AGRICULTURE DECISIONS

Volume 79

Book One

Part One (General)

Pages 1–287

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

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2020

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

--

MISCELLANEOUS ORDERS & DISMISSALS

AGRICULTURAL MARKETING AGREEMENT ACT

ANIMAL WELFARE ACT

HORSE PROTECTION ACT

--

DEFAULT DECISIONS

ANIMAL WELFARE ACT

--

CONSENT DECISIONS

ANIMAL WELFARE ACT

COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT OF 1996

HORSE PROTECTION ACT

--

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: TIMOTHY L. STARK, an individual; and WILDLIFE IN NEED AND WILDLIFE IN DEED, INC., an Indiana corporation.
Docket Nos. 16-0124, 16-0125.
Decision and Order Affirming Initial Decision.
Filed April 8, 2020.

AWA – Business, size of – Civil penalties – Correction – Deterrence – Four-factor analysis – Eighth Amendment – Good faith – Penalty, amount of – Previous violations, history of – Revocation – Violation, gravity of – Willfulness.

Ciarra A. Toomey, Esq., for APHIS.
Respondents Timothy L. Stark and Wildlife In Need and Wildlife In Deed, Inc., *pro se*.
Initial Decision and Order by Channing D. Strother, Chief Administrative Law Judge.
Final Decision and Order entered by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER AFFIRMING INITIAL DECISION

Summary of Issue in Dispute and Findings

Whether the petition for appeal filed by the Respondents in the above-captioned case on March 4, 2020 ("Appeal") supports the reversal in whole or in part of the Initial Decision issued by Chief Administrative Law Judge Channing D. Strother on February 3, 2020 finding that Respondents violated the Animal Welfare Act ("AWA") and regulations issued thereunder (9 C.F.R. pt. 2) on multiple occasions over a four-year period between January 2012 and January 2016 and Ordering that Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, cease and desist from violating the AWA and the regulations and standards issued thereunder; that AWA license number 32-C-0204 be revoked; that Respondents Timothy L. Stark and Wildlife In Need Wildlife In Deed, Inc., be jointly and severally assessed a civil penalty of $300,000 for those violations, and that Respondent Timothy L. Stark is assessed a civil penalty of $40,000 for his violations. For the reasons discussed below, I find that it does not; accordingly, the Initial Decision and Order is hereby AFFIRMED and ADOPTED in all respects, including the findings of fact, conclusions of law, and the sanctions Ordered by the Chief Judge therein. *See* Rules of

Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice"), 7 C.F.R § 1.145(i).

Respondents' request for oral argument before the Judicial Officer is not supported by good cause because it fails to provide a probative basis as to how oral argument would add to the record and is therefore denied.[1] *See* 7 C.F.R. § 1.145(d).

I. Summary of Procedural History

On July 8, 2016, APHIS filed a complaint alleging that the Respondents, Timothy L. Stark ("Respondent Stark") and Wildlife in Need and Wildlife in Deed, Inc. ("Wildlife in Need") (hereinafter collectively referred to as "Respondents"), violated the AWA and regulations issued thereunder (9 C.F.R. pt. 2) on multiple occasions over a four-year period between January 2012 and January 2016. Respondent Stark is an exhibitor as the term is defined in the AWA and the Regulations and is the holder of AWA license 32-C-0204.[2] Respondent Wildlife in Need, an exhibitor as the term is defined in the AWA, is an Indiana corporation who has never held an AWA license and whose agent for service of process and president is Respondent Stark.[3] Respondents' counsel withdrew from representation three weeks before the hearing and Respondent Stark chose to proceed *pro se*.[4]

On August 23, 2016, Respondents filed an answer in which they

[1] Appeal Pet. at 1.

[2] 7 U.S.C. § 2132(h); Answer ¶ 1; CX 1.

[3] 7 U.S.C. § 2132(h); Answer ¶ 1; CX 2.

[4] Throughout this decision and order I have taken into account that "[p]ro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003); *see also Ramos v. U.S. Dep't of Agric.*, 322 F. App'x 814, 820-21 (11th Cir. 2009), *reported in* 68 Agric. Dec. 60, 69 (U.S.D.A. 2009). Respondents' filings in this docket, even if done to the best of Respondents' ability, likely have not been as skillfully prepared and articulated as they would have been if aided by counsel and/or other professionals. However, among other things, I have fully attempted to extract Respondents' contentions from not only Respondents' brief but all of the record and to fully and fairly consider each.

admitted the jurisdictional allegations of the complaint and admitted that in 2008 Respondent Timothy Stark was convicted of violating the Endangered Species Act. *United States v. Timothy L. Stark*, Case No. 4:07-CR-00013-001 (S.D. Ind.). Respondents denied the remaining allegations and asserted five affirmative defenses: (1) estoppel; (2) laches; (3) res judicata; (4) statute of limitations; and (5) waiver. Answer ¶¶ 2, 5. Respondents also asserted in their answer that APHIS "should be barred from bringing a Complaint containing allegations that were not included as a part of the ongoing litigation that is presently the subject of an Appeal in AWA Docket No. 15-0080." Answer ¶ 4.

The Complaint alleged over 120 violations of the AWA. An eight-day hearing was held before Chief Administrative Law Judge ("Judge") Channing D. Strother on September 26-28 and October 1-5, 2018, in Louisville, Kentucky. The record before Judge Strother was extensive, with 101 admitted exhibits and over 2000 pages of transcript, which included the testimony of twenty-five witnesses.

Complainant introduced the testimony of seventeen witnesses: Veterinarians Dr. Robert M. Gibbens, Dr. Dana Miller, Dr. Peter R. Kirsten, Dr. Juan Arango, Dr. Cynthia DiGesualdo, Dr. Kerry McHenry, Dr. Barbara Pepin, and Dr. Harold Gough; APHIS Animal Care Inspectors Randall Coleman and Ann Marie Houser; APHIS Investigator Yosarah Stephens; Indiana State Trooper Mark LaMaster, and four members of the public who had attended Respondents' animal exhibitions (AnnMarie Maldini, Nicole Pollitt, Charles Grimley, and Brigette Brouillard).

Respondents introduced the testimony of eight witnesses: Respondent Timothy Stark, Melisa Stark, veterinarians Dr. Rick Pelphrey and Dr. Jill Cook, former APHIS inspector Elizabeth Taylor, and three of Respondents' volunteers (Max Strong, Christina Densford, and Jessica Amin).

Following the hearing, the parties filed proposed findings of fact, conclusions of law, and briefs, and reply briefs. On February 3, 2020, Chief Judge Strother ("Judge") filed an initial decision and order ("ID"), in which he found that Respondents willfully violated the AWA on multiple occasions. ID at 2-3 (". . . Respondent Stark . . . in many instances showing blatant disregard for the Regulation Standards and requirements

applicable to him as a licensee . . ."). The Judge concluded that "Respondents' business is large, the gravity of such violations was great, there is a history of previous violations, and Respondents did not act in good faith." ID at 3. Consequently, he assessed a civil penalty against Respondent Stark for $40,000 and a joint and several civil penalty of $300,000 against Respondent's business entity, Wildlife In Need and Wildlife In Deed, Inc.; ordered AWA license 32-C-0204 revoked; and ordered Respondents to cease and desist from further violations. ID at 146-52. [5]

II. Respondents' Appeal Petition Is Denied

On March 4, 2020, Respondents filed a Petition for Appeal ("Appeal"), in which they "disagree both overall and point by point with the ALJ's adverse determination in his Decision and Order" and, as discussed more fully below, specifically challenged several of the Judge's findings. Appeal at II. Respondents request that the Judicial Officer reverse all of the Judge's findings "as being erroneous" and remand the matter to "the ALJ to issue a new order and decision consistent with those findings." *Id*. at III.

Respondents' Petition for Appeal contains ten general categories of alleged error by the Judge. More specifically, in the Petition for Appeal, Respondents made ten arguments, some with overlapping issues. They argued that the Chief Judge:

1. erred by finding that he had been provided a reasonable opportunity to correct the alleged violations (Appeal at [unnumbered] 2);

2. erred in finding that Respondents applied AWA criteria and standards as written (Appeal at [unnumbered 2-3);

3. erred in finding that Respondents exhibited the requisite "willfulness" in violating AWA criteria and standards as written (Appeal at [unnumbered] 3-4);

[5] *Id*.

4. erred by making an adverse decision in spite of insufficient proof of inadequate veterinary care (Appeal at [unnumbered] 4-5);

5. erred by finding sufficient proof of inadequate recordkeeping (Appeal at [unnumbered] 5-6);

6. erred by finding sufficient proof of inadequate food, water, or shelter (Appeal at [unnumbered] 6-7);

7. erred in finding sufficient proof of "inadequate employee number" [sic] (Appeal at [unnumbered] 7-8);

8. erred in finding sufficient proof of inadequate care or treatment (Appeal at [unnumbered 8-9);

9. erred in finding sufficient proof of physical interference or actual physical threat (Appeal at [unnumbered 10-11); and

10. erred in awarding fines that violated respondents' constitutional rights against excessive fines (Appeal at [unnumbered] 11-12).

All of these arguments, with the exception of the excessiveness of the fines, were made by Respondents in their post-hearing brief. With that exception, Respondents simply repeat the arguments initially advanced in their post-hearing brief filed on June 24, 2019.[6] These same arguments were already before the Chief Judge, along with Complainant's response to these arguments as set forth in its post-hearing reply brief filed on July 23, 2019, when he issued his Initial Decision on February 3, 2020. The Chief Judge systematically addressed each allegation in his 183-page Initial Decision and provided detailed findings of fact and conclusions of law, fully supported by the evidence of record, which have already taken these arguments into consideration.

The Chief Judge also addressed each of Respondents' five affirmative defenses: (1) estoppel; (2) laches; (3) res judicata; (4) statute of limitations;

[6] Complainant fully addressed these arguments in its post-hearing reply brief filed on July 23, 2019.

and (5) waiver,[7] and, providing rationale, found each to be without merit.[8] Accordingly, the Findings of Fact and Conclusions of Law set forth in the Initial Decision are hereby AFFIRMED and ADOPTED for all purposes. Only Respondents' newly raised arguments regarding the excessiveness of the fines will be addressed below.

Civil Penalties Under the AWA
Do Not Violate the Eighth Amendment

Respondents contend that the $340,000 penalty violates the Eighth Amendment to the United States Constitution. That Amendment provides that "Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The Supreme Court has recognized that a civil penalty satisfies those protections so long as it is not grossly disproportionate to the gravity of the offense for which it is imposed. *See United States v. Bajakajian*, 524 U.S. 321, 334-35 (1998).

