealed that the donors had not bred and raised their animals. It is patently manifest that the donors focused on surrendering their animals to Respondent, and not on verifying the representations they made on the forms they signed. It is immaterial that the donors later admitted that they had falsified their certifications.

I acknowledge that Respondent's inquiry into the genesis of the donated animals was less than artful. Mr. Woudenberg has since revised the form to elicit more thorough information about an animal's birth and origin. However, Respondent had been using the form that was falsely certified for years and no one from USDA gave Mr. Woudenberg

constructive criticism about its efficacy, despite his requests for USDA's input. Moreover, no matter how much information is requested about the source of an animal, Class "B" dealers are dependent upon the answers of the people who dispose of their animals.

The regulation prohibits Respondent from knowingly accepting animals from unlicensed sources without obtaining a certification. Respondent secured the requisite certifications. Therefore, Respondent did not violate 7 C.F.R. § 1.132(d), or by imputation, violate 7 C.F.R. § 1.132(a).

The Complaint is DISMISSED. Accordingly, no sanctions are warranted.

2. *Jencks Act*

The specific language of the Jencks Act requires the government to produce a report made by a witness whose testimony is material and whose credibility is attacked. The Jencks Act includes among its definitions of a "statement" of a witness called by the United States as "a written statement made by said witness and signed or otherwise adopted or approved by him" 18 U.S.C. § 3500(e)(I).

Courts have required the government to produce a report made by a witness whose testimony is material and whose credibility is attacked. *Moore* v. *Administrator, Veterans Administration*, 475 F.2d 1283, 155 U.S. App. D.C. 14 (D.C. Cir. 1973). A report prepared by a law enforcement agent that summarizes his notes and recollections of interviews with witnesses is considered the agent's "statement" within the meaning of the Jencks Act, for both the author and any agent verifying the accuracy of the report. *United States v. Sink*, 586 F.2d 1041 (5th Cir. 1978), *cert. denied*, 443 U.S. 912 (1979).

In the instant adjudication, APHIS's IES initiated an investigation into Respondent's AWA practices. The case was reassigned from initial Investigator Rippy to Investigator Dawson. When Respondent learned that Complainant would not call Mr. Rippy as a witness, despite including him on the government's witness list, Respondent attempted to serve a subpoena for Mr. Rippy's appearance. Complainant's counsel

stated on the record that she would not assist Respondent in locating Mr. Rippy to serve the subpoena. Therefore, Mr. Dawson's testimony about Mr. Rippy's investigative findings was material to Respondent and, any mention of Mr. Rippy's report in Mr. Dawson's written report would have been crucial to Respondent's cross-examination.

Although the circumstances demonstrate the impeachment value of Dawson's report, Respondent is not required to prove the merit of a report so long as it relates to the subject matter that the agent has testified about. *United States v. New*, 491 F.3d 369 (8th Cir. 2007). The Sixth Circuit has held that the government must provide a copy of an investigative report after a witness has testified, without regard to claims of privileged information. *United States v. Pope*, 335 Fed. Appx. 598 (6th Cir. 2009). The Court observed that the government could choose not to produce the report at the risk of exposure to mandatory sanctions under the Jencks Act. *Id.*

The Supreme Court addressed the consequences of the government refusing to produce material in its decision in *Jencks v. United States*, 353 U.S. 657 (1957), wherein the Court stated that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession…but only at the price of letting the defendant go free." *United States v. Valenzuela-Bernal*, 353 U.S. 858, 670 (1982). The Court explained, "[t]he rationale of this is that …since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id.* at 671 (quoting *United States v. Reynolds*, 345 U.S. 1, 12 (1953)).

Accordingly, I find that my ruling to exclude the testimony of the investigator Harry Dawson is well supported. I decline to accord weight to the cases that Complainant cited in support of its objection to the production of the report. The finding of the court in *Norinsberg Corp. v. U.S. Dep't of Agric.*, 47 F.3d 1224 (D.C. Cir. 1995), was that a memorandum summarizing the USDA's file on the subject of the hearing met the definition of a "statement" within the meaning of the Jencks Act, particularly since the report was written by an investigator who testified. Those are the circumstances that faced me at Respondent's hearing. The

circumstances involved in the other case cited by Complainant, *In re Cozzi*, 42 Agric. Dec (U.S.D.A. 1983), do not apply, as Mr. Dawson had specifically testified about events that he presumably summarized in the report.

I note that counsel for Complainant provided the report to me for distribution to the Respondent. The Jencks Act specifically requires, in salient part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b).

After first denying the availability of the report, Complainant found it and objected to its exchange with Respondent on the grounds that the report was not subject to the Jencks Act, and then on grounds that it contained privileged information. In written closing argument, Complainant alleges that the report was not producible because Respondent did not move for its production. The record establishes that Respondent's counsel asked for the production of Mr. Dawson's report after he testified, once it became clear that a report had been prepared. *See* Tr. at 193. Although it is true that I explained that the report should be produced under the Jencks Act and the Rules of Practice, I did so after counsel for Respondent asked Investigator Dawson, after direct examination, for its production.

The Jencks Act provides, in pertinent part:

> If the United States claims that any statement ordered to be produced under this section contains matter which

> does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use…

18 U.S.C. § 3500(c).

In closing written argument, Complainant asserted that I failed to follow procedure by failing to conduct an *in camera* inspection of the report. Counsel maintains that she had provided an investigative report to me for *in camera review*, citing to Tr. at 199. The context of the entire colloquy contradicts that assertion. Counsel first denied having a report, and then after finding it, produced it with the objection that it was not subject to the Jencks Act, and was subject to attorney-client privilege. I asked counsel several times to redact the report for the undefined privileged information, and Counsel refused, repeatedly objecting to the production of the report. Without specific information about the extent of attorney-client privilege, I perceived very little merit in conducting an *in camera* inspection. Regardless, when I asked if counsel for Complainant if she wished me to conduct such a review, counsel declined my offer. Tr. at 256.

Complainant's counsel's overweening position was that the report should not be exchanged with Respondent. Tr. at 256-257. Accordingly, I concluded that the government refused to provide the report to Respondent, and struck Mr. Dawson's testimony, pursuant to 18 U.S.C. § 3500(d).

In any event, because the material facts underlying this matter are largely undisputed, Mr. Dawson's testimony has limited probative value, and its exclusion does not prejudice Complainant.

3. *Recusal*

Although Complainant has not addressed this issue in its brief,

Complainant's counsel advised at the hearing that she would address her motion for recusal in an appeal. Tr. at 314. Interlocutory appeals of rulings on motions for recusal may be taken[8] although such route is not specifically provided by the Rules of Practice governing this adjudication. Although no interlocutory appeal has been filed, I find it prudent to address the issue in the event that it is raised in an appeal of my Decision and Order.

It is generally recognized that a judge has a duty to sit and decide a case that is assigned to her, which is as serious as the duty to not sit if disqualified. *Laird v. Tatum*, 409 U.S. 824, 837 (1972). I am required to recuse myself only if it would appear to a reasonable person with knowledge of all the facts that my impartiality might reasonably be questioned. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). This standard is objective and is not based "on the subjective view of a party." *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir. 1988), *cert. denied*, 1095 S.Ct. 816 (1989). In order to justify recusal, prejudice or bias must be personal, or extrajudicial. *Litkey v. United States*, 510 U.S. 540 (1994). The test of whether the alleged bias stems from an extrajudicial source is whether an opinion on the merits rests on some basis other than what the judge learned from her participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Allegations of events emanating in the courtroom are generally insufficient to demonstrate bias. *Id*. The authority of judges depends upon the presumption that they have sworn to render impartial adjudications and will not be biased; therefore, allegations of bias must be rigorously supported to justify recusal. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986).

At the hearing, Complainant's counsel orally raised a motion for me to recuse myself on the grounds that I had disparaged her skills as counsel and had directed her to cease speaking. Tr. at 310-315. Without regard to the form of the motion for recusal, which generally requires an

[8] United States, 666 F.2d 690 (1st Cir. 1981); IBM Corp., 618 F.2d 923 (2d Cir. 1980); School Asbestos Litig., 977 F. 2d 764 (3rd Cir. 1992); Rogers, 537 F. 2d 1196 (4th Cir. 1976); Corrugated Container Antitrust Litig., 614 F. 2d 958 (5th Cir. 1980); Aetna Cas. & Surety, 919 F. 2d 1136 (6th Cir. 1990); Liddell v. Bd. of Educ., 677 F. 2d 626 (8th Cir. 1982); Cement Anti-trust Litig., 673 F.2d 1020 (9th Circ. 1992); Bell v. Chandler, 589 F. 2d 556 (10th Cir. 1978).

affidavit as to cause (18 U.S.C. § 144), I denied Complainant's motion. I acknowledge that my colloquy with Complainant's counsel regarding the application of the Jencks Act to the production of an investigative report left me frustrated. First, counsel advised that she did not have the report, which she immediately followed by a brief search of her materials that disclosed that she indeed possessed it. She then summarily raised objections to its exchange without reviewing it. She asserted that the Jencks Act did not apply. She then raised objections on the grounds of privilege, but failed to provide enough details for me to conduct an in camera inspection of the report to confirm that it contained privileged information. She repeated her summary objection until I asked her not to. I do not find that any expressions of frustration regarding counsel's actions are tantamount to criticism of counsel's competence. Even if one were to find them so, a judge's comments to an attorney regarding her skill does not mandate recusal. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), *cert. denied*, 117 St. Ct. 76 (1996). A party seeking recusal because of bias against an attorney must show that the bias extends to counsel's client, and the allegations must be more than conclusory. *United States v. Sykes*, 7 F.3d 1331 (7th Cir. 1993).

My directive that counsel not offer repetitive objections falls within my obligation to maintain order during a hearing and to assure that the record is complete and relevant. 7 C.F.R. §§ 1.144(c)(13) and (14). Moreover, I recessed the hearing to allow both counsel to research the issue. Tr. at 248. During a later discussion about counsel's offer of proof during cross-examination of a witness, I expressed my confusion about why the motion was made, and whether I understood the legal underpinnings of offers of proof. Tr. at 404-407; 7 C.F.R. § 1.141(h)(7). I do not find that my remarks merit recusal.

Counsel moved for recusal upon my ruling against her on the Jencks Act issue. Adverse rulings against a party do not provide a sufficient basis for recusal. *Martin-Trigona v. Lavien*, 573 F. Supp. 1237 (D. Conn. 1983). I find Complainant's motion trivial, considering how often I ruled in Complainant's favor. I denied a motion by the opposing party to exclude Complainant's evidence. I denied Respondent's motion for summary judgment. I did not order Complainant to produce a witness that Respondent hoped to subpoena, and I have made no adverse inference regarding his absence. I granted Complainant's motion for an

extension of time to submit closing argument.

I further find no disqualifying impediment to hear and decide the instant matter that conflicts with the standards set forth at 28 U.S.C. § 455.

Upon further reflection of the motion for recusal, and again, without regard to the irregularity of its form, I find no grounds to deviate from my ruling. There is no reasonably objective rationale to support recusal. Complainant's motion is without merit, both factually and legally.

IV. Findings of Fact

1. Respondent James G. Woudenberg is an individual with a mailing address in Michigan, who operated a business under the name of R & R. Research.

2. At all times herein, Respondent operated as a Class "B" dealer defined by the Act and regulations under AWA license No. 34-B-001.

3. On or about April 18, 2008, Respondent accepted a donation of a dog from Gilbert Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the animal he donated.

4. On or about June 3, 2008, Respondent accepted a second donation of a dog from Gilbert Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the animal he donated.

5. On or about June 10, 2008, Respondent accepted a donation of a dog from Max Hawley, who signed a certification that he had bred and raised the animal he donated.

6. On or about August 28, 2008, Respondent accepted a donation of a cat from Sandra Castle, who signed a certification that she had bred and raised the animal she donated.

7. On or about November 4, 2008, Respondent accepted a donation of a dog from Kate Snyder, who signed a certification that she had bred and raised the animal she donated.

8. APHIS conducted random inspections of animals in Respondent's inventory to trace back the origins of the animals.

9. APHIS's inspection disclosed that none of the animals that Respondent accepted from the donations identified in ¶¶ 3 through 7, *supra*, had been born and raised on the premises of the donors.

10. An investigation by APHIS's IES confirmed that all of the donors admitted that they had not bred and raised the animals, despite signing certifications that they had.

11. None of the donors were compensated for the donation of their pets.

12. Mr. Woudenberg personally accepted the animals and confirmed the identities of the donors.

13. Mr. Woudenberg drafted a form for donors to certify that they had bred and raised their animals, which he later revised to reflect current regulatory language.

V. Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. Regulations governing Class "B" dealers set forth the sources from which the dealers may acquire animals. 9 C.F.R. § 1.132.

3. Class "B" dealers may accept random source animals from other dealers, from shelter and pounds, and from unlicensed individuals who have bred and raised the animals and who sell or donate up to 25 animals in a year. 9 C.F.R. § 1.132 (a)-(d).

4. The AWA excludes from its definition of dealer "[A]ny 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." 7 U.S.C. § 2132(f)(ii).

5. Since the donors at issue herein did not sell their animals to Respondent, they do not meet the definition of dealers under the Act, and were not required to secure an AWA license to legitimize their donations.

6. Because the donors are not considered unlicensed dealers under the Act, Respondent's acceptance of their animals did not violate 9 C.F.R. § 1.132(a), as charged in the Complaint.

7. Similarly, because the donors were not dealers, by accepting the donations at issue here, Respondent did not violate the first sentence of 9 C.F.R. § 1.132(d), which prohibits Class "B" dealers from knowingly acquiring animals from a person who is required to be licensed but who does not hold a current, valid AWA license.

8. As a Class "B" dealer, Respondent is prohibited from knowingly accepting random source animals from unlicensed persons without obtaining a certification that the animals were born and raised on that person's premises. 9 C.F.R. § 1.132(d).

9. Respondent knowingly obtained certifications from each of the donors herein, which represented that the owners had bred and raised the donated animals on their premises.

10. The regulations do not require dealers to verify the origins of animals that they acquire.

11. The regulations do not hold dealers strictly liable for false statements made by donors on certifications that the donors signed, or caused to be signed on their behalf.

12. Respondent did not violate the AWA or its prevailing regulations.

13. Sanctions are not warranted where Complainant failed to established violations.

ORDER

The preponderance of the evidence fails to support the allegations stated in the complaint brought against Respondent. The complaint is, therefore, DISMISSED, with prejudice.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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MISCELLANEOUS ORDERS

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

ADMINISTRATIVE WAGE GARNISHMENT

ANN HUFCUT.
Docket No. 13-0090.
Order of Dismissal.
Filed July 15, 2013.

AGRICULTURAL MARKETING AGREEMENT ACT

ORANGES, GRAPEFRUITS, TANGERINES, AND TANGELOS (CITRUS) GROWN IN FLORIDA.
Docket Nos. AO-13-0163, FV-13-905-1, AMS-FV-12-0069.
Certification of Transcript.
Filed July 1, 2013.

ANIMAL WELFARE ACT

In re: TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., A MARYLAND CORPORATION; & ROBERT L. CANDY, AN INDIVIDUAL.
Docket No. 11-0222.
Miscellaneous Order.
Filed July 12, 2013.

AWA – Petition for reconsideration – Regulations, vagueness of – Sanctions – Willful.

Colleen A. Carroll, Esq. and Buren W. Kidd, Esq. for Complainant.
Robert L. Candy for Respondents.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION

Procedural History

On May 28, 2013, Tri-State Zoological Park of Western Maryland, Inc., and Robert L. Candy [hereinafter Respondents] filed a Petition for Reconsideration requesting that I reconsider *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013). On June 10, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Respondents' Petition for Reconsideration, and on June 13, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Respondents' Petition for Reconsideration.

Discussion

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer, 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

[1] 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) [hereinafter the Rules of Practice].

> decision upon 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). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Respondents in their Petition for Reconsideration, I find no error of law or fact necessitating modification of *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013). Moreover, Respondents do not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of the March 22, 2013 Decision and Order. Therefore, I deny Respondents' Petition for Reconsideration. I note that the Rules of Practice do not require a petition for reconsideration in order to exhaust administrative remedies. Therefore, review by the appropriate judicial forum is available without a party seeking reconsideration by the Judicial Officer (7 C.F.R. § 1.145(i)).

Respondents raise seven issues in their Petition for Reconsideration. First, Respondents contend the evidence does not support my conclusion that Respondents violated the Regulations (Pet. for Recons. at 1-33).

I have carefully reviewed the evidentiary basis for my conclusions of law and again find the Administrator proved each of the violations identified in *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___, slip op. at 56-61 (Conclusions of Law ¶¶ 6a-6ff) (U.S.D.A. Mar. 22, 2013), by a preponderance of the evidence. Therefore, I reject Respondents' contention that I erroneously concluded Respondents violated the Regulations.

Second, Respondents contend I erroneously concluded Respondents' violations of the Regulations were willful (Pet. for Recons. at 1).

An act is willful if the violator intentionally does an act which is prohibited or intentionally fails to do an act which is required, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.[2] A review of the record reveals that all of Respondents' violations either were intentional or were committed with careless disregard of the requirements of the Regulations. Therefore, I reject Respondents' contention that I erroneously concluded their violations of the Regulations were willful.

Third, Respondents contend the Administrator filed the Complaint in violation of "rules, regulations, and procedural mandates dictated by the USDA guide book" (Pet. for Recons. at 2, ¶ III). Specifically, Respondents assert a United States Department of Agriculture inspector did not recommend that the Administrator file the Complaint and the Administrator did not conduct an investigation prior to filing the Complaint (Pet. for Recons. at 1-2). I infer Respondents contend I erroneously failed to dismiss the Complaint in light of the Administrator's alleged procedural errors.

The Rules of Practice provide that the Administrator may file a complaint alleging a violation of the Animal Welfare Act or the Regulations based upon reason to believe that a person has violated the Animal Welfare Act or the Regulations, as follows:

> **§ 1.133. Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint or petition for review*. (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of

[2] Ash, No. 11-0380, 71 Agric. Dec. 900, slip op. at 912-13 (U.S.D.A. Sept. 14, 2012); Bauck, No. D-09-0139, 68 Agric. Dec. 853, 860-61, 2009 WL 8382865 (U.S.D.A. Dec. 2, 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); D&H Pet Farms, Inc., No. 07-0083, 68 Agric. Dec. 798, 812-13, 2009 WL 8382862 (U.S.D.A. Oct. 19, 2009); Bond, No. 04-0024, 65 Agric. Dec. 92, 107, 2006 WL 1430148 (U.S.D.A. May 19, 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Stephens, No. 98-0019, 58 Agric. Dec. 149, 180, 1999 WL 288586 (U.S.D.A. May 5, 1999); Arab Stock Yard, Inc., No. 5172, 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

> any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

7 C.F.R. § 1.133(b)(1). The Rules of Practice do not require that the Administrator receive a recommendation that he institute a proceeding from a United States Department of Agriculture inspector prior to filing a complaint and do not require that the Administrator conduct an investigation prior to filing a complaint.[3] Therefore, I reject Respondents' contention that my failure to dismiss the Complaint is error.