Respondents contend that their AWA license revocation and "the imposition the fines by the ALJ are at least partly punitive . . ." and "Respondent Stark does not fit at all into the class of persons for whom punitive statutes were principally designed." Appeal at II.H. This argument is not supportable in light of well established precedent that the purpose of civil penalties assessed under the Animal Welfare Act is to *deter* future violations of the Animal Welfare Act and the Regulations and the Standards; "civil penalties assessed under the Animal Welfare Act are

[7] Answer ¶¶ 2, 5

[8] Respondent's Answer asserted five affirmative defenses: (1) estoppel; (2) laches; (3) res judicata; (4) statute of limitations; and (5) waiver (Answer ¶¶ 2, 5). As to equitable estoppel, the CALJ found that Respondent provided no evidence of reliance on any action by Complainant. Similarly, a claim of collateral estoppel, related to Respondent's previous conviction, had no merit because an enforcement action by the agency is not barred by disciplinary proceedings instituted by other entities (ID at 9-10) (citing former CALJ Davenport in *Lacy*, 65 Agric. Dec. 1157, 1159 (U.S.D.A. 2006)). Laches have long been held to be inapplicable to administrative proceedings (*see infra* note 32; ID at 10), and Respondent provided no factual basis or legal authority to support any argument related to a statute of limitations issue; therefore, waiver would not apply. ID at 10.

not for the purpose of punishment."[9] The Judicial Officer has held that "the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators."[10]

Civil Penalties Under the AWA Are Established Pursuant to 7 U.S.C. § 2149(b)

Under the Animal Welfare Act, the appropriateness of the civil penalty should be determined "with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." [11]

The Chief Judge's findings of fact and conclusions of law addressing each of these factors are based on substantial record evidence and a through and well supported analysis of applicable statutes, regulations and judicial and agency precedent. Accordingly, the Chief Judge's findings of fact and conclusions of law set forth in the Initial Decision are hereby

[9] *Hansen*, 58 Agric. Dec. 369, 387 (U.S.D.A. 1999) (citing *Austin v. United States*, 509 U.S. 602, 609 (1993) (stating that "[t]he purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) (stating that the word fine, as used in the Excessive Fines Clause, means payment to a sovereign as punishment for some offense); *Little v. Comm'r*, 106 F.3d 1445, 1454 (9th Cir. 1997) (stating that the Excessive Fines Clause is not applicable to additions to income tax for negligence and for substantial understatement of tax because the additions serve only to deter noncompliance with tax laws by imposing a financial risk on those who fail to comply with tax laws); *United States v. One Parcel of Real Estate at 321 S.E. 9th Court, Pompano Beach, Fla.*, 914 F. Supp. 522, 525-26 (S.D. Fla. 1995) (stating that the Excessive Fines Clause limits the government's power to extract payments as punishment for an offense).

[10] *Hansen*, 58 Agric. Dec. 369, 386 (U.S.D.A. 1999).

[11] 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,* 331 U.S. 519, 528-29 (1947).

AFFIMED and **ADOPTED** herein for all purposes.

To facilitate future review, the Chief Judge's analysis addressing each of the four factors required under 7 U.S.C. § 2149(b), as well as whether Respondents' actions were willful, is restated and summarized below. *See* ID at 147-52.

Willfulness

As the Chief ALJ explained, under the AWA, the term "willful" means "action knowingly taken by one subject to the statutory provision in disregard of the action's legality. . . . Actions taken in reckless disregard of statutory provisions may also be 'willful.'"[12] The Court in *Hodgins* determined the "proper rule": [13]

> Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty.

The Chief Judge further explained that the Judicial Officer "has long held that a 'willful act under the Administrative Procedure Act ("APA") (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous

[12] *Hodgins v. U.S. Dep't of Agric*., 238 F.3d 421, 2000 WL 1785733, *9 (6th Cir. Nov. 20, 2000) (table) (internal quotations omitted) (quoting *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999) (citing *United States v. Ill. Cent. Ry*., 303 U.S. 239, 242-43 (1938) (one who "intentionally disregards the statute or is plainly indifferent to its requirements" acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961) (one who "acts with careless disregard of statutory requirements" acts willfully); JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action "was committed intentionally" or "was done in disregard of lawful requirements" and also noting that "gross neglect of a known duty will also constitute willfulness")).

[13] *Hodgins*, 2000 WL 1785733, at *10.

advice, or acts with careless disregard of statutory requirements.'"[14] He added, "It is also important to note that 'willfulness' determinations are not necessary for issuance of civil penalties or cease and desist orders. Only one finding of a willful violation is needed under 7 U.S.C. § 2149(a) to provide authority for the suspension or revocation of a license."[15] ID at 147.

The Chief ALJ considered Respondents' contentions that "willfulness—a mandatory element to be proven—is one that must be addressed separately with respect to each specific violation" and that "Complainant utterly failed to do so at every turn" but that Respondents' evidence "demonstrated well that Respondents did not plan or commit any willful violation, nor intentionally perform any prohibited act without regard to motive or erroneous advice, nor act with *any* disregard of statutory requirements, much less by doing so in a reckless fashion." Answering Brief in Support (Post-Hearing Brief) at 10; emphasis in original; ID at 148. The Chief Judge also considered the contention that Respondents were never given a reasonable opportunity to correct violations because, although Respondents conceded that they "had in fact been provided with copies of the regulations once per year and presumably given written copies of each inspection report," Respondents maintained that they were "definitely *not* provided any such reasonable or realistic opportunity [to demonstrate compliance], especially in any form that would satisfy the core purposes of the Act."[16] Answering Brief at 6-7.

The Chief Judge also considered the position of Complainant, which, in its Reply Brief at 7-8, stated that the APA does not require notice and an opportunity to correct in cases where public health, interest, or safety

---

[14] *Terranova Enters., Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. 2012) (citing *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*., 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009); *Bond*, 65 Agric. Dec. 92, 107 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978)).

[15] *See Big Bear Farm, Inc*, 55 Agric. Dec. 107, 139 (U.S.D.A. 1996); *Horton*, 73 Agric. Dec. 77, 85 (U.S.D.A. 2014).

[16] Citing "Transcript at 148:2-28 in Testimony of Tim Stark on 10/04/18."

requires otherwise and that this case is one that "implicates public health, public interest, and public safety."[17] Complainant contended, *id.*, that "the record is replete with evidence that APHIS repeatedly and specifically advised respondents of their noncompliance - through inspection reports, post inspection exit interviews, correspondence, and a 21-day suspension of respondent Stark's license in 2015."[18] Complainant stated that the "evidentiary record in this case . . . establishes that respondents repeatedly failed to correct the deficiencies documented by the APHIS inspectors."[19]

The Chief Judge noted that Complainant further contended, *id.* at 14-15, that Respondents "are wrong on both the law and the facts" as there was no requirement to establish willfulness because: (1) willfulness does not need to be established to assess civil penalties or to order a cease and desist; (2) willfulness does not need to be established because Respondents were provided both notice and opportunity to correct;[20] and (3) willfulness does not need to be established because this case concerns public health, public interest, and public safety.

The four-factor analysis of 7 U.S.C. § 2149(b):

The Chief Judge prefaced his analysis as follows:

> Here, regarding each of the allegations, I have considered whether each violation concerned public health, interest, and/or safety. I've also considered whether each violation was a repeat (i.e. Respondents had notice and a chance to correct but failed to do so), the gravity of the violation, and whether Respondents knew or should have known that their action or inaction would lead to a violation

[17] Citing *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 140 (U.S.D.A. 1996) (citing 5 U.S.C. § 558(c)).

[18] Citing CX 4, 6, 14, 18, 22, 23, 29, 30, 35, 36, 45-48.

[19] *Id.* at 9 (citing CX 4, 6, 14, 18, 22, 23, 29, 30, 35, 36; RX 14, 18-20).

[20] Also noting, *id.* at 11, that "the Judicial Officer has held that the regulations themselves provide adequate notice of the requirements, particularly with respect to handling" (citing *Zoocats, Inc*., 68 Agric. Dec. 1072, 1078 (U.S.D.A. 2009) (Order Den. Pet. to Reconsider)).

> based on their knowledge of the Regulations. I have also taken into consideration Respondent Stark's background in animal ownership and exhibition, that Respondent Stark held a Class B AWA license from 1999 until 2008, and has held a Class C exhibitors license since 2008 with full awareness, knowledge of, and access to the AWA and Regulations promulgated thereunder.[21]

ID at 149.

a. Size of the business

The Chief Judge found that Respondents' business is large based on the evidence of record as to the number of animals housed at the facility and the revenue conducted. [22] ID at 149-50.

b. Gravity of the violation

The Chief Judge found the gravity of many of the violations to be serious due to: (1) repeated failure and/or refusal to provide access to APHIS inspectors for the purpose of conducting inspections to determine compliance with the AWA and Regulations promulgated thereunder; (2) repeated interference with and verbal abuse of APHIS inspectors; (3) repeated failures to handle animals carefully, particularly repeated exposure of the public and animals to risks by failing to provide proper distance and barriers during exhibition particularly with small children and infants present; (4) repeated failures to provide attending veterinarian

[21] Tr. Vol. 7, 1901:2-1902:9.

[22] Complainant contends, and Respondents do not deny, that Respondents' business is large based on Respondent Stark's representations to APHIS between 2011 and 2015 that he held between forty-three and 124 animals and derived over $569,000 from animal exhibitions in 2014 alone. Complaint ¶ 3. *See also* Complainant's Post-Hearing Brief at 128-29 (citing *Perry*, 2013 WL 8213618, at *8 (U.S.D.A. 2013) (citing *Huchital*, 58 Agric. Dec. 763, 816-17 (U.S.D.A. 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 that respondent, who held 75-80 animals, operated a moderately large business), *aff'd per curium*, 15 F.3d 1097 (11th Cir. 1994); CX 1, CX 36 at 9; Tr. Vol. 7, 1953-54; Respondent Wildlife in Need and Wildlife in Deed, Inc. 2014-17 Tax Returns, attached to Complainant's Proposed Order and Request to Take Official Notice).

supervision and involvement; and (5) repeated failures to provide adequate veterinary care to animals that may have resulted in the deaths of many animals.[23]

c. Good faith and History of Previous Violations

The Chief Judge found that Respondents have a history of previous violations and a lack of good faith to comply with the AWA and Regulations promulgated thereunder. He explained:

> Although Respondents have never been subject to a previous adjudication finding that they violated the AWA, [I] have found numerous violations of the AWA and Regulations between January 2012 and January 2016[24] and such an "ongoing pattern of violations establishes a 'history of previous violations' for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith."[25] Specifically, the record reflects that Respondent Stark has shown a lack of good faith by deliberately trying to circumvent the AWA regulations, including presenting forged documents and in his interference with

[23] *See Mitchell*, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001) ("Interference with Animal and Plant Health Inspection Service officials' duties under the Animal Welfare Act and the failure to allow Animal and Plant Health Inspection Service officials access to facilities, animals, and records are extremely serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act."); *Yost*, 78 Agric. Dec. 23, 40 (U.S.D.A. 2019) ("The Secretary has found that violations based on an exhibitor's failure to handle dangerous animals with sufficient distance and/or barriers are serious, can result in harm to animals and people, and merit assessment of 'the maximum, applicable civil penalty for each handling violation.'") (citing *Mitchell*, AWA Docket No. 09-0084, 2010 WL 5295429, at *8 (U.S.D.A. Dec. 21, 2010)).