Fourth, Respondents contend I erroneously rejected their argument that the Regulations are void for vagueness (Pet. for Recons. at 2-3).

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.[4] I have reviewed each of the regulations that I concluded Respondents violated.[5] I find that none of those regulations is unconstitutionally vague.[6] Nonetheless, difficulty may arise when defining certain

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[3] Bauck, No. D-09-0139, 68 Agric. Dec. 853, 859, 2009 WL 8382865 (U.S.D.A. Dec. 2, 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

[4] Thomas v. Hinson, 74 F.3d 888, 889 (8th Cir. 1996); Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1004-05 (11th Cir. 1994); Throckmorton v. NTSB, 963 F.2d 441, 444 (D.C. Cir. 1992); Great Am. Houseboat Co. v. United States, 780 F.2d 741, 746 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

[5] I concluded that Respondents violated 9 C.F.R. §§ 2.40(a), 2.40(b)(2)-(3), 2.75(b), 2.131(c), 3.84(d), 3.125(a), 3.125(d), 3.127(b), 3.127(d), 3.131(a), 3.131(c), 3.131(d), and 3.132. Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. ___, slip op. at 56-61 (Conclusions of Law ¶¶ 6a-6ff) (U.S.D.A. Mar. 22, 2013).

[6] I have previously rejected vagueness doctrine challenges to the Regulations, including challenges to three of the specific regulations that I concluded Respondents violated. *See* Bauck, No. D-09-0139, 68 Agric. Dec. 853, 865 2009 WL 8382865 (U.S.D.A. Dec. 2, 2009) (finding 9 C.F.R. § 2.11(a)(6) is not so unclear that ordinary people cannot understand what is prohibited or so unclear that it encourages arbitrary and discriminatory enforcement by the Secretary of Agriculture), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Int'l Siberian Tiger Found., No. 01-0017, 61 Agric. Dec. 53, 78-79 (U.S.D.A. Feb. 15, 2002) (concluding 9 C.F.R. § 2.131(b)(1) (2000) provides

regulatory terms, such as "adequate veterinary care" found in 9 C.F.R. § 2.40(a), and applying those terms to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[7] Therefore, I reject Respondents' contention that my rejection of their argument that the Regulations are void for vagueness, is error.

Fifth, Respondents assert they corrected violations immediately after United States Department of Agriculture inspectors found the violations or within the time required by United States Department of Agriculture inspectors. Respondents assert they will continue to work closely with the United States Department of Agriculture to ensure that they comply with the Animal Welfare Act and the Regulations. Respondents "feel that [they] continue to demonstrate a good faith effort to continue improvement." (Pet. for Recons. at 29). I infer Respondents contend the sanction in *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013), should be modified to reflect their correction of their violations of the Regulations.

Respondents' correction of their violations of the Regulations does not eliminate the fact that the violations occurred.[8] Nonetheless,

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the respondents with adequate notice of the manner in which the respondents' animals are to be handled during public exhibition); Hansen, No. 96-0048, 58 Agric. Dec. 369, 382-83, 1999 WL 138224 (U.S.D.A. Mar. 15, 1999) (Order Den. Pet. for Recons.) (holding 9 C.F.R. § 3.131(c) is not unconstitutionally vague merely because it does not specify the amount of dirt that constitutes noncompliance), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (U.S.D.A. 2000); Davenport, No. 97-0046, 57 Agric. Dec. 189, 214, 1998 WL 300096 (U.S.D.A. May 18, 1998) (concluding 9 C.F.R. §§ 2.40, 2.75(b)(1), 2.100, 2.131(a)(1), 3.128, 3.129(a), 3.137(d), 3.138(a), and 3.140(a) are not unconstitutionally vague), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

[7] Great Am. Houseboat Co. v. United States, 780 F.2d 741, 747 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

[8] Pearson, No. 02-0020, 68 Agric. Dec. 685, 727-28, 2009 WL 8382858 (U.S.D.A. July 13, 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, No. 04-0024, 65 Agric. Dec. 92, 109, 2006 WL 1430148 (U.S.D.A. May 19, 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, No. 04-0014, 63 Agric. Dec. 623, 643, 2004 WL 2619832 (U.S.D.A. Oct. 28, 2004); Parr, No. 99-0022, 59 Agric. Dec. 601, 644, 2000 WL 1230146 (U.S.D.A. Aug. 30, 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, No. 99-0036, 59 Agric. Dec. 97, 112 n.12, 2000 WL 523166 (U.S.D.A. May 1, 2000); Huchital, No. 97-0020, 58 Agric. Dec. 763, 805 n.6, 1999 WL

Respondents' correction of violations is commendable, and I took Respondents' correction of violations into account when determining the sanction to be imposed, as follows:

> The Animal and Plant Health Inspection Service has recommended that Tri-State's Animal Welfare Act license be suspended for a period of 6 months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based have been corrected by Tri-State and Mr. Candy. Considering the remedial nature of the Animal Welfare Act and the fact that no violations resulted in harm to the animals or to the public, I find a 45-day suspension of Tri-State's Animal Welfare Act license and a cease and desist order should be sufficient to deter Tri-State, Mr. Candy, and others from future violations of the Animal Welfare Act and the Regulations.

Tri-State Zoological Park of Western Maryland, Inc., 72 Agric. Dec. ___, slip op. at 48 (U.S.D.A. Mar. 22, 2013). Therefore, I reject Respondents' contention that modification of the sanction imposed in *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013), is necessary to reflect Respondents' correction of their violations of the Regulations.

Sixth, Respondents assert I erroneously failed to comment on harassment and unprofessional behavior by Animal and Plant Health Inspection Service employees (Pet. for Recons. at 29-30).

Respondents failed to establish harassment or unprofessional behavior by any Animal and Plant Health Inspection Service employee. Therefore, I reject Respondents' contention that my failure to comment on alleged harassment and unprofessional behavior by Animal and Plant Health Inspection Service employees is error.

Seventh, Respondents assert the following are sanctions that have been imposed on them for their violations of the Regulations: (1) United

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33314045 (U.S.D.A. Nov. 4, 1999); Stephens, No. 98-0019, 58 Agric. Dec. 149, 184-85, 1999 WL 288586 (U.S.D.A. May 5, 1999).

States Department of Agriculture inspections of their facility, records, and animals; (2) citations of Animal Welfare Act violations by United States Department of Agriculture inspectors; (3) Respondents' litigation costs; and (4) Respondents' loss of business, revenue, and reputation. Respondents contend, in light of these purported sanctions that have already been imposed on them, my 45-day suspension of Animal Welfare Act license number 51-C-0064 is error. (Pet. for Recons. at 32).

The Animal Welfare Act identifies the following sanctions that the Secretary of Agriculture is authorized to impose for violations of the Animal Welfare Act or the Regulations: (1) suspension or revocation of an Animal Welfare Act license; (2) assessment of a civil penalty; and (3) issuance of a cease and desist order.[9] United States Department of Agriculture Animal Welfare Act inspections, citations of Animal Welfare Act violations by United States Department of Agriculture inspectors, litigation costs, and the loss of business, revenue, and reputation are not sanctions.

Respondents' Request for Oral Argument

Respondents request oral argument in connection with their Petition for Reconsideration (Pet. for Recons. at 33). Respondents' request for oral argument is denied because the issues in this proceeding are not complex and have been fully briefed by the parties.

Lifting of the Automatic Stay

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration (7 C.F.R. § 1.146(b)). Respondents' Petition for Reconsideration was timely filed and automatically stayed *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013). Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. ___ (U.S.D.A. Mar. 22, 2013), is reinstated.

[9] 7 U.S.C. § 2149(a)-(b).

For the foregoing reasons, the following Order is issued.

ORDER

Respondents' Petition for Reconsideration, filed May 28, 2013, is denied.

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In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; AND LE ANNE SMITH, AN INDIVIDUAL.
Docket No. 05-0026.
Miscellaneous Order.
Filed August 30, 2013.

AWA – Supplemental brief.

Colleen A. Carroll, Esq. for Complainant.
Larry J. Thorson, Esq. for Respondents.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING ADMINISTRATOR'S REQUEST TO FILE SUPPLEMENTAL BRIEF

On July 5, 2012, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], requested leave to file a supplemental brief in support of the Administrator's appeal of two (2) initial decisions issued by Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] in the instant proceeding, *Smith*, 71 Agric. Dec. 416 (U.S.D.A. 2012), and *Perry*, 71 Agric. Dec. 362 (U.S.D.A. 2012) (Complainant's Pet. for Appeal of Initial Decisions and Orders at 11 n.10, 46). Craig A. Perry; Perry's Wilderness Ranch & Zoo, Inc.; and Le Anne Smith oppose the Administrator's request (Resp'ts' Resp. to Complainant's Appeal and Resp'ts' Brief at 20-21).

I previously granted the Administrator two (2) extensions of time within which to appeal the ALJ's initial decisions.[1] These extensions of

time provided the Administrator approximately three (3) months within which to appeal the ALJ's March 29, 2012 and March 30, 2012 initial decisions. In light of the length of time the Administrator had to file a brief in support of the Administrator's appeal of the ALJ's initial decisions, I deny the Administrator's July 5, 2012, request for leave to file a supplemental brief.

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G. FREDERICK KEATING.
Docket No. 11-0224.
Order of Dismissal.
Filed September 12, 2013.

In re: LEE MARVIN GREENLY.
Docket No. 11-0073.
Stay Order.
Filed September 17, 2013.

AWA – Motion for stay.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondent.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

STAY ORDER

I issued *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. July 2, 2013), in which I terminated Animal Welfare Act license number 41-C-0122 and disqualified Lee Marvin Greenly for two (2) years from becoming licensed under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159). On August 27, 2013, Mr. Greenly filed "Motion for Stay of Order Pending Judicial Review" [hereinafter Motion for Stay] seeking a stay of the Order in *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. July 2, 2013), pending the outcome of proceedings for judicial review. On September 16, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response opposing Mr. Greenly's Motion for Stay.

I reject the Administrator's arguments in opposition to Mr. Greenly's Motion for Stay, and, in accordance with 5 U.S.C. § 705, I grant Mr. Greenly's Motion for Stay. For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Greenly*, 72 Agric. Dec. ___, (U.S.D.A. July 2, 2013), 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.

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In re: LEE MARVIN GREENLY, AN INDIVIDUAL; SANDY GREENLY, AN INDIVIDUAL; CRYSTAL GREENLY, AN INDIVIDUAL; AND MINNESOTA WILDLIFE CONNECTION, INC., A MINNESOTA CORPORATION.
Docket No. 11-0072.
Miscellaneous Order.
Filed September 19, 2013.

AWA – Motion for stay.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

STAY ORDER AS TO LEE MARVIN GREENLY AND MINNESOTA WILDLIFE CONNECTION, INC.

I issued *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly & Minnesota Wildlife Connection, Inc.), in which I: (1) ordered Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., to cease and desist from violations of Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142); (2) revoked Mr. Greenly's Animal Welfare Act license; and (3) assessed Mr. Greenly and

Minnesota Wildlife Connection, Inc., jointly and severally, a $11,725 civil penalty. On August 27, 2013, Mr. Greenly and Minnesota Wildlife Connection, Inc., filed a "Motion for Stay of Order Pending Judicial Review" [hereinafter Motion for Stay] seeking a stay of the Order in Greenly, 72 Agric. Dec. ___ (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly & Minnesota Wildlife Connection, Inc.), pending the outcome of proceedings for judicial review. On September 16, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay stating, should I deny Mr. Greenly's request for a stay in *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. July 2, 2013), he (the Administrator) would not oppose Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay in this proceeding.

I granted Mr. Greenly's request for a stay in *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. July 2, 2013);[1] therefore, I infer the Administrator opposes Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay in this proceeding on the same grounds that the Administrator opposed Mr. Greenly's request for a stay in *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. July 2, 2013).

I reject the Administrator's arguments in opposition to Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay, and, in accordance with 5 U.S.C. § 705, Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Greenly*, 72 Agric. Dec. ___ (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), 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.

[1] Greenly, 72 Agric. Dec. ___ (U.S.D.A. Sept. 17, 2013) (Stay Order).

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In re: BODIE S. KNAPP, AN INDIVIDUAL, D/B/A THE WILD SIDE.
Docket No. 09-0175.
Miscellaneous Order.
Filed November 6, 2013.

AWA – Administrative Procedure Act – "Animal," definition of – Civil penalties – Dealer, operation as – Due process – Judicial Officer – Petition for reconsideration – Sanctions – Willful.

Colleen A. Carroll, Esq. for Complainant.
Phillip Westergren, Esq. for Respondent.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING AMENDED PETITION FOR RECONSIDERATION

Procedural History

On June 20, 2013, Bodie S. Knapp filed a "Petition for Reconsideration of the Judicial Officer's Ruling - Motion for Extension of Time for Filing Same" requesting reconsideration of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013) and requesting an extension of time to August 23, 2013, to file an amended petition for reconsideration. I granted Mr. Knapp's request for an extension of time and extended to August 23, 2013, the time for filing an amended petition for reconsideration.[1] On August 21, 2013, Mr. Knapp filed an "Amended Petition for Reconsideration of the Judicial Officer's Ruling" [hereinafter Amended Petition for Reconsideration] again requesting reconsideration of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013).[2] On September 12, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

[1] "Order Extending Time for Filing Mr. Knapp's Petition to Reconsider" filed June 21, 2013.

[2] I conclude Mr. Knapp's Amended Petition for Reconsideration is the only operative petition for reconsideration in this proceeding as it entirely supersedes Mr. Knapp's Petition for Reconsideration of the Judicial Officer's Ruling filed June 20, 2013.

[hereinafter the Administrator], filed "Complainant's Response to Respondent Bodie S. Knapp's Petition for Reconsideration," and on September 17, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Knapp's Amended Petition for Reconsideration.

Discussion

Mr. Knapp's Request for Oral Argument

Mr. Knapp requests oral argument in connection with his Amended Petition for Reconsideration (Am. Pet. for Recons. at 1, 21). Mr. Knapp's request for oral argument is denied because the issues in this proceeding are not complex and have been fully briefed by the parties.

Summary of Denial of Mr. Knapp's Amended Petition for Reconsideration

The rules of practice applicable to this proceeding[3] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer, 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

[3] 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) [hereinafter the Rules of Practice].

> filed within 10 days after the date of service of such decision upon 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). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Mr. Knapp in the Amended Petition for Reconsideration, I find no error of law or fact necessitating modification of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013). Moreover, Mr. Knapp does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013). Therefore, I deny Mr. Knapp's Amended Petition for Reconsideration. I note the Rules of Practice do not require a petition for reconsideration in order to exhaust administrative remedies. Therefore, review by the appropriate judicial forum is available without a party seeking reconsideration by the Judicial Officer. (7 C.F.R. § 1.145(i).)

Issues Raised by Mr. Knapp in the Amended Petition for Reconsideration

Mr. Knapp raises 16 issues in the Amended Petition for Reconsideration. First, Mr. Knapp contends I failed to articulate the basis for my rejection of Chief Administrative Law Judge Peter M. Davenport's [hereinafter the Chief ALJ] conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159 [hereinafter the Animal Welfare Act] and the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations] (Am. Pet. for Recons. at 2 ¶ 1).

I articulated the basis for my concluding that Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations and my rejection of the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations, as follows:

> The Chief ALJ found that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations. The Chief ALJ concluded that each of the eight transactions which he found to be in violation of the Animal Welfare Act and the Regulations constituted a violation of the Animal Welfare Act and the Regulations. However, when determining the number of violations committed by a person who purchases and sells animals without a required Animal Welfare Act license, each animal purchased or sold constitutes a separate violation of the Animal Welfare Act and the Regulations. Therefore, I reject the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations. Instead, I find that Mr. Knapp purchased and sold 235 animals in violation of the Animal Welfare Act and the Regulations; thus, Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations.

Knapp, 72 Agric. Dec. ___, slip op. at 17 (U.S.D.A. June 3, 2013) (footnotes omitted). Therefore, I reject Mr. Knapp's contention that I failed to articulate the basis for my rejection of the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations.

Second, Mr. Knapp contends my increasing the $15,000 civil penalty assessed by the Chief ALJ to $395,900 constitutes a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Am. Pet. for Recons. at 2-3 ¶¶ 3-4).

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 United States

government. The United States Department of Agriculture is an executive department of the government of the United States;[4] it is not a state. Therefore, as a matter of law, my increasing the civil penalty assessed against Mr. Knapp could not have violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, as Mr. Knapp contends.[5]

Moreover, I reject Mr. Knapp's contention that my increasing the $15,000 civil penalty assessed by the Chief ALJ to $395,900 constitutes a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The fundamental elements of due process are notice and opportunity to be heard.[6] The record reveals that the Second Amended Complaint, which is the operative pleading in this proceeding, fully apprised Mr. Knapp of the issues in controversy and that Mr. Knapp was provided with an opportunity to be heard.

The Second Amended Complaint specifically notifies Mr. Knapp that the Administrator seeks an order assessing civil penalties against Mr. Knapp for his violations of the Animal Welfare Act and Regulations and for his violations of the cease and desist orders issued against Mr. Knapp in previous Animal Welfare Act proceedings, as follows:

> FAILURE TO OBEY TWO ORDERS TO CEASE AND DESIST FROM VIOLATING THE ACT AND THE REGULATIONS
>
> 4. On July 5, 2005, the Judicial Officer issued an order requiring respondent Knapp, and his agents, employees, successors and assigns, to "cease and desist from violating the Animal Welfare Act and the Regulations and Standards, directly or indirectly, through any

[4] 5 U.S.C. §§ 101, 551(1).

[5] Bauck, 68 Agric. Dec. 853, 864 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Mealman, No. 03-0013, 64 Agric. Dec. 1987, 1990, 2005 WL 2994267 (U.S.D.A. Oct. 3, 2005) (Order Den. Pet. to Reconsider); Knapp, No. 04-0029, 64 Agric. Dec. 253, 303-04, 2005 WL 1649009 (U.S.D.A. July 5, 2005).

[6] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993); Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84 (1988); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

corporate or other device." 64 Agric. Dec. 1668, 1673 (2005). That order became final and effective on September 10, 2005.

5. On August 31, 2006, Administrative Law Judge Victor W. Palmer issued an order requiring respondent Knapp to "cease and desist from violating the Animal Welfare Act and the regulations and standards issued pursuant to the Animal Welfare Act." 65 Agric. Dec. 993. That order became final and effective October 11, 2006.

6. On each of the dates set forth herein, respondent Knapp knowingly failed to obey one or both of the cease and desist orders made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in the above-cited cases. Therefore, pursuant to section 2149(b) of the Act, said respondent "shall be subject to a civil penalty of [$1,650] for each offense, and each day during which such failure continues shall be deemed a separate offense." 7 U.S.C. § 2149(b); 7 C.F.R. § 3.91.

. . . .