[24] Also noting that Respondent Stark's AWA license was previously suspended in 2015 for a period of twenty-one days, RX 9.

[25] *Staples*, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014). I here acknowledge that Respondent Stark was convicted of violating the Endangered Species Act in 2008, *United States v. Timothy L. Stark*, Case No. 4:07CR00013~001 (S.D. Ind.), and is was respondent in a license termination proceeding, *Stark*, AW A Docket No. 15-0080, but it was found on the merits that Respondent Stark's AWA license should not be terminated in that case.

> APHIS inspectors, and by repeatedly misrepresenting the involvement of attending veterinarians in operations.

ID at 151 (internal citations omitted).

d. Penalty Amount

Explaining that the amount of the civil penalty was subject to his discretion within the statutory limit at the time of violation, and was justified with a purpose of deterring future violations, the Chief ALJ set forth his finding and rationale as to the penalty amount.

> The maximum civil penalty per violation in this case is $10,000.[26] Complainant states that the Complaint alleged Respondents committed not fewer than 339 willful violations of the AWA and Regulations and Complainant calculates that Respondent Stark is alleged to have committed not fewer than four willful violations of the AWA and Regulations.[27] Complainant asks that the undersigned not assess less than ten percent (10%) of the maximum penalties assessable under the AWA.[28] Complainant's reasoning is considered and consideration of other mitigation factors regarding gravity have been noted as to each allegation where appropriate. Based on the number of violations,[29] size of the business, the gravity of the violations, the history of previous violations, and Respondents' lack of good faith, I find that Respondents should be jointly and severally assessed a

[26] 7 U.S.C. § 2149(b). *See also supra* note 25.

[27] Complainant's Post-Hearing Brief at 133.

[28] *Id.*

[29] Based on the findings herein, Complainant did not meet its burden of proof regarding at least twenty alleged violations. It is unclear how Complainant counted each alleged violation, considering alleged violations that pertained to multiple animals. Thus, I have rounded down Complainant's calculated number of violations. Respondent Stark individually is found herein to have committed four willful violations of the AWA and Regulations.

civil penalty in the amount of $300,000.

ID at 151-52.

As the Chief ALJ noted, the Complaint in paragraphs 7 (a) through (d) alleged that "respondent Stark willfully violated the Act and the Regulations, 9 C.F.R. § 2.4, by interfering with, and/or verbally abusing APHIS officials in the course of carrying out their duties . . ." The text of the Complaint does not allege that Respondent Wildlife in Need committed these particular violations, and Complainant on brief seeks penalties only against Respondent Stark for these violations. As Complainant stated on brief: "Dr. Gibbens testified that the kind of behavior exhibited by respondent Timothy Stark impedes the ability of the Department to enforce the AWA." [30]

The Chief ALJ found the allegations of these Complaint paragraphs "virtually undisputed in the record with no credible showing of any alleged good faith, and to state violations of great gravity." The Chief ALJ agreed with Dr. Gibbens'—who at the time of the Hearing was the National Director of APHIS Animal Care's Field Operations and previously an APHIS VMO, Field Supervisor, and Regional Director[31]—opinion that the subject actions by Respondent Stark interfered with the ability of APHIS to enforce the AWA. He explained: "The ability to enforce the AWA is fundamental to the USDA program, and the maximum penalties are appropriate for such interference in the circumstances of this proceeding." ID at 152. The Chief Judge therefore found that Respondent Stark should be assessed a civil penalty in the amount of $40,000.

As previously explained, while license termination proceedings are not penal and license termination is not a sanction,[32] it is well settled that in

[30] Complainant's Post-Hearing Brief at 32-33 (citing Tr. Vol. 8 at 2217:11-19).

[31] Tr. Vol. 8, 2196.

[32] As established by previous case precedent, the Animal Welfare Act is a remedial statute and Animal Welfare Act license termination proceedings are not penal. "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." *Greenly*, 72 Agric. Dec. 586, 592-93 (U.S.D.A. 2013).

administrative enforcement cases, "[t]he purpose of an administrative sanction is deterrence of future violations by the violator and other potential violators."[33] Here, the Initial Decision reflects that the Respondents violated the AWA and its Regulations over 100 times from December 2012 to January 2016 clearly establishing that Respondents have remained undeterred by APHIS's previous enforcement efforts, including two summary license suspensions,[34] and demonstrating Respondents' continued disregard for, and unwillingness to abide by, the requirements of the Act and Regulations.

As the Chief Judge explained in his analysis of good faith and history of previous violations as set forth above (*supra* at 13), he found a lack of good faith evidenced by numerous violations of the AWA and Regulations between January 2012 and January 2016, and well as deliberate attempts to circumvent the AWA regulations. The Chief ALJ concluded, that despite no previous adjudication that Respondents violated the AWA, "[S]uch an "ongoing pattern of violations establishes a 'history of previous violations' for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith." ID at 151.

Based on substantial record evidence, and following a through and well supported analysis of these factors, the Chief Judge determined that revocation of AWA license 32-C-0204, permanent disqualification from obtaining an AWA license, and issuance of a cease and desist order was necessary to deter future violations, that Respondents should be jointly and severally assessed a civil penalty in the amount of $300,000 and Respondent Timothy Stark should be assessed a civil penalty in the amount of $40,000.

ORDER

Respondents' arguments have been previously considered and are rejected. Accordingly, Respondents' Petition for Appeal is ***denied*** and the

---

[33] *Zimmerman*, 57 Agric. Dec. 1038, 1064 (U.S.D.A. 1998).

[34] *See* RX 9.

Initial Decision issued by Chief Administrative Law Judge Channing D. Strother on February 3, 2020 finding that Respondents violated the Animal Welfare Act and regulations issued thereunder (9 C.F.R. pt. 2) on multiple occasions over a four-year period between January 2012 and January 2016 is hereby ***affirmed and adopted*** by the Judicial Officer for all purposes.

Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall decease and desist from violating the AWA and the regulations and standards issued thereunder; AWA license number 32-C-0204 shall be revoked; Respondents Timothy L. Stark and Wildlife In Need and Wildlife In Deed, Inc., shall be jointly and severally assessed a civil penalty of $300,000 for those violations, and Respondent Timothy L. Stark is assessed a civil penalty of $40,000 for his violations.

RIGHT TO SEEK JUDICIAL REVIEW

Respondents have the right to seek judicial review of the Decision and Order entered in this proceeding on February 3, 2020 and of this Order Denying Respondents' Petition for Appeal and Affirming the February 3, 2020 Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341–2350. Respondents must seek judicial review within sixty (60) days after entry of this Order.[35]

Copies of this Order shall be served by the Hearing Clerk upon each of the parties (by certified mail as to Respondents), with courtesy copies provided via email where available.

___

[35] The appeal deadline for the Decision and Order issued in this proceeding on 2/3/2020 was stayed by the timely filing of Respondents' Petition for Appeal and the time for judicial review shall begin to run for the date of entry of this Order as the final action in this proceeding in accordance with 7 C.F.R. §1.146(b). Respondents must seek judicial review within sixty days of entry of this Order in accordance with 7 U.S.C. § 2149(c).

In re: TIMOTHY L. STARK, an individual; and WILDLIFE IN NEED AND WILDLIFE IN DEED, INC., an Indiana corporation.
Docket Nos. 16-0124, 16-0125.
Decision and Order.
Filed February 3, 2020.

AWA.

Ciarra A. Toomey, Esq., for APHIS.
Respondent Timothy L. Stark, pro se.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER

INTRODUCTION AND SUMMARY OF DECISION

The Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), Complainant, instituted this administrative enforcement proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq*.). ("AWA"), by filing a Complaint alleging that Respondents, Timothy L. Stark ("Respondent Stark") and Wildlife in Need and Wildlife in Deed, Inc. ("Wildlife in Need") (hereinafter collectively referred to as "Respondents"), violated the AWA and regulations issued thereunder (9 C.F.R. pt. 2). Respondent Stark is an exhibitor as the term is defined in the AWA and the Regulations and is the holder of AWA license 32-C-0204. [1] Respondent Wildlife in Need, an exhibitor as the term is defined in the AWA, is an Indiana Corporation who has never held an AWA license and whose agent for service of process and president is Respondent Stark.[2]

The Complaint alleges well over 120 violations of the AWA. The record before me is extensive, with 101 admitted exhibits and over 2000 pages of transcript, which includes the testimony of twenty-five witnesses. I note that Respondents' counsel withdrew from representation three

[1] 7 U.S.C. § 2132(h); Answer at ¶ 1; CX 1.

[2] 7 U.S.C. § 2132(h); Answer at ¶ 1; CX 2.

weeks before the hearing and Respondent Stark chose to proceed *pro se*.[3]

Although Respondent Stark credibly testified that he loves his animals and would never intentionally hurt them,[4] and the record shows that he inspired trust in the volunteer workers at the subject facilities,[5] the record also shows that Respondent Stark violated the AWA on multiple occasions; in many instances showing blatant disregard for the regulation Standards and requirements applicable to him as a licensee. Respondent Stark, in his actions, testimony, and pleadings, revealed a belief that his own experience and expertise is more reliable that of experienced USDA personnel and experts, and that his opinions should override the AWA and Regulations. I do not have the authority to overrule the AWA and Regulations based upon Respondent Stark's lay opinions. Moreover, while I recognize that Respondent Stark has substantial experience in the handling of animals, his experience is that of one, uncredentialed layman. The animals at issue are not family pets, generally exposed only to family and volunteers, but are exposed to the public for commercial purposes and subject to AWA regulation.