The Animal and Plant Health Inspection Service requests that unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this second amended complaint, this matter proceed to oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and that such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order requiring the respondent to cease and desist from violating the Act and the regulations and standards issued thereunder, and assessing civil penalties against the respondent, in accordance with the Act.

Second Am. Compl. at 3-4, 10. Moreover, Mr. Knapp has fully participated in this proceeding, including the oral, in-person hearing conducted by the Chief ALJ on June 21, 2011, in Corpus Christi, Texas.

Third, Mr. Knapp contends, as I did not hear the case and observe the demeanor of the witnesses, I should not have substituted my judgment for the judgment of the Chief ALJ, especially on issues of fact (Am. Pet. for Recons. at 3, 18-19 ¶¶ 5, 16).

The Administrative Procedure Act provides, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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

Thus, as the final deciding officer for the United States Department of Agriculture in this proceeding,[7] I may substitute my judgment regarding issues of fact for the judgment of the Chief ALJ. 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.[8] I carefully examined the record prior to

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[7] 7 C.F.R. § 2.35(a)(2).

[8] Perry, 72 Agric. Dec. ___, slip op. at 15 (U.S.D.A. Sept. 6, 2013) (Decision as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.); KOAM Produce, Inc., No. 01-0032, 65 Agric. Dec. 1470, 1476, 2006 WL 2439000 (U.S.D.A. Aug. 21, 2006) (Order Den. Pet. to Reconsider); Bond, No. 04-0024, 65 Agric. Dec. 1175, 1183, 2006 WL 2006163 (U.S.D.A. July 6, 2006) (Order Den. Pet. to Reconsider); G&T Terminal Packing Co., 64 Agric. Dec. 1839, 1852 (U.S.D.A. 2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006), *cert. denied*, 552 U.S. 814 (2007); S. Minn. Beet Sugar Coop., No. 03-0001, 64 Agric. Dec. 580, 608, 2005 WL 1222860 (U.S.D.A. May 9, 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon, 60 Agric. Dec. 527, 561-62 (U.S.D.A. 2001) (Decision as to Jerry W. Graves and Kathy Graves), *appeal dismissed sub nom.* Graves v. U.S. Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Sunland Packing House Co., No. 96-0532, 58 Agric. Dec. 543, 602, 1999 WL 92441 (U.S.D.A.

substituting my judgment for that of the Chief ALJ and found ample basis to reverse some of the Chief ALJ's findings of fact, as discussed in *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013).

Fourth, Mr. Knapp, citing *Knapp*, 72 Agric. Dec. ___, slip op. at 16 (U.S.D.A. June 3, 2013), contends I erroneously found his purchases of animals, as alleged in paragraphs 7b, 7c, 7f, 7j, 7m, 7n, 7p, 7r, 7t, 7v, 7x, 7z, 7bb, and 7dd of the Second Amended Complaint, were not for his own use or enjoyment; thus, I erroneously concluded Mr. Knapp violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)(1) and 2.10(c) when, without an Animal Welfare Act license, he purchased these animals (Am. Pet. for Recons. at 3-5 ¶ 6).

The Regulations require any person operating or intending to operate as a dealer to have an Animal Welfare Act license but exempt from the licensing requirement any person who buys animals solely for his or her own use or enjoyment if that person does not also sell or exhibit animals, as follows:

> **§ 2.1. Requirements and application.**
>
> (a)(1) Any person operating or intending to operate as a dealer, . . . except persons who are exempted from the

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Feb. 17, 1999); Zimmerman, No. 98-0005, 57 Agric. Dec. 1038, 1055-56, 1998 WL 799196 (U.S.D.A. Nov. 18, 1998); Goetz, 56 Agric. Dec. 1470, 1510 (U.S.D.A. 1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); Saulsbury Enters., No. 94-2, 56 Agric. Dec. 82, 89, 1997 WL 41360 (U.S.D.A. Jan. 29, 1997) (Order Den. Pet. for Recons.); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (U.S.D.A. 1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); White, 47 Agric. Dec. 229, 279 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); King Meat Packing Co., No. 5579, 40 Agric. Dec. 552, 553, 1981 WL 31730 (U.S.D.A. May 1, 1981); Thornton, 38 Agric. Dec. 1425, 1426 (U.S.D.A. 1979) (Remand Order); Unionville Sales Co., 38 Agric. Dec. 1207, 1208-09 (U.S.D.A. 1979) (Remand Order); Beech, 37 Agric. Dec. 869, 871-72 (U.S.D.A. 1978); Nat'l Beef Packing Co., 36 Agric. Dec. 1722, 1736 (U.S.D.A. 1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); Whaley, 35 Agric. Dec. 1519, 1521 (U.S.D.A. 1976); Davis, 35 Agric. Dec. 538, 539 (U.S.D.A. 1976); Am. Commodity Brokers, Inc., 32 Agric. Dec. 1765, 1772 (U.S.D.A. 1973); Dishmon, 31 Agric. Dec. 1002, 1004 (U.S.D.A. 1972); Sy B. Gaiber & Co., 31 Agric. Dec. 474, 497-98 (U.S.D.A. 1972); Romoff, 31 Agric. Dec. 158, 172 (U.S.D.A. 1972).

> licensing requirements under paragraph (a)(3) of this section, must have a valid license.
>
> . . . .
>
> (3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:
>
> . . . .
>
> (viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

9 C.F.R. § 2.1(a)(1), (a)(3)(viii). After a careful review of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013), I cannot locate any language that supports Mr. Knapp's contention that I concluded Mr. Knapp's purchases of animals alleged in paragraphs 7b, 7c, 7f, 7j, 7m, 7n, 7p, 7r, 7t, 7v, 7x, 7z, 7bb, and 7dd of the Second Amended Complaint were not for his own use or enjoyment. Instead, I stated the evidence establishes that Mr. Knapp sold animals for regulated purposes; therefore, Mr. Knapp's purchases of animals (even if the purchases were for his own use or enjoyment), without an Animal Welfare Act license, violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).[9]

Fifth, Mr. Knapp contends I found the exemption for limited sales of hoofstock in the Animal Care Resource Guide published by the Animal and Plant Health Inspection Service [hereinafter APHIS] (RX 2) binding on APHIS (Am. Pet. for Recons. at 5-6 ¶ 7).

After a careful review of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013), I cannot locate any language that supports Mr. Knapp's contention that I found the Animal Care Resource Guide published by APHIS (RX 2) binding on APHIS. Instead, I merely declined to assess Mr. Knapp a civil penalty for his sales of hoofstock, as alleged in paragraphs 7d, 7g, 7q, 7s, 7y, and 7aa of the Second Amended

[9] Knapp, 72 Agric. Dec. ___, slip op. at 16 (U.S.D.A. June 3, 2013).

Complaint, without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), because APHIS' Animal Care Resource Guide (RX 2) unambiguously exempts limited sales of hoofstock made for regulated purposes.[10]

Sixth, Mr. Knapp contends I erroneously concluded Mr. Knapp violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)(1) and 2.10(c) when, without an Animal Welfare Act license, he sold animals at Lolli Brothers Livestock Market, Inc., where the intended use of the animals sold is unknown (Am. Pet. for Recons. at 6-8 ¶ 8).

The Chief ALJ rejected Mr. Knapp's argument that his sales of, or offers to sell, one kinkajou on July 12, 2008, one camel on September 27, 2008, one guanaco on April 10, 2009, three camels on April 10, 2010, four guanaco on July 10, 2010, and two camels on September 25, 2010 to or at Lolli Brothers Livestock Market, Inc. were not violations of the Animal Welfare Act and the Regulations because the intended end use of the animals is unknown. I concluded the Chief ALJ correctly inferred, based on the value of the animals and the relative rarity of these animals, that these animals sold or offered for sale by Mr. Knapp to or at Lolli Brothers Livestock Market, Inc. were used, or intended to be used, for a regulated purpose,[11] and I find nothing in Mr. Knapp's Amended Petition for Reconsideration on which to base an alteration of my conclusion that the Chief ALJ's inference was correct.

Seventh, Mr. Knapp contends the sanctions which the Secretary of Agriculture is authorized, pursuant to 7 U.S.C. § 2149(b), to impose for violations of the Animal Welfare Act and the Regulations may only be imposed on Animal Welfare Act licensees and I erroneously assessed Mr. Knapp a civil penalty for his purchases and sales of animals when he was not an Animal Welfare Act licensee (Am. Pet. for Recons. at 8-9 ¶ 9).

The Animal Welfare Act authorizes the Secretary of Agriculture to assess any dealer a civil penalty for violations of the Animal Welfare Act or the Regulations, as follows:

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[10] Knapp, 72 Agric. Dec. ___, slip op. at 14-15 (U.S.D.A. June 3, 2013).
[11] Knapp, 72 Agric. Dec. ___, slip op. at 28 (U.S.D.A. June 3, 2013).

§ 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 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 $10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation.

7 U.S.C. § 2149(b). The fact that 7 U.S.C. § 2149 is entitled "Violations by licensees" does not mean that the sanctions authorized in 7 U.S.C. § 2149 may only be imposed on a person who holds an Animal Welfare Act license. The plain language of 7 U.S.C. § 2149 refutes that interpretation. Headings and titles are not meant to take the place of the provisions of the text. As stated in *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 528–29 (1947):

> But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors

> of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. [Citations omitted.] For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

The language of 7 U.S.C. § 2149(b) has been consistently interpreted to authorize the Secretary of Agriculture to assess civil penalties and issue cease and desist orders against dealers, exhibitors, research facilities, intermediate handlers, carriers, or operators of auction sales who violate the Animal Welfare Act or the Regulations even if those persons were not Animal Welfare Act licensees at the time they violated the Animal Welfare Act or the Regulations.[12] Therefore, I reject Mr. Knapp's contention that the sanctions which the Secretary of Agriculture is authorized to impose, pursuant to 7 U.S.C. § 2149(b), for violations of the Animal Welfare Act and the Regulations may only be imposed on Animal Welfare Act licensees, and I reject Mr. Knapp's contention that I erroneously assessed Mr. Knapp a civil penalty pursuant to 7 U.S.C. § 2149(b) for his purchases and sales of animals when he was not an Animal Welfare Act licensee.

Eighth, Mr. Knapp contends, when determining the amount of the civil penalty to be assessed for Mr. Knapp's violations of the Animal Welfare Act and the Regulations, I erroneously failed to consider that Mr. and Mrs. Knapp have nine children and Mr. and Mrs. Knapp are

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[12] *See, e.g.*, Horton, 72 Agric. Dec. ___ (U.S.D.A. Apr. 5, 2013) (ordering the respondent to cease and desist from operating as a dealer without having obtained an Animal Welfare Act license and assessing the respondent a $191,200 civil penalty for operating as a dealer without an Animal Welfare Act license); Mitchell, 69 Agric. Dec. ___, 2010 WL 5295429, at *7, *8 (U.S.D.A. Dec. 21, 2010) (ordering the respondents to cease and desist from operating as exhibitors without having obtained an Animal Welfare Act license and assessing the respondents a $67,000 civil penalty for violations of the Animal Welfare Act and the Regulations); Mazzola, No. 06-0010, 68 Agric. Dec. 822, 2009 WL 8382864 (U.S.D.A. Nov. 24, 2009) (ordering the respondent to cease and desist from operating as a dealer and an exhibitor without having obtained an Animal Welfare Act license and assessing the respondent a $21,000 civil penalty for violations of the Animal Welfare Act and the Regulations), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010).

"barely getting by financially" (Am. Pet. for Recons. at 9 ¶ 9).

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.[13] The number of children a violator has and the violator's financial condition are not factors that are required to be considered by the Secretary of Agriculture when determining the amount of the civil penalty.[14] While I sympathize with Mr. Knapp's financial circumstances and I commend Mr. Knapp for raising nine children, I find Mr. Knapp's financial condition and the number of Mr. Knapp's children irrelevant to the determination of the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations.

Ninth, Mr. Knapp contends I erroneously concluded Mr. Knapp's violations of the Animal Welfare Act and the Regulations were willful violations. Mr. Knapp contends his violations were not willful because he relied on the Animal Care Resource Guide published by APHIS (RX 2) as the basis for his determination that he was not required to obtain an Animal Welfare Act license (Am. Pet. for Recons. at 10-14 ¶¶ 10-11.)

A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.[15] Therefore, even if I found the Animal Resource Guide (RX 2) contained erroneous information regarding Animal Welfare Act license

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[13] 7 U.S.C. § 2149(b).

[14] *See* Everhart, No. 96-0051, 56 Agric. Dec. 1400, 1416-17, 1997 WL 655550 (U.S.D.A. Oct. 2, 1997).

[15] Terranova Enters., Inc., No. 09-0155, 71 Agric. Dec. 876, slip op. at 6 (U.S.D.A. July 19, 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.); Bauck, 68 Agric. Dec. 853, 860-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); D&H Pet Farms, Inc., No. 07-0083, 68 Agric. Dec. 798, 812-13, 2009 WL 8382862 (U.S.D.A. Oct. 19, 2009); Bond, 65 Agric. Dec. 92, 107 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Stephens, No. 98-0019, 58 Agric. Dec. 149, 180, 1999 WL 288586 (U.S.D.A. May 5, 1999); Arab Stock Yard, Inc., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

requirements and Mr. Knapp relied on that information, I would find Mr. Knapp's violations of the Animal Welfare Act and the Regulations willful.[16]

Tenth, Mr. Knapp contends I erroneously concluded the Animal Welfare Act leaves no room for discretion regarding the assessment of a civil penalty for a knowing failure to obey a cease and desist order (Am. Pet. for Recons. at 14-15 ¶ 12).

The Animal Welfare Act requires the Secretary of Agriculture to assess a specified civil penalty for each violation of a cease and desist order issued under 7 U.S.C. § 2149, as follows:

> **§ 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 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.

7 U.S.C. § 2149(b) (emphasis added). Effective September 2, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture

[16] I agree with Mr. Knapp and the Chief ALJ that the Animal Care Resource Guide (RX 2) unambiguously exempts limited sales of hoofstock made for a regulated purpose. Therefore, I did not assess Mr. Knapp a civil penalty for his sales of hoofstock, even though I found his sales of hoofstock to be in willful violation of the Animal Welfare Act and the Regulations. Knapp, 72 Agric. Dec. ___, slip op. at 14-15 (U.S.D.A. June 3, 2013).

increased the civil penalty for a knowing failure to obey a cease and desist order from $1,500 to $1,650.[17] The word "shall" is ordinarily the language of command and leaves no room for discretion.[18] Thus, the Secretary of Agriculture is required to assess Mr. Knapp a civil penalty of $1,650 for each of Mr. Knapp's 214 knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Knapp* (Order Den. Mot. for Recons.), 64 Agric. Dec. 1668 (U.S.D.A. 2005), and *In re Coastal Bend Zoological Ass'n*., 65 Agric. Dec. 993 (U.S.D.A. 2006); namely, a total civil penalty of $353,100 for Mr. Knapp's knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture.

Eleventh, Mr. Knapp asserts the Secretary of Agriculture is authorized, but not required, to assess a civil penalty for violations of the Animal Welfare Act and the Regulations (Am. Pet. for Recons. at 15-16 ¶ 13).

I agree with Mr. Knapp. Unlike the civil penalty which the Secretary of Agriculture is required to assess for a knowing failure to obey a cease

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[17] 7 C.F.R. § 3.91(b)(2)(v) (2005); 7 C.F.R. § 3.91(b)(2)(ii) (2006).

[18] *See generally* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); Escoe v. Zerbst, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte* Jordan, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); Lion Raisins, Inc., No. 989-1, 62 Agric. Dec. 149, 151-52, 2003 WL 21213748 (U.S.D.A. May 12, 2003) (Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for discretion); PMD Produce Brokerage Corp., No. 99-0004, 60 Agric. Dec. 364, 369-70, 2001 WL 358757 (U.S.D.A. Apr. 6, 2001) (Order Den. Pet. to Reopen Hearing and Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for administrative law judge discretion); Harris, No. 91-27, 50 Agric. Dec. 683, 703, 1991 WL 290656 (U.S.D.A. May 1, 1991) (stating the word "shall" is ordinarily the language of command); Borden, Inc., No. 126-9, 46 Agric. Dec. 1315, 1460, 1987 WL 119801 (U.S.D.A. Sept. 30, 1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (U.S.D.A. 1991); Haring Meats & Delicatessen, Inc., 44 Agric. Dec. 1886, 1899 (U.S.D.A. 1985) (stating the word "shall" is ordinarily the language of command); Great W. Packing Co., 39 Agric. Dec. 1358, 1366 (U.S.D.A. 1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); Ben Gatz Co., 38 Agric. Dec. 1038, 1043 (U.S.D.A. 1979) (stating the word "shall" is ordinarily the language of command).

and desist order, the Animal Welfare Act authorizes the Secretary of Agriculture to assess not more than $10,000 for each violation of the Animal Welfare Act or the Regulations.[19]

Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b) (2006)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture is authorized to assess Mr. Knapp a maximum civil penalty of $1,902,500 for his 214 violations of the Animal Welfare Act and the Regulations.[20] For the reasons articulated in *Knapp*, 72 Agric. Dec. ___, slip op. at 18-22 (U.S.D.A. June 3, 2013), I assessed Mr. Knapp a $42,800 civil penalty for his 214 violations of the Animal Welfare Act and the Regulations.

Twelfth, Mr. Knapp asserts none of the "creatures" he is alleged to have purchased or sold are "animals," as that term is defined in the Animal Welfare Act; therefore, my failure to dismiss the Second Amended Complaint, is error. Mr. Knapp argues, as he is a breeder only, he did not purchase or sell "animals," as that term is defined in the

[19] 7 U.S.C. § 2149(b).

[20] Mr. Knapp may be assessed a civil penalty of not more than $3,750 for each of the 38 violations of the Animal Welfare Act and the Regulations that Mr. Knapp committed before June 18, 2008, and a civil penalty of not more than $10,000 for each of the 176 violations of the Animal Welfare Act and the Regulations that Mr. Knapp committed after June 18, 2008.

Animal Welfare Act, because the definition of the term "animal" exempts "creatures" that the seller has bred that are not intended for research, testing, experimentation, or exhibition. Mr. Knapp's argument relies upon the language at the end of the definition of the term "animal" which is specific to dogs: "With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes" (7 U.S.C. § 2132(g)). Mr. Knapp argues, since dogs used for breeding are specifically included in the definition of the term "animal" and other animals used for breeding are not mentioned, animals other than dogs used for breeding must be excluded under the canon of statutory construction: "expressio unius est exclusio alterius." (Am. Pet. for Recons. at 16-18 ¶ 14.)