Therefore, based on careful review of the record and arguments before me, I find that Respondents willfully violated the AWA on multiple occasions. As set out below, I also find that that Respondents' business is large, the gravity of such violations was great, there is a history of previous violations, and Respondents did not act in good faith. Therefore, Respondents are ordered to cease and desist from violating the AWA and the regulations and standards issued thereunder; AWA license number 32-

---

[3] Throughout this decision and order I have taken into account that "[p]ro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Boxer X v. Harris*, 437 F.3d 1107 (11th Cir. 2006) (quoting *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003)). *See also Ramos v. USDA*, 68 Agric. Dec. 60 (U.S.D.A. 2009). Respondents' filings in this docket, even if done to the best of Respondents' ability, likely have not been as skillfully prepared and articulated as they would have been if aided by counsel and/or other professionals. However, among other things, I have fully attempted to extract Respondents' contentions from not only Respondents' brief but all of the record and to fully and fairly consider each.

[4] *See, e.g.*, Tr. Vol. 7, 1937-38.

[5] *See, e.g.*, Tr. Vol. 7 1882, 1837-38, 1861.

C-0204 is hereby revoked; Respondents are jointly and severally assessed a civil penalty of $300,000 for their violations herein; and Respondent Stark is assessed a civil penalty of $40,000 for his violations herein.

JURISDICTION AND BURDEN OF PROOF

The AWA was promulgated to insure the humane care and treatment of animals intended for use in research facilities, exhibition, or as pets.[6] Congress provided for enforcement of the AWA by the Secretary of Agriculture, USDA.[7] Regulations promulgated under the AWA are in the Code of Federal Regulations, part 9, sections 1.1 through 3.142. Among other things, as licensees under the AWA, Respondents are required to comply with the AWA and Regulations.

The burden of proof is on Complainant, APHIS.[8] The standard of proof applicable to adjudicatory proceedings under the Administrative

---

[6] 7 U.S.C. § 2131.

[7] 7 U.S.C. §§ 2131-59.

[8] 5 U.S.C. § 556(d). *See also Terranova*, 78 Agric. Dec. 248, 281 (U.S.D.A. 2019) (stating: "Complainant bears the initial burden of coming forward with evidence sufficient for a *prima facie* case" and that, because Complainant established a *prima facie* case, "[t]he burden of production then shifted to Respondents to rebut Complainant's *prima facie* showing. Shifting burdens of production are necessary tools in developing a full and complete record and in assessing the weight to assign evidence") (citing among other things 5 U.S.C. § 556(d); *JSG Trading Corp.*, 57 Agric. Dec. 640, 709-10, 721-22 (U.S.D.A. 1998); *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (U.S.D.A. 1996); *Davenport*, 57 Agric. Dec. 189, 223 (U.S.D.A. 1998) ("The burden of proof in disciplinary proceedings under the Animal Welfare Act is preponderance of the evidence, which is all that is required for the violations alleged in the Complaint."); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 266 (D.C. Cir. 1989), *cert. denied sub nom. Am. Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. U.S. Dep't of Agric*., 754 F.2d 804, 810 (9th Cir. 1984); *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) (additional citations omitted).

Procedure Act,[9] such as this one, is the preponderance of the evidence.[10]

APPLICABLE STATUTORY PROVISIONS

Congress enacted the AWA, in relevant part "to insure that animals intended for . . . exhibition purposes . . . are provided humane care and treatment"[11]

To achieve this purpose, Congress provided that the Secretary of Agriculture "shall make such investigations or inspections as he deems necessary" to determine violations of the AWA and shall establish rules and regulations as he deems necessary to achieve the purpose of the AWA.[12]

The corresponding Regulations mandate, in pertinent part, that exhibitors must provide access to APHIS officials for inspection of records and property[13] and prohibit exhibitors from interfering with APHIS officials in the course of carrying out official duties.[14] The Regulations establish certain requirements on licensees, such as having an attending veterinarian;[15] accurately keeping records of animal acquisition and

[9] 5 U.S.C. §§ 551 *et seq*.

[10] *See Herman & Maclean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is the preponderance of the evidence).

[11] 7 U.S.C. § 2131. *See also Animal Legal Defense Fund, Inc. v. Perdue*, 872 F.3d 602, 607 (D.C. Cir. 2017) ("Congress enacted the Animal Welfare Act in 1966 to ensure the humane treatment of animals used in medical research. In 1970, Congress amended the Act to cover animal 'exhibitors' a category that includes zoos.") (internal citations omitted).

[12] 7 U.S.C. § 2146(a).

[13] 9 C.F.R. § 2.126.

[14] 9 C.F.R. § 2.4.

[15] 9 C.F.R. § 2.40.

disposition;[16] identifying dogs and cats on exhibitor property;[17] and the proper handling of animals.[18] The Regulations set forth Standards[19] for the humane handling, care, treatment and transportation of animals, including Standards relevant to this case regarding housing, shelter, and facilities;[20] exercise and enrichment;[21] feeding, watering, and sanitization;[22] and that a sufficient number of employees be utilized.[23] Lastly, the AWA provides for civil penalties as well as suspension or revocation of AWA license if violation of the statute is found.[24]

PROCEDURAL HISTORY

This case was initiated by Complainant APHIS via Complaint on July 8, 2016. An Answer was timely filed on August 23, 2016 and the case was thereafter assigned to the undersigned, now Chief Administrative Law Judge Channing D. Strother,[25] on August 25, 2016. I issued an Order Setting Deadlines for Submissions on September 28, 2016. Complainant filed a List of Exhibits and Witnesses on December 1, 2016, Respondents

---

[16] 9 C.F.R. §§ 2.75(a)(2), 2.75(b).

[17] 9 C.F.R. § 2.50(c).

[18] 9 C.F.R. § 2.131.

[19] 9 C.F.R. § 2.100(a).

[20] 9 C.F.R. §§ 3.1 (a). 3.1(c)(1)(ii), 3.1(e); 9 C.F.R. § 3.3(e)(1); 9 C.F.R. § 3.4(b); 9 C.F.R. §§ 3.125(a), 3.125(c); 9 C.F.R. §§ 3.127(a), 3.127(b), 3.127(d).

[21] 9 C.F.R. § 3.8; 9 C.F.R. § 3.81.

[22] 9 C.F.R. § 3.9; 9 C.F.R. § 3.10; 9 C.F.R. § 3.11(b)(2); 9 C.F.R. § 3.80(a)(2)(viii); 9 C.F.R. § 3.129; 9 C.F.R. § 3.130.

[23] 9 C.F.R. § 3.132.

[24] 7 U.S.C. §§ 2149(a), (b). The civil penalty for a violation of the AWA is a maximum of $11,390, for violations taking place between December 5, 2017 and March 14, 2018; and a maximum of $10,000 for violations taking place between May 7, 2010 and December 4, 2017. 7 C.F.R. § 3.91(b)(2)(ii).

[25] At the time this case was assigned to the undersigned, then-Administrative Law Judge Strother, the Chief Administrative Law Judge was Bobbie J. McCartney. Secretary Perdue appointed me USDA Chief Administrative Law Judge on October 17, 2018.

filed a List of Exhibits and Witnesses on April 20, 2017, and Complainant's filed an Updated and Supplemental List of Witnesses and Exhibits on July 6, 2017.

A telephone conference was held on June 6, 2017 and I issued a Summary of June 6, 2017 Telephone Conference and Order Scheduling Hearing for November 13 to 22, 2017 on June 7, 2017. On November 6, 2017 I issued an Order canceling the scheduled hearing due to a scheduling conflict and providing instructions for rescheduling. I then issued a Summary of June 18, 2018 Telephone Conference and Order Scheduling Hearing for September 24 to October 5, 2018. On July 19, 2018 an Adjustment of Hearing Dates and Designation of Hearing Location was issued.

On September 4, 2018 counsel for Respondents filed a Motion for Withdrawal of Attorney. A telephone conference was held on September 4, 2018, during which Respondents' motion for withdrawal of counsel was granted and each party expressed a desire to continue with the scheduled hearing. Another telephone conference was held on September 17, 2018, during which the parties agreed that they wished to proceed with the scheduled hearing. Since Respondent Stark stated that he planned to appear *pro se*, counsel for Complainant confirmed that Complainant would assist in ensuring Respondents had all documents needed in advance of the hearing.

On September 28, 2019, Mr. Shane McLain, a non-party, filed a Motion to Quash Subpoena, stating that the subpoena was not timely served, that the witness has no relevant knowledge of the facts alleged in the Complaint, that Mr. McLain was likely subpoenaed for improper purposes, and the witness was currently unavailable for the hearing. Mr. McLain's motion was granted on October 2, 2018.

An in-person Hearing was held on Wednesday, September 26, 2018 through Friday, September 28, 2018, and Monday, October 2, 2018 through Friday, October 5, 2018, a total of eight days, in Louisville, Kentucky. Respondents submitted a Motion in Limine on September 26, 2018, during the Hearing, requesting, at 2, that "any and all evidence that could have been provided in the February 26, 2015 lawsuit . . . be excluded." Respondents' Motion in Limine was denied during the Hearing

on September 26, 2018,[26] and it was noted that Respondents could raise the issue again in post-hearing briefs.[27] The Motion in Limine is discussed further herein.

The official Transcript of the Hearing, Volumes 1 through 8, were filed on December 14, 2018.[28] Complainant filed its Proposed Corrections to Amended Transcript of Oral Hearing on March 5, 2019, which were approved by Order on April 3, 2019. Complainant filed its Proposed Finding of Fact, Conclusions of Law, and Order; and Request to Take Official Notice ("Complainants Proposed Order") as well as Complainant's Brief in Support of Proposed Findings of Fact, Conclusions of Law, and Order ("Complainant's Post-Hearing Brief") on May 7, 2019. Respondents filed their Proposed Findings of Fact, Conclusions of Law, and Order ("Respondent's Proposed Order") as well as an Answering Brief in Support of Respondents' Proposed Findings of Fact, Conclusions of Law, and Order ("Respondent's Post-Hearing Brief") on June 25, 2019.[29] Complainant filed its Reply Brief on July 23, 2019.

---

[26] Tr. Vol. 1, 17:6-7, 23:25.

[27] Tr. Vol. 1, 23:4-5.

[28] Due to mistakes made by the court reporting company, among other things, multiple modifications were made to the briefing schedule: Complainant filed a Motion to Modify Schedule for Filing Post-Hearing Briefs on February 5, 2019, which was granted on February 7, 2019; a Notice of Reformatted Transcripts and Order Revising Transcript Corrections Due dates was then filed on February 11, 2019; and Complainant filed a Request for Extension of Time and for Clarification RE Official Transcript on April 2, 2019, which was granted on April 3, 2019.

Complainant also requested clarification regarding the official transcript. *See* April 8, 2019 Order Granting Complainant's Request for Clarification Regarding Official Transcripts (clarifying, at 5, that the "the electronic (.pdf) version of the reformatted transcripts is the official version of the transcripts for the Hearing that took place September 26 through September 28, 2018, and October 1 through October 5, 2018, in Louisville, Kentucky, and are the transcripts that are a part of the official record in this proceeding.").

[29] Despite the April 8, 2019 Order Granting Complainant's Request for Clarification Regarding Official Transcripts, Respondents appear to have referenced the incorrect version of transcripts throughout their Post-Hearing Brief. Because it is not clear exactly the text meant to be cited in the official

On September 5, 2019, Complainant filed a Notice of Limited Appearance and Motion for an Expedited Decision, where USDA General Counsel, Stephen A. Vaden, entered a limited appearance and provided information that was provided to Mr. Vaden from the General Counsel at the Indiana Department of Natural Resources. Complainant reiterated the urgency of both parties' receiving an expeditious decision in this matter. On September 3, 2019 Respondents responded to Complainant's Notice of Limited Appearance and Motion for an Expedited Decision, expressing concern regarding the attachments to the motion that Respondents consider "unfair at a basic level since they provide evidence via witness statements in which the witness has not been cross-examined" and requesting that the information provided be disregarded.

For the purposes of this Decision and Order, the record in Docket Nos. 16-0124 and 16-0125 is closed. Attachments to and information included in Complainant's entry of limited appearance and motion for expedited decision, which are outside of the allegations in the instant Complaint and outside the hearing conducted in this proceeding, are not considered part of the record and will not be considered in the adjudication of this case, including for purposes of the findings, conclusions, and order of the herein Decision.

DISCUSSION

The Complaint alleges that Respondents willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et. seq.*) ("AWA"), and the Regulations promulgated thereunder (9 C.F.R. part 2) on several occasions ranging from January 2012 through January 2016.

In the Answer filed on August 23, 2016, at 1, Respondents admitted the jurisdictional allegations (Complaint, paras. 1-2) and admitted part of the allegations contained in Complaint, para. 6, regarding a previous conviction under the Endangered Species Act in 2008 but asserted the doctrine of estoppel and laches to prohibit the previous conviction from being used in the proceeding. Respondents specifically denied all other

---

transcript in every instance Respondents cite the transcript, Respondents' citations to the transcript are quoted as written in Respondents' Post-Hearing Brief.

allegations contained in the complaint. *Id.* Respondents also raised certain affirmative defenses, Answer at paras. 4-5, including: estoppel, laches, res judicata, statute of limitations, and waiver.

I. Affirmative Defenses Raised in Answer

Respondents, Answer at 1, assert the affirmative defenses of estoppel and laches, contending that Respondents' previous conviction under the Endangered Species Act should not be used in this proceeding. Respondents also generally assert, *id.* at 1-2, the affirmative defenses of estoppel, laches, res judicata, statute of limitations, and waiver but do not provide any factual support or authority on which to assert such defenses. I find that the affirmative defenses asserted in Respondents' Answer are without merit.

As Complainant accurately points out, "[t]he doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. . . . One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his position for the worse." [30] Here, Respondents provide no factual support for having relied on any action by Complainant to their detriment in any way.

Respondents' assertion of estoppel regarding the use of the previous conviction, *United States v. Timothy L. Stark*, Case No. 4:07CR00013~001 (S.D. Ind.), which is perhaps an attempt to assert collateral estoppel, is similarly without merit. As explained by former Chief Judge Davenport as to circumstances similar to those here:

---

[30] Complainant's Post Hearing Brief at 3 (quoting *Lawson*, 57 Agric. Dec. 980, 1020 (U.S.D.A. 1998) (citing *Kennedy v. United States*, 965 F.2d 413, 417-18 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986); *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993)).

> Even were all the requisite threshold elements present necessary to trigger the defenses, which they are not, a detailed discussion of the doctrines of res judicata, collateral estoppel and waiver is not necessary as the issue of whether disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell*, et al., 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

Lacy, 65 Agric. Dec. 1157, 1159 (U.S.D.A. 2006).

Respondents' defenses of laches, res judicata, statute of limitations, and waiver are also unsupported and vague, at best.

Furthermore, as Complainant points out, a defense of laches has long been held inapplicable to administrative proceedings.[31] A defense of res judicata is similarly inapplicable here as Respondents have not demonstrated that there was a previous adjudication that involved the same allegations as the instant Complaint. The defenses of statute of limitations and waiver are also inapplicable here[32] as Respondents provide no factual basis or legal authority to support that any portion of the Complaint was brought after any statute of limitations period passed or that Complainant waived bringing any portion of the Complaint by not bringing it sooner, or in some other manner, or by any other means.

II. Respondent's Motion in Limine

---

[31] *See* Complainant's Post Hearing Brief at 5 (citing *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-36 (1824). *See also United States v. Mack*, 295 U.S. 480, 489 (1935); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *German Bank v. United States*, 148 U.S. 573, 579-80 (1893); *Gaussen v. United States*, 97 U.S. 584, 590 (1878); *All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414–15 (1991).

[32] *See* 28 U.S.C. § 2462; *Lacy*, *supra*, 65 Agric. Dec. 1157, 1159 (U.S.D.A. 2006).

Respondent submitted a Motion in Limine on September 26, 2018, during the Hearing, requesting, at 2, that "any and all evidence that could have been provided in the February 26, 2015 lawsuit . . . be excluded." I denied Respondent's Motion in Limine during the Hearing on September 26, 2018,[33] and noted that Respondent could re-raise the issue in post-hearing briefs.[34]

In their Post-Hearing Brief, at 1-2, Respondents state that "as to Respondents' affirmative defense of estoppel, both in the form of a defense and as it was raised in the motions *in limine*" they are not contending that a complaint is precluded in the present action and are not claiming res judicata, but are arguing that:

> the Complainant is at the very least collaterally estopped from relitigating any particular factual issue that the same Complainant had both the opportunity and the incentive to litigate as a factual issue back on February 26, 2015 in the AWA administrative licensing proceeding by the same complainant, against the same party Timothy Stark, in the same jurisdiction, and under the same rules and regulations.

Respondent contends, *id.* at 2, that

> the doctrine of collateral estoppel has a quite significant preclusive impact on any and all factual issues that Complainant voluntarily elected to not raise when it had the chance and incentive to do so, the effect being that not only all evidence that could have been provided in the February 26,2015 proceeding should have been excluded, but that the Judge at this stage simply should not be redeciding issues of fact that were already precluded earlier as being decided the first time around.

However, Respondents do not point to any specific allegations in the

[33] Tr. Vol. 1, 17:6-7, 23:25.

[34] Tr. Vol. 1, 23:4-5.

current Complaint that they claim were previously litigated, or could have been litigated, during the February 26, 2015 administrative proceeding.[35] Rather, Respondents contend that, because, they claim, "the final determination" in the 2015 administrative proceeding was that:

there was no evidence presented that Mr. Stark had harmed any animals in his custody . . . [t]hose judicial findings are binding, and must therefore be considered final determinations of fact with respect to any parallel claims that Mr. Stark harmed any of the same animals in his custody in this proceeding.

Respondents' Post-Hearing Brief at 3 (citing RX 10, 11, 26).

Complainant responds by pointing out that the 2015 administrative proceeding was initiated by an Order to Show Cause Why Animal Welfare Act License 32-C-0204 Should Not Be Terminated ("Order to Show Cause"), a license termination proceeding pursuant to 9 C.F.R. §§ 2.11(a)(6) and 2.12, as opposed to an administrative disciplinary proceeding as in the instant case under 7 U.S.C. § 2149.[36] The 2015 Order to Show Cause alleged that Mr. Stark was unfit for licensure because "he was convicted for violating the Endangered Species Act (16 U.S.C. § 1538(a)(1)(E)) by illegally transporting an ocelot."[37] Complainant confirms that, in the instant case, Complainant does not seek license termination based on conviction of violating the Endangered Species Act as was sought in the 2015 proceeding and explains that the Complaint states that Respondent Stark was convicted of violating the Endangered Species Act only because it is relevant to the factors that must be considered in the instant case to assess civil penalties.[38]

---

[35] *Stark*, 75 Agric. Dec. 419, 424 (U.S.D.A. 2016).

[36] *See* Complainant's Post-Hearing Brief at 10 (stating "[i]t is well settled that a license termination proceeding is not the same as an administrative disciplinary proceeding" and citing *Greenly*, 72 Agric. Dec. 586, 592–93 (U.S.D.A. 2013)).

[37] *Id.* at 8 (citing *United States v. Stark*, Case No. 4:07-CR-00013-001 (S.D. Ind. Jan. 17, 2008); *Stark*, 75 Agric. Dec. 419, 424 (U.S.D.A. 2016). Also noting that Wildlife in Need Wildlife in Deed, Inc. was not a party to the license termination proceeding).

[38] *Id.* at 12 (citing Complaint ¶ 6, Answer ¶ 3; CX 3).

I again deny Respondents' Motion in Limine. Respondents offer no legal authority or factual support for the contention that any "judicial findings" from the 2015 administrative proceeding regarding termination of an AWA license are "binding" on the instant case. The violations alleged in the Complaint in this proceeding do not involve the violations alleged in the 2015 proceeding and vice versa.

III. Interference with, Verbal Abuse of, and Harassment of APHIS Officials

Complainant alleges that Respondent Timothy Stark —the applicable Complaint paragraphs refer solely to "Respondent Stark" and not to "Respondents," as do the other Complaint paragraphs—willfully violated the AWA and Regulations (9 C.F.R. § 2.4) by interfering with and verbally abusing APHIS officials in the course of carrying out their duties on four occasions: June 25, 2013; September 24, 2013; September 26, 2013; and January 20, 2016.[39] There is no dispute that on each of the relevant dates Respondent Timothy Stark was an AWA licensee.

Complainant presented the testimony of Dr. Dana Miller, an APHIS veterinary medical officer ("VMO"), who was one of two inspectors at Respondents' property on June 25, 2013. Dr. Miller testified that Respondent Stark used "a great deal of profanity," that Respondent Stark "presented . . . a threat to our agency personnel," and that Respondent Stark asked "a number of questions" that were inappropriate and directed towards Dr. Arango such as "[w]here you from, boy."[40] Dr. Miller explained that Respondent Stark informed her that he received a testosterone shot that day and she thought he might be in physical pain[41] but that she began to document Respondent Stark's behavior after subsequent inspections when she realized it was not an isolated occurrence.[42]

---

[39] Complaint at ¶ 7(a)-(d).