The maxim "*expressio unius est exclusio alterius*" is an aid to statutory construction, not a rule of law. This aid to statutory construction can never override clear and contrary evidence of congressional intent.[21] Mr. Knapp's interpretation of the Animal Welfare Act is contrary to the objectives of the Animal Welfare Act and to the longstanding interpretation of the Animal Welfare Act by the Secretary of Agriculture. The stated objectives of the Animal Welfare Act are to insure the humane care and treatment of animals and to protect owners of animals from theft of their animals (7 U.S.C. § 2131). To achieve these objectives, all warm-blooded animals are encompassed within the definition of the term "animal," with certain species-specific exclusions and use-specific exclusions (7 U.S.C. § 2132(g)). The definition of the term "animal" does not exclude warm-blooded animals used for breeding, and the fact that the definition of the term "animal" specifically provides that the term "animal" means all dogs, including dogs used for hunting, security, and breeding, does not mean that other warm-blooded animals used for hunting, security, and breeding are not "animals," as that term is defined in the Animal Welfare Act.

Moreover, the Animal Welfare Act specifically authorizes the Secretary of Agriculture to issue Animal Welfare Act licenses to breeders of animals other than dogs[22] and the Regulations specifically provide for the issuance of Class "A" Animal Welfare Act licenses to

[21] Neuberger v. Comm'r, 311 U.S. 83, 88 (1940); Springer v. Philippine Islands, 277 U.S. 189, 206 (1928); United States v. Barnes, 222 U.S. 513, 518-19 (1912).
[22] 7 U.S.C. § 2133.

animal breeders.[23] Finally, the Secretary of Agriculture has long interpreted the Animal Welfare Act as authorizing the licensing of breeders of animals other than dogs.

Thirteenth, Mr. Knapp asserts he is the victim of selective enforcement; therefore, he has been denied equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Am. Pet. for Recons. at 18 ¶ 15).

I find nothing in the record to support Mr. Knapp's contention that the Administrator has singled out Mr. Knapp for enforcement of the Animal Welfare Act and the Regulations. Mr. Knapp bears the burden of proving he is the target of selective enforcement. Persons claiming selective enforcement must demonstrate the enforcement policy had a discriminatory effect and the enforcement policy was motivated by a discriminatory purpose.[24] In order to prove his selective enforcement claim, Mr. Knapp must show one of two sets of circumstances. Mr. Knapp must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[25] Mr. Knapp has not shown that he is a member of a protected group; that, in a similar situation, no disciplinary proceeding would be instituted against others that are not members of the protected group; or that this proceeding was initiated with discriminatory intent. In the alternative, Mr. Knapp must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) this disciplinary proceeding was initiated with intent to punish Mr. Knapp for exercise of the protected right.[26] Mr. Knapp has not shown any of these circumstances.

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[23] 9 C.F.R. §§ 1.1 (*Class "A" licensee*); 2.6(b)(1).

[24] United States v. Armstrong, 517 U.S. 456, 465 (1996); Wayte v. United States, 470 U.S. 598, 608 (1985).

[25] *See* Futernick v. Sumpter Twp., 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied sub nom.* Futernick v. Caterino, 519 U.S. 928 (1996); United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom.* McNeil v. United States, 500 U.S. 936 (1991).

[26] *See* Futernick v. Sumpter Twp., 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied sub nom.* Futernick v. Caterino, 519 U.S. 928 (1996); United States v. Anderson,

Therefore, I reject Mr. Knapp's unsupported assertion that the Administrator singled out Mr. Knapp for enforcement of the Animal Welfare Act and the Regulations.

Fourteenth, Mr. Knapp requests that I describe my relationship to the United States Department of Agriculture and contends, if I am an employee of the United States Department of Agriculture, *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013), is tainted by the human influences associated with the employment relationship (Am. Pet. for Recons. at 19 ¶ 16).

My relationship to the United States Department of Agriculture has had no effect on my disposition of this proceeding and my relationship to the United States Department of Agriculture is not relevant to this proceeding. Nonetheless, since Mr. Knapp believes my relationship to the United States Department of Agriculture tainted *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013), and he requests full disclosure of my relationship to the United States Department of Agriculture, I briefly address the relationship of the Judicial Officer to the United States Department of Agriculture and, in particular, my relationship to the United States Department of Agriculture.

The Act of April 4, 1940, as amended (7 U.S.C. §§ 450c-450g),[27] authorizes the Secretary of Agriculture to delegate his regulatory functions. Pursuant to this authority, the Secretary of Agriculture established the position of Judicial Officer.[28] The Secretary of Agriculture has delegated authority to the Judicial Officer to act as the final deciding officer in lieu of the Secretary of Agriculture in adjudicatory proceedings identified in 7 C.F.R. § 2.35, including adjudicatory proceedings subject to the Rules of Practice.[29] Since the position was created in 1940, three people have served as the United

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923 F.2d 450, 453-54 (6th Cir. 1991), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom.* McNeil v. United States, 500 U.S. 936 (1991).

[27] The Act of April 4, 1940, is also referred to as the Schwellenbach Act.

[28] The position was called "Assistant to the Secretary" until 1945, when the title became "Judicial Officer" as a result of a United States Department of Agriculture reorganization. 10 Fed. Reg. 13769 (Nov. 9, 1945).

[29] 7 C.F.R. § 2.35(a)(2).

States Department of Agriculture's Judicial Officer.[30] The Judicial Officer is an employee of the United States Department of Agriculture.

I have been an employee of the United States Department of Agriculture since July 18, 1976. During the period July 18, 1976 to January 20, 1996, I was employed in the Office of the General Counsel, Regulatory Division, and from January 21, 1996 to the present I have served as the United States Department of Agriculture's Judicial Officer.[31]

Congress has put in place a number of statutory provisions and the United States Department of Agriculture has put in place a number of regulatory provisions and institutional practices designed to ensure that the Judicial Officer renders impartial decisions in administrative proceedings.

The Administrative Procedure Act requires that the functions of the Judicial Officer must be conducted in an impartial manner.[32] Between the institution of a proceeding and the issuance of a final decision, the Judicial Officer is prohibited from discussing ex parte the merits of a proceeding.[33] The Judicial Officer has no responsibility for investigation, prosecution, or advocacy and is not responsible to, supervised by, or directed by any employee or agent engaged in the investigative or prosecuting functions of the United States Department of Agriculture.[34] During the period of my employment as the Judicial Officer, my job performance has never been evaluated; I have never

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[30] Thomas J. Flavin held the position from 1940 to June 1972, and Donald A. Campbell held the position from January 1971 to January 1996, when I was appointed as the Judicial Officer. A fourth person, John J. Franke, Jr., was delegated authority to decide one case as Judicial Officer, but that decision, *Utica Packing Co.* (Ruling on Complainant's Motion for Recons. and Decision and Order on Recons.), 43 Agric. Dec. 373 (U.S.D.A. 1984), was held to violate due process of law. United Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986).

[31] My service computation date as a United States government employee predates July 18, 1976, due to my service in the United States Army during the period 1970 through 1972.

[32] 5 U.S.C. § 556(b).

[33] 5 U.S.C. § 557(d); 7 C.F.R. § 1.151.

[34] Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 GEO. WASH. L. REV. 277, 284 (1957).

received an award, bonus, certificate of merit, or emolument; and I never been promoted, demoted, penalized, or reprimanded.

In short, the Judicial Officer is required by law to conduct the functions of the Judicial Officer in an impartial manner and the incentives normally present in an employment relationship to conduct functions in other than an impartial manner are not present in the employment relationship between the United States Department of Agriculture and the United States Department of Agriculture's Judicial Officer. Therefore, I reject Mr. Knapp's contention that *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013), is tainted by my employment relationship with the United States Department of Agriculture.

Fifteenth, Mr. Knapp asserts I took nearly 2 years to issue *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013) (Am. Pet. for Recons. at 2, 19 ¶¶ 1, 16).

On April 9, 2012, the Hearing Clerk transmitted the record in this proceeding to the Office of the Judicial Officer for consideration and decision. I did not issue a decision until June 3, 2013, 1 year, 1 month, 25 days after the Hearing Clerk referred the record to the Office of the Judicial Officer. While I disagree with Mr. Knapp's characterization of 1 year, 1 month 25 days as "nearly 2 years," I do agree with Mr. Knapp's general point that the time between referral of the record to the Office of the Judicial Officer and my issuance of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013) was far too long. However, there is no limitation on the time within which the Judicial Officer must issue a decision in an Animal Welfare Act proceeding, and I do not find that Mr. Knapp was harmed by the lengthy period between referral of the record to the Office of the Judicial Officer and issuance of *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013).

Sixteenth, Mr. Knapp asserts my suggestion that the Administrator consider referring any future knowing violation of the Animal Welfare Act or the Regulations by Mr. Knapp for criminal prosecution is an indication that I harbor personal animosity toward Mr. Knapp (Am. Pet. for Recons. at 19 ¶ 16).

As Mr. Knapp states, I did urge the Administrator to consider referring for criminal prosecution any future knowing violation of the Animal Welfare Act or the Regulations by Mr. Knapp, as follows:

> **Criminal Prosecution of Mr. Knapp**
>
> This proceeding is the third administrative proceeding brought under the Animal Welfare Act against Mr. Knapp. As evidenced in this proceeding, the orders issued by the Secretary of Agriculture against Mr. Knapp in *Knapp* (Order Den. Mot. for Recons.), 64 Agric. Dec. 1668 (2005), and *Coastal Bend Zoological Ass'n*., 65 Agric. Dec. 993 (2006), have not deterred Mr. Knapp from continuing to violate the Animal Welfare Act and the Regulations. If Mr. Knapp knowingly violates the Animal Welfare Act or the Regulations in the future, I would urge the Administrator to consider referring the matter for criminal prosecution in accordance with 7 U.S.C. § 2149(d).

Knapp, 72 Agric. Dec. ___, slip op. at 41 (U.S.D.A. June 3, 2013). However, my suggestion to the Administrator was not motivated by personal animosity toward Mr. Knapp. Instead, my suggestion was motivated by the failure to deter Mr. Knapp from violating the Animal Welfare Act and the Regulations through the administrative process.