[40] *See* Complainant's Post Hearing Brief at 26 (citing Tr. Vol 2, 433:4-8, 444:11-445:10, 512; CX 10).

[41] *See* Tr. Vol 2, 161:18-25.

[42] Tr. Vol. 2, 445:3-10.

As to the September 24, 2013 inspection, Dr. Miller testified about a particular instance where Respondent Stark entered a tiger enclosure, despite being asked not to by Drs. Miller and Arango, that contained "multiple tigers . . . and no shift cage or double gate system that would allow for safe entry."[43] Dr. Miller testified about her perceived danger of the situation stating "at the point at which he had that enclosure open, there would have been nothing standing between [the tigers and] Dr. Arango and myself"[44] and that "Mr. Stark was laughing at it, and saying that he was going to show us . . . saying that he was going to show us tiger teeth, and proceeded to enter that enclosure anyway despite . . . our objections and concern that we had for our safety."[45] Dr. Miller testified she felt Respondent Stark's actions were "an attempt to intimidate [herself and Dr. Arango] and interfere with that inspection process."[46] Dr. Miller explained that it was due to this behavior that she and Dr. Arango decided to start exiting the property because they no longer felt safe.[47] Dr. Arango also testified that he felt this incident was threatening.[48] The record clearly demonstrates that Respondent Stark's behavior took place and was threatening.

Dr. Miller testified that during the exit briefing of the September 26, 2013 inspection, when discussing with Respondent Stark that the inspectors spoke with Dr. Pepin who said that she had neither completed the entire APHIS 7002 Form nor agreed to be the attending veterinarian for Respondent Stark's facility, Respondent Stark became increasingly "agitated" and started to use profanity.[49] Dr. Miller testified that

---

[43] CX 10 at 5.

[44] Tr. Vol. 2, 522:7-9.

[45] Tr. Vol. 2, 522:18-23. Complainant notes that Drs. Miller and Arango did not ask to see the tiger's teeth. Complainant's Post Hearing Brief at 27 n.17 (citing CX 10).

[46] Tr. Vol. 2, 524:9-11. *See also* CX 10.

[47] Tr. Vol. 2, 522:13-15, 524:12-14.

[48] Tr. Vol. 5, 1412:8-13.

[49] Tr. Vol. 2, 539:10-540:13. Dr. Miller also testified that Respondent Stark began slamming his hand and fist on the table and becoming very hostile. Tr. Vol. 2, 541:7-13.

Respondent Stark's "behavior was severe enough that [she] actually had some concerns for Dr. Pepin's safety" and "went so far as to" reach out to Dr. Pepin so that she could make sure to take some precautions.[50]
Dr. Miller also testified that when she invited an Indiana Department of Natural Recourses ("DNR") Officer to attend one of the inspections at the Stark facility, the DNR Officer declined the invitation due to the hostility between Respondent Stark and the DNR.[51] Dr. Miller explained that this reaction by the DNR Officer to the APHIS invitation to attend an inspection, as well as anti-government articles and Facebook posts, increased her concerns about safety for inspectors at the Stark Facility.[52]

Complainant states that the January 20, 2016, inspection was conducted by APHIS employees VMO Dr. Peter Kirsten and Animal Care Inspector ("ACI") AnnMarie Houser, accompanied by Indiana State Trooper Mark LaMaster and Officer Nicholas Yeager. Trooper LaMaster testified that he accompanied the APHIS inspectors in his part-time capacity as a security officer with Alliance Security, and, when he arrived, Respondent Stark seemed "agitated" or "upset" and "cursed in regards to how he responded to their requests to do their inspections."[53] Trooper LaMaster also testified that Ms. Stark told him to "keep [your] mouth shut or leave" when he asked about the animals in the room.[54]

Both ACI Houser and Dr. Kirsten testified that Respondent Stark was "agitated" when they arrived and proceeded to refuse the inspection because he was too busy removing snow and then told the inspectors to

---

[50] *Id.* (Also stating that that Respondent Stark made statements about Dr. Pepin that "he would f**king show her, and he would give her what for." Tr. Vol. 2, 540:20-22).

[51] Tr. Vol 2, 547:4-24; CX 28 (April 13, 2014 Memo by Dr. Miller).

[52] Tr. Vol 2, 533:11-20, 536:14-23. *See also* CX 42 (printout of Wildlife in Need, Inc. Facebook page).

[53] Tr. Vol. 1, 137:8-16, 140:13, 140:21-24, 143:4-11 (Trooper LaMaster recalls Respondent Stark telling the group that he was "f**king too busy for their sh*t"), 143:24-144:11 (Trooper LaMaster recalls Respondent Stark telling Dr. Kirsten to "get the f**k off my property").

[54] Tr. Vol. 1, 145:3-6.

leave his property.[55] Dr. Kirsten testified that Ms. Stark, who was leaving for a medical appointment, came back and said she would conduct the inspection because she had rescheduled her appointment.[56] Dr. Kirsten described that during the inspection Ms. Stark put on a video recording camera (a "GoPro") as instructed by Respondent Stark and started saying she "felt bullied and threatened" but that her remarks were without cause and seemed, in Dr. Kirsten's opinion, "to be for the purpose of the camera."[57] Dr. Kirsten and ACI Houser also testified that during the exit interview Respondent Stark continued to be confrontational towards the inspectors, refusing to provide records, and continuing to use profanity and verbal abuse towards the inspectors.[58]

---

[55] Tr. Vol. 3, 736:1-738:7 (ACI Houser recalled that Respondent Stark stated he was "f**king too busy for our sh*t," that he became increasingly angry, used profanity, and turned his anger on one of the troopers when asked to calm down); Tr. Vol 5, 1484:16-1485:10 (Dr. Kirsten recalled that Respondent Stark ordered the inspectors off of his property). *See also* CX 36 (Inspection Report for January 20, 2016); CX 38 (January 21, 2016 Memo by ACI Houser regarding January 20, 2016 inspection); CX 39 (January 20, 2016 Memo by VMO Dr. Kirsten).

[56] Tr. Vol. 5, 1485:11-15.

[57] Tr. Vol. 5, 1485:23-1486:11. *See also* Tr. Vol. 3, 739:5-20 (ACI Houser recalled that Ms. Stark kept saying she felt threatened and bullied without cause and "it appeared strange" to ACI Houser because "it felt like a show for the camera, because nothing was happening").

[58] Tr. Vol. 3, 743:19- (ACI Houser recalled that Respondent Stark was angry and kept muttering and cursing under his breath, that Respondent Stark refused to get records for review, and that Respondent Stark told ACI Houser that he was "sick and tired of [your] f**king opinions being in the reports"), 747:1-13 (ACI Houser recalled that Respondent Stark became more confrontational when the fence height violation was brought up and called Dr. Kirsten "you f**king geriatric old bastard"); Tr. Vol. 5, 1488:1-11, 1490:13-23 (Dr. Kirsten recalled that the exit interview became "very confrontational" and Respondent Stark called him a name and so he "took the lead from Inspector Houser . . . that [they] were in a situation that was . . . more dangerous than [they] needed to be in."), 1491:6-11 (Dr. Kirsten stated that because the inspectors felt unsafe even though they had a security guard with them, they decided to leave). *See also* RX 56 (a video taken by Respondent Stark where he clearly becomes confrontational with Dr. Kirsten and ACI Houser); RX 57, at 17:46-52 (a video taken by a GoPro camera worn by Ms. Stark where Respondent Stark calls Dr. Kirsten an "old geriatric bastard" along with other expletives).

Respondents do not deny confrontational behavior, intimidation, or use of profanity or verbal abuse directed towards inspectors. Rather, Respondents contend that "no objective evidence of any actual physical interference or actual physical threat by Respondents to any APHIS official was presented by Complainant" and that Respondent Stark's behavior and statements (i.e. "use of profanity, their making generically derogatory comments about others around them, or their being argumentative") are:

> not only *not* violations of the Animal Welfare Act or the regulations, standards, instructions, or orders issued pursuant thereto, but are in fact prime examples of valid conduct, speech acts constitutionally protected from governmental inhibition or punishment under the state and federal constitutional provisions protecting core rights of free speech and free association . . . [and]
>
> punishment of Respondent Stark for engaging in those types of expression would be impermissible prior restraint of protected conduct and would be itself sanctionable as censorship and a violation of citizen's basic rights and liberties.

Respondents' Post-Hearing Brief at 27. Respondents also contend that, for speech to be "true intimidation" it must amount to denial of access and that none of the language "rose to anywhere near the level of actual obstruction required to do so."[59]

The Regulation states that "[a] licensee . . . 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 (emphasis added) ("2.4"). Respondents do not deny Respondent Stark's behavior and statements alleged by Complainant during inspections on June 25, 2013; September 24, 2013; September 26, 2013; and January 20, 2016. The case law Respondents cite in an attempt to demonstrate that Respondent Stark's

[59] *Id.* (citing *SEMA, Inc.*, 49 Agric. Dec. 176, 184 (U.S.D.A. 1990); *Ramos*, 75 Agric. Dec. 24, 42-43 (U.S.D.A. 2016)).

behavior during the inspections did not "rise to the level of a sanctionable violation of the Act," is inapplicable here.[60] Verbal abuse alone, including calling officials derogatory names, is a willful violation of 2.4 and there is no requirement that "physical threats" be shown.[61]

Here, Complainant alleges, and Respondents do not deny, that Respondent Stark was verbally abusive and harassing toward Dr. Arango during the June 25, 2013 inspection; and toward Dr. Kirsten during the January 20, 2016 exit briefing. Complainant also alleges, and Respondents do not specifically deny, that Respondent Stark displayed threatening and harassing behavior during the September 26, 2013 inspection by being argumentative, using profanity, and threatening the veterinarian; and during the September 24, 2013 inspection clearly engaging in threatening behavior by intentionally opening the tiger enclosure and saying he was going to show them tiger teeth which resulted in Drs. Miller and Arango cutting their inspection short due to safety concerns.

Respondent Stark's contention that his behavior and speech was constitutionally protected expression is without merit. As Complainant states: "[a]lthough the United States Constitution guarantees Mr. Stark freedom of speech, it does not guarantee Mr. Stark an Animal Welfare Act license" and "the AWA regulations do prohibit Mr. Stark, as a licensee, form threatening, verbally abusing, or harassing APHIS inspectors."[62]

---

[60] In *Ramos*, 75 Agric. Dec.at 42-43, the Judicial Officer finds that Respondent did not violate 9 C.F.R. § 2.4 because the APHIS inspector claimed verbal abuse in her November 18, 2008 memorandum of the November 7, 2008 inspection, but never actually recorded such violation in the inspection reports. As Complainant points out, Complainant's Reply Brief at 46, *SEMA, Inc.*, where the Respondent was a research facility and not a licensee, is not relevant to the current matter as a violation of 9 C.F.R. § 2.4 was not at issue.

[61] *See Mazzola*, 68 Agric. Dec. 822, 831 (U.S.D.A. 2009) (where respondent calling an APHIS inspector "incompetent" and an "imbecile" who was too "dumb" to conduct and inspection, and also threatened to have the jobs of the inspectors, was found to have willfully violated 2.4).

[62] Reply Brief at 47 (emphasis in original). *See also Shepherd*, 2007 WL 4711537, at *4 (U.S.D.A. 2007) (finding no validity to the respondent's claim that obtaining a license should be voluntary to be constitutional as respondent chose to engage

Therefore, I find that the record shows by a preponderance of the evidence that Respondent Timothy Stark willfully violated the Regulations, 9 C.F.R. § 2.4, by interfering with and verbally abusing, harassing, and threatening APHIS officials in the course of carrying out their duties on four occasions: June 25, 2013; September 24, 2013; September 26, 2013; and January 20, 2016.

IV. Failure to Provide Access to Inspectors

Complainant alleges that Respondents failed to provide APHIS officials with access to conduct AWA inspections of their facilities, animals and records, or to make an authorized person available to accompany APHIS officials on such inspections in willful violation of the AWA and regulations (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126) on the following dates: May 14, 2013; May 23, 2013; and January 17, 2014.[63] Complainant also alleges that Respondents willfully violated the regulations (9 C.F.R. § 2.126(a)(2)) by failing to provide APHIS officials with access to conduct AWA inspections of their records in June 2013.[64]

a) Complaint Paragraph 16 (May 14, 2013 and May 23, 2013)

In support of the allegations in the Complaint, para. 16, Complainant provides an Inspection Report for May 14, 2013, CX 45, from Dr. Arango stating that "[a] responsible adult was not available to accompany APHIS Officials during the inspection process at 11:00 am on 5/14/2013." Dr. Arango testified that he recalls not seeing anyone when he arrived and was unable to conduct the inspection.[65] Dr. Arango also stated that he returned to the Stark facility on May 23, 2013 and encountered Respondent Stark who said he was leaving for a doctor appointment; Dr. Arango replied that he could conduct the inspection with another person as long as they were more than eighteen years old and reminded Respondent Stark that this

in business which "Congress specifically required those who engage in this business to obtain a license")

[63] Complaint at ¶ 16; 18.

[64] Complaint at ¶ 17.

[65] Tr. Vol. 5, 1266:21-22.

would be a repeat violation.[66] Complainant provided the May 23, 2013 Inspection Report, CX 47, stating "[a] responsible adult was not available to accompany APHIS Officials during the inspection process at 10:50 am on 5/23/2013." Complainant contends that these failures to provide access for inspection are willful violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).[67]

In their Post-Hearing Brief, at 17-18, Respondents generally contend that they did not "block" APHIS officials from accessing their facility, but "regularly provided" access for inspections "which were then sadly and repeatedly conducted with aggression and venom by the inspectors toward everything Respondents said and did in spite of their cooperation." Complainant also provides a submission from Respondent Stark to APHIS, CX 46 at 5, relevant to the May 23, 2013 non-compliance in which Respondent Stark stated:[68]

> I was confronted by ACI Juan F. Arango and was told he was my new inspector and that he needed to come in and do his inspection. I told him I had a Doctors [sic] appointment at noon and was getting ready to leave and that was not to be possible. He very rudely told me that either I or another responsible adult had to be here for him to do his inspection. I again told him no one else was here and that he could come back in 3-4 hours and gave him my cell number so he could make sure I was back so he wouldn't waste his time again. He persistently made me feel threatened by telling me over and over that I had to let him come in to do his inspection. He still proceeded bullying by telling me I had to let him come in so he could do his inspection. At that time I told him to go f**k himself that I was going to my doctor's appointment and he could either come back later or he could just kiss my ass. I felt I had no choice but to stand my ground with him

---

[66] Tr. Vol. 5, 1267:17-23, 1271:19-1272:6.

[67] *See* Complainant's Post-Hearing Brief at 62-63 (citing *Perry*, 71 Agric. Dec. 876, 880 (2012)).

[68] *See also* Tr. Vol. 7, 1907:18-1908:6.

> to try and stop the bullying. I was already getting tired of his attitude by him trying to degrade me and that my time was not valued. I then ask him to leave and he said he would call me later if he had time that day to come back.

It is well recognized that 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.". [69] AWA license holders are required to have "some employee or agent . . . available at each facility . . . to give full and ready access to it and its records, for any unannounced APHIS inspection [during business hours]."[70] It is well-established that surprise, unannounced inspections providing immediate access to licensee premises and records are appropriate and necessary to the AWA enforcement program.[71] A doctor's appointment for a particular individual does not excuse a licensee from compliance with the AWA and regulations.[72] A particular individual is not required to be available to "give full and ready access to the [licensee] and its records," but "some employee or agent" is required to be available during the hours designated in the regulations.

Despite a previous Inspection Report citing the failure to provide access for inspection on May 14, 2013, in violation of 9 C.F.R.§ 2.126, Respondent again intentionally refused APHIS officials' entry for inspection on May 23, 2013, when Respondent Stark had to leave for a

---

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

[70] *Berosini*., 54 Agric. Dec. 886 (U.S.D.A. 1995) (quoting *S.S. Farms Linn Cnty., Inc*., 50 Agric. Dec. 476, 492 (1991) [, *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)]).

[71] *See Hodgins v. U.S. Dep't of Agric*., 238 F.3d 421 (6th Cir. 2000) (Table) (published in full at 59 Agric. Dec. 534 (U.S.D.A. 2000).

[72] *See Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A. 2013), where the Judicial Officer determined that, even though the Respondent was ill and had to leave for a doctor's appointment during an attempted inspection, and even though the APHIS inspector agreed to return on another day, the Respondent was found to have violated the AWA and regulations because "[n]othing 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)."

doctor appointment and did not arrange for another responsible adult to facilitate the inspection. Therefore, I find that Respondents willfully violated the AWA, 7 U.S.C. § 2146(a), and regulations, 9 C.F.R.§ 2.126, by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours on or about May 14, 2013 and on or about May 23, 2013.[73]

b) Complaint Paragraph 17 (June 25, 2013)

Complainant alleges that "[o]n or about June 25, 2013, respondents failed to provide APHIS officials with access to conduct AWA inspections of their records, in willful violation of the Regulations (9 C.F.R. § 2.126(a)(2))" and, specifically, provided false records.[74] Complainant presented the affidavits of Dr. Miller, CX 43, and Dr. Arango, CX 9.

Dr. Arango stated in his Affidavit that he and Dr. Miller received an APHIS form 7002 (also referred to as a "Program for Veterinary Care" or "PVC") from Respondent Stark that included both Respondent Stark and Dr. Harold Gough's, DVM, information and a signature from Dr. Gough dated January 17, 2013.[75] In her Affidavit, CX 43 at 1-3, Dr. Miller stated that, throughout the inspection, Respondent Stark "referred to his attending veterinarian by either name (Dr. Gough) or title" but when she attempted to contact Dr. Gough by phone on June 26, 2013, the "receptionist confirmed that DVM Gough had not been to Stark's property in several years" and, later when speaking with Dr. Gough over the phone,

---

[73] *See also* Tr. 1907:3-17 (where Respondent Stark testifies that Dr. Arango first came to the Stark facility on 28 June 2013, and no one was present. Respondent Stark contends "I'm a private individual . . . Tim Stark founded Wildlife in Need, but Wildlife in Need is not an open-to-public business. We do not have set hours from 8 to 5 or any of that kind of stuff. It is just there. It is a personal private property that is owned by Tim and Melissa Stark.").

I note that, as a licensee conducting a facility with AWA regulated animals, Respondent Stark is subject to 9 C.F.R.§ 2.126. Further, the regulations are not vague in requiring that licensees must provide access "during business hours," *id.*, and define business hours generally to include "a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday." 9 C.F.R. § 1.1.

[74] Complaint ¶ 17.

[75] CX 9 at 2.

Dr. Gough "confirmed having been the attending veterinarian for Stark years ago, but stated that he terminated that relationship." Dr. Miller stated in her Affidavit, *id.*, that she "informed DVM Gough that I had a PVC with his information and his apparent signature dated 17 January 2013. DVM Gough stated that he had definitely not signed the PVC; although he had signed them in the past, which would give Stark access to his signature."

Dr. Gough testified that he did not fill out any part of the "Program of Veterinary Care for Research Facilities or Exhibitors," that the handwriting on the form was not his, and that the signature at the bottom in "Block D" was not his signature.[76]

Respondent Stark does not address or deny the allegation that he submitted false records on June 25, 2013 by providing the PVC to Drs. Miller and Arango with Dr. Gough's forged signature, falsely saying it was completed by Dr. Gough as his "attending veterinarian."[77] During his cross-examination of Dr. Gough, Respondent Stark seemed to contend that once a veterinarian has prepared and signed a PVC "it's good for the duration of the relationship."[78]

The Regulations, 9 C.F.R. § 2.126(a)(2), require that licensed exhibitors allow APHIS officials to "examine records required to be kept by the Act and the regulations in this part." Relevant to this matter, the Regulations also require that "[i]n the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall

---

[76] Tr. Vol. 4, 971:20 (Dr. Gough testified that he never wrote in print and only writes in cursive).

[77] *See* Tr. Vol. 4, 989:16-990:7 (Cross examination of Dr. Gough by Respondent Stark. Dr. Gough testified "you lied and wrote my signature when you shouldn't have" and Respondent Stark does not deny such).

[78] *See* Tr. Vol. 4, 990:8-991:20 (Dr. Gough replied that he did not believe it was true that the form need only be signed once and was good for "the duration of the relationship"). *See* RX 73, the original "Program for Veterinary Care" prepared and signed by Dr. Gough on April 10, 2008). Respondent Stark also asked Dr. Gough if he ever called or sent any notification that he was terminating the relationship, and Dr. Gough replied "No; not that I recall." Tr. Vol. 4, 997:23-998:2.

include a written program of veterinary care and regularly scheduled visits to the premises of the dealer exhibitor."[79] The PVC, CX 44 at 5, has an attestation on page 1 of 4, which states:

> The attending veterinarian shall establish, maintain and supervise programs . . . for all animals on the premises of the licensee/registrant. A written program of adequate veterinary care between the licensee/registrant and the doctor of veterinary medicine shall be established and reviewed on an annual basis. By law, such programs must include regularly scheduled visits to the premises by the veterinarian.

I find Dr. Gough's testimony credible that he did not assist in the completion of the PVC dated 2013, did not sign the PVC dated 2013, and had not been the attending veterinarian for the Stark facility for several years at the time of the June 25, 2013 inspection. The record is unequivocal that Respondent Stark willfully provided a false, forged PVC to APHIS inspectors on or about June 25, 2013 when asked for the PVC prepared by the attending veterinarian for the facility.[80] Respondent Stark's vague contention that once a PVC is completed it is good "throughout the relationship" does not justify the forgery of a PVC provided for APHIS official inspection or the forging of the professional signature of Dr. Gough. Additionally, such contention is inconsistent with the unambiguous requirements set out on the attestation of the PVC form on page 1.

Therefore, the PVC dated 2013, presented to APHIS inspectors on June 25, 2013, was not completed by an attending veterinarian as required by 9 C.F.R. § 2.40(a)(1) and Respondents failed to allow APHIS officials to examine legitimate records required to be kept by the AWA in willful violation of 9 C.F.R. § 2.126(a)(2).

---

[79] 9 C.F.R. § 2.40(a)(1).

[80] In comparing the original (mostly incomplete) PVC, signed by Dr. Gough in April 2008, RX 73, to the false PVC dated 2013, CX 44 at 5-9, it is clear that the Program recommendations are completely different. *See also* CX 44; Tr. Vol. 4, 977:11-17 (Dr. Gough expressed that he was extremely angered that Respondent Stark would forge his professional signature).

c) Complaint Paragraph 18 (January 17, 2014)

In support of the allegation in the Complaint, para. 18, Complainant provided CX 18 (Inspection Report for January 17, 2014 with pictures); CX 19 (January 17, 2014 Memo from Dr. Juan Arango and ACI AnnMarie Houser, with photographs); and CX 20 (January 28, 2014 Statement by Witness E, redacted). According to the January 17, 2014 Inspection Report, CX 19, and the January 17, 2014 Memo by the APHIS inspectors, Respondents allowed the inspectors to conduct an inspection on January 17, 2014 (albeit not of the animal exhibition the inspectors planned to attend).[81] Therefore, the record is not sufficient to show that Respondents violated the AWA or Regulations, 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126, on January 17, 2014.

V. Veterinary Care and Standards Violations

Complainant alleges sixteen willful violations of veterinary care regulations (9 C.F.R. §§ 2.40(a)-(b)).[82]

In general, Respondents contend that they "relied on and utilized veterinarians in exactly the manner needed for the circumstances[;]"[83] that they "enlisted veterinary resources as needed when needed, networked with a variety of vets on a host of concerns when they arose, contributed his own experience in collaboration with vet, and utilized and relied conscientiously on strong levels of veterinary care for all animals[;]"[84] and that their "actions comported with applicable scientific standards."[85] Respondents also contend[86] that Complainant, and Complainant's

---

[81] *See* CX 18; CX 19 at 1

[82] Complaint at ¶ 8 (a)-(p).

[83] Respondents' Post-Hearing Brief at 11 (citing "Transcript at 178:17-179:9 in Testimony of Tim Stark on 10/04/18"; RX 24, 27, 64).

[84] *Id.* (citing "Transcript at 164:20-165:3, 174:10-175:8, 176:3-179:10, 196:16-197:19 in Testimony of Rick Pelphrey, DVM on 10/03/18")

[85] *Id.* at 11-12.

[86] *Id.* at 13.

witnesses,

> merely speculated on *potential* risks for adverse health, infection, or hypothetical injuries to animals . . . which never came to actual fruition, [and] turned out to be purely irrelevant to any factual determination needed to be made in this adjudication on Respondents actually maintaining a plan of adequate veterinary care for the particular time period charged.

However, at issue is whether Respondents complied with the AWA and Regulations thereunder. As Respondent Stark is an AWA licensee, Respondents cannot have used veterinarians "in . . . the manner needed for the circumstances" if Respondents did not comply with the AWA and the Regulations as written.

Respondents also generally contend that "there is good reason to question whether any of Complainant's so-called 'findings' in this area was ever supported by evidence . . . since it was Complainant's inspectors who did not perform a true physical examination of any of the animals" and "where APHIS inspectors truly believe an animal is suffering and the exhibitor refuses to provide adequate care, the inspector has the power to, and regularly does, confiscate the animal if the inspector even has a suspicion that animal's health is in danger."[87] Respondents reason that because APHIS inspectors never sought to confiscate any of Respondents' animals, "no objective basis existed to believe care was even required much less urgent—and thus no violation occurred."[88]

Complainant, in the Reply Brief at 26, states "it is not, however, the job of APHIS inspectors to themselves conduct veterinary medical examinations of respondents' animals or to provide care"[89] but that "inspectors are charged with identifying and documenting deficiencies and

---

[87] *Id.* at 15 (citing 9 C.F.R. § 2.129(a)).

[88] *Id.* at 14, 16 (citing *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 868 (10th Cir 2016).

[89] Citing *Lorsch v. United States*, No. CV 14-2202 AJW, 2015 WL 6673464, at *10- 11 (C.D. Cal. Oct. 29, 2015).

noncompliance with those regulations." Complainant also contends that Respondents' argument "erroneously conflates the veterinary care regulations with confiscation" whereas "7 U.S.C. § 2146 . . . permits confiscation of any animal found to be suffering as a result of a failure to comply with any provision of the Animal Welfare Act or any regulation or standard issued under the Animal Welfare Act."[90]

I agree with Complainant that Respondents misstate that function of the APHIS inspectors under the AWA and Regulations and confuse the consequence of confiscation with an APHIS inspector's duty to inspect and identify non-compliance.

a) Complaint Paragraphs 8a-8b (October 30, 2012-December 1, 2012; June 25, 2013)

Complainant alleges, Complaint at para. 8a, that, between October 30, 2012 and about December 1, 2012 Respondents failed to obtain any veterinary care for two juvenile female leopards in violation of 9 C.F.R. §§ 2.40(a) and (b)(2); and, *id.* at para. 8b, on June 25, 2013, Respondents failed to obtain adequate veterinary care for a juvenile female leopard and failed to establish and maintain a program of adequate veterinary care in violation of 9 C.F.R. §§ 2.40(a), (b)(1), and (b)(4).

Complainant states that APHIS inspectors, Drs. Miller and Arango performed a compliance inspection on June 25, 2013 and determined that Respondent Stark had acquired two female juvenile leopards on October 30, 2012.[91] Complainant states that, according to Respondent Stark, both leopards suffered from metabolic bone disease and died shortly after their acquisition.[92] Specifically, Dr. Arango stated in the report that: "[r]eportedly one of these leopards was found dead while the second was found gasping for air and was euthanized by the licensee."[93]

---

[90] *Id.* at 29 (citing *Knaust*, 73 Agric. Dec. 92, 113 (U.S.D.A. 2014) (internal quotations omitted)).

[91] *See* Complainant's Post-Hearing Brief at 36-37; CX 6 (June 25, 2013 Inspection Report completed by Dr. Arango); CX 9 (July 25, 2013 Dr. Arango's Affidavit).

[92] *Id.* (citing CX 6 at 2; Tr. Vol. 2, 389:4-390:9; and Tr. Vol. 7, 1933:18-24).

[93] CX 6 at 2.

Complainant's allege that only Respondent Stark, who is not a veterinarian, "diagnosed" the leopards with metabolic bone disease; that the acquisition report states that the two leopards arrived in good condition; and that Respondent Stark admitted that he never had the leopards examined by a veterinarian.[94]

Respondent Stark testified that, after "diagnosing" the leopards with metabolic bone disease, he was "treating that cat" for "somewhere between a week and two weeks at the most" and when he went in to feed the leopard, the leopard charged him and "literally ran into the bat—. . . it fell over and . . . it probably broke it's [sic] neck, or whatever . . . and it was convulsing . . . [t]hat's when me, as an animal owner, as an animal caretaker, as an animal lover, I chose at that moment . . . I had to do the one thing that I hate doing more than anything on this planet: I had to euthanize an animal such as a leopard."[95]

Respondents contend that they did have an attending veterinarian, Dr. Rick Pelphrey, and that Respondent Stark's "extensive and impressive experience with raising, care, and handling of these animals . . . should be given substantial deference in terms of assessing whether proper and appropriate treatment was provided."[96]

The Regulations, 9 C.F.R. §§ 2.40(a) and (b)(1)-(2) provide that:

> (a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.
>
> (1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In

---

[94] *See id.* (citing CX 6; CX 9; and Tr. Vol. Tr. Vol. 7, 1933:18-24); Tr. Vol. 7, 1933:10-17 (Respondent Stark testified "I hadn't been able to get any kind of help looking at it, or any of that kind of stuff."), 1934:1-13 (Respondent Stark testified "I didn't need a vet to tell me what was wrong , because I have experienced it numerous times. The animal had metabolic bone disease. . . . So I did diagnose it myself.").

[95] Tr. Vol. 7, 1935:25-1937:19.

[96] Respondent's Post-Hearing Brief at 13-14, 15.

> the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and
>
> (2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.
>
> (b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:
>
> (1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;
>
> (2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;
> . . . .
>
> (4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia[.]

The record demonstrates that there was not an attending veterinarian for the Stark facility during the period at issue here, October 30, 2012 through about December 1, 2012, and on June 25, 2013. Dr. Rick Pelphrey testified that he has been the attending veterinarian since 2013,[97] and the Veterinarian Care Agreement provided by Respondents, RX 64, is dated October 1, 2013. Further, it was established *supra* that during the June 25, 2013 inspection by APHIS inspectors, Respondent Stark presented a false

[97] Tr. Vol. 6, 1651:20-21, 1686, 5-9.

PVC with a forged signature of Dr. Gough and falsely claimed that Dr. Gough was the attending veterinarian for the Stark facility.

Respondent Stark's testimony also makes clear that he chose to "diagnose" and "treat" the leopards and chose to "euthanize" one of the leopards, without the assistance of a veterinarian. According to Respondent Stark's testimony, he was aware that there was something wrong with at least one of the leopards for about one to two weeks but did not seek the services of a qualified veterinarian. No matter a licensee's faith in his own experience and self-asserted expertise, such disregard of the Regulations' requirements which direct an exhibitor to "provide adequate veterinary care to its animals" and to "establish and maintain programs of adequate veterinary care that include . . . the availability of emergency, weekend, and holiday care," is a willful violation of those Regulations. Therefore, a preponderance of the evidence shows that Respondents willfully violated 9 C.F.R. §§ 