Lifting of the Automatic Stay

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration (7 C.F.R. § 1.146(b)). Mr. Knapp's Amended Petition for Reconsideration was timely filed and automatically stayed *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013). Therefore, since Mr. Knapp's Amended Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *Knapp*, 72 Agric. Dec. ___ (U.S.D.A. June 3, 2013) is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Knapp's Amended Petition for Reconsideration, filed August 21, 2013, is denied.

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CIVIL RIGHTS

EDDIE SLAUGHTER.
Docket No. 13-0324.
Miscellaneous Order.
Filed October 29, 2013.

EDDIE WISE.
Docket No. 13-0325.
Miscellaneous Order.
Filed October 29, 2013.

FEDERAL MEAT INSPECTION ACT

PAISANO MEATS, INC. AND JOSE CRUZ LOPEZ PEREZ.
Docket No. 12-0651.
Order Granting Withdrawal of Complaint and Dismissing Action.
Filed July 19, 2013.

JOSE CRUZ LOPEZ PEREZ.
Docket No. 12-0652.
Order Granting Withdrawal of Complaint and Dismissing Action.
Filed August 19, 2013.

FEDERAL TORT CLAIMS ACT

JUSTO E. ROQUE, JR.
Docket No. 13-0321.
Memorandum Opinion and Order of Dismissal.
Filed September 12, 2013.

FOOD AND NUTRITION ACT

MISCELLANEOUS ORDERS

BRENDA RANDALL.
Docket No. 13-0323.
Order of Dismissal.
Filed November 25, 2013.

HORSE PROTECTION ACT

JUSTIN R. JENNE, D/B/A JUSTIN JENNE STABLES AND JUSTIN JENNE STABLES AT FRAZIER AND FRAZIER FARMS; DAVID MULLIS; AND REBECCA MULLIS.
Docket No. 13-0080.
Order Dismissing Party and Amending Caption.
Filed August 15, 2013.

JOHN CALLICUTT.
Docket No. 13-0037.
Order Dismissing Complaint.
Filed August 19, 2013.

JUSTIN R. JENNE, D/B/A JUSTIN JENNE STABLES AND JUSTIN JENNE STABLES AT FRAZIER AND FRAZIER FARMS; DAVID MULLIS; REBECCA MULLIS; AND DARREL W. FRAZIER, D/B/A FRAZIER AND FRAZIER FARMS.
Docket No. 13-0080.
Order Consolidating Cases for Hearing and Rescheduling Hearing.
Filed November 26, 2013.

ORGANIC FOODS PRODUCTION ACT

KRIEGEL, INC. AND LAURANCE KRIEGEL.
Docket No. 13-0260.
Decision and Order Dismissing Petition.
Filed July 16, 2013.

KRIEGEL, INC. AND LAURANCE KRIEGEL.
Docket No. 13-0260.
Miscellaneous Order.
Filed August 22, 2013.

OFPA – Discrimination.

Buren W. Kidd, Esq. for Complainant.
Laurance Kriegel for Respondents.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING APPEAL

Procedural History

On May 28, 2013, Kriegel, Inc., and Laurance Kriegel [hereinafter Petitioners] filed a pleading with the United States Department of Agriculture, Office of Administrative Law Judges, entitled "Review of the NOP Opinion Dated May 13, 2013" [hereinafter Petition]. Petitioners assert the Texas Department of Agriculture, operating as an accredited certifying agency of the United States Department of Agriculture, National Organic Program, discriminated against Petitioners on the basis of religion and race. Petitioners request an order requiring the Texas Department of Agriculture to approve Petitioners' organic certification. On July 1, 2013, the Agency[1] filed "Agency Response to Petitioners' Request for Review of the NOP Opinion Dated May 13, 2013" in which the Agency contends the Office of Administrative Law Judges does not have jurisdiction to consider Petitioners' claim of discrimination and urges the Office of Administrative Law Judges to dismiss the proceeding for lack of jurisdiction.

On July 16, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a "Decision and Order Dismissing Petition": (1) concluding the Office of Administrative Law Judges has no jurisdiction to consider Petitioners' claim of discrimination; (2) denying Petitioners' Petition; and (3) dismissing the proceeding.

On July 23, 2013, Petitioners filed "Appellants Agency Response to Petitioner's [sic] Request for Review of the NOP Opinion Dated May 13, 2013" and on August 5, 2013, Petitioners filed "Appeal to the Decision and Order Dismissing Petition." On August 15, 2013, the Agency filed "Agency Response to Petitioners' Appeal to the Judicial Officer." On

[1] Based upon the record, I infer the "Agency" is the Agricultural Marketing Service, United States Department of Agriculture.

August 20, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The Secretary of Agriculture has delegated authority to the Judicial Officer to act as final deciding officer in the adjudicatory proceedings identified in 7 C.F.R. § 2.35. Petitioners do not assert that this proceeding is an adjudicatory proceeding identified in 7 C.F.R. § 2.35, and, after a careful review of the record, I find the proceeding instituted by Petitioners is not one of the proceedings identified in 7 C.F.R. § 2.35. Therefore, I have no jurisdiction to hear Petitioners' appeal of the ALJ's "Decision and Order Dismissing Petition" and Petitioners' appeal petition must be dismissed for lack of jurisdiction.

For the foregoing reasons, the following Order is issued.

ORDER

Petitioners' appeal petition is dismissed. This Order shall be effective upon service on Petitioners.

PLANT PROTECTION ACT

SOULEYMANE N. KONE, D/B/A INTERNATIONAL OASIS.
Docket No. 13-0247.
Order of Dismissal.
Filed December 3, 2013.

POULTRY PRODUCTS INSPECTION ACT

PAISANO MEATS, INC. AND JOSE CRUZ LOPEZ PEREZ.
Docket No. 12-0651.
Order Granting Withdrawal of Complaint and Dismissing Action.
Filed July 19, 2013.

JOSE CRUZ LOPEZ PEREZ.
Docket No. 12-0652.
Order Granting Withdrawal of Complaint and Dismissing Action.

Filed August 19, 2013.

SALARY OFFSET ACT

NANCY L. LAYLAND.
Docket No. 13-0235.
Order of Dismissal.
Filed November 25, 2013.

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DEFAULT DECISIONS

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

AGRICULTURAL MARKETING AGREEMENT ACT

BAKER WALNUT, INC.
Docket No. 13-0224.
Default Decision and Order.
Filed August 7, 2013.

ANIMAL WELFARE ACT

ERIC JOHN DROGOSCH.
Docket No. 12-0586.
Default Decision and Order.
Filed November 22, 2013.

HORSE PROTECTION ACT

NICHOLAUS PLAFCAN.
Docket No. 13-0242.
Default Decision and Order.
Filed November 7, 2013.

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CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

American Airlines, Inc.
Docket Nos. 12-0393, 13-0194.
Filed December 12, 2013.

ANIMAL WELFARE ACT

Thomas R. Lease.
Docket No. 11-0026.
Filed July 11, 2013.

James Lee Riggs.
Docket No. 11-0025.
Filed July 15, 2013.

Hawaiian Airlines, Inc.
Docket No. 13-0266.
Filed September 18, 2013.

Charles Schreiner, Christie Schreiner, Gus Schreiner, and Walter Schreiner, D/B/A Y.O. Ranch.
Docket Nos. 13-0335, 13-0336, 13-0336, and 13-0338.
Filed October 21, 2013.

Lawrence C. Wallach, A/K/A Larry Wallach.
Docket No. 13-0230.
Filed December 2, 2013.

American Airlines, Inc.
Docket Nos. 12-0393, 13-0194.
Filed December 12, 2013.

Joseph D. Graber and Rhoda Graber.
Docket No. 13-0197.
Filed December 16, 2013.

CONSENT DECISIONS

FEDERAL CROP INSURANCE ACT

Jody A. Miles and Miles Insurance Agency.
Docket Nos. 13-0178, 13-0179.
Filed July 18, 2013.

HORSE PROTECTION ACT

Justin Taylor.
Docket No. 13-0252.
Filed July 17, 2013.

Jimmy Lightfoot.
Docket No. 13-0269.
Filed July 19, 2013.

Stanley Uradzionek, A/K/A Stan Urad.
Docket No. 13-0251.
Filed September 12, 2013.

Brandi L. Mills.
Docket No. 13-0346.
Filed November 19, 2013.

Michael Chiappari.
Docket No. 13-0022.
Filed November 22, 2013.

Randy T. Young, D/B/A D & R Stables of Sparta.
Docket No. 13-0229.
Filed December 4, 2013.

Patricia Kelly Sherman.
Docket No. 13-0286.
Filed December 12, 2013.

Larry D. George.
Docket Nos. 13-0287, 13-0290.

Filed December 12, 2013.

William O. Young.
Docket No. 13-0288.
December 12, 2013.

Beverly T. Sherman.
Docket No. 13-0289.
Filed December 12, 2013.

ORGANIC FOODS PRODUCTION ACT

R & R Trade International, Inc., T/A Orinoco Coffee & Tea, LTD.
Docket No. 13-0187.
Filed July 1, 2013.

PLANT PROTECTION ACT

JS Pallet Company, Inc., A/K/A J & S Pallet Company, Inc.
Docket No. 12-0626.
Filed November 25, 2013.

American Airlines, Inc.
Docket No. 12-0393.
Filed December 12, 2013.

POULTRY PRODUCTS INSPECTION ACT

Meat Chips, LLC and Daniel T. Fillmore.
Docket Nos. 14-0033, 14-0034.
Filed November 19, 2013.

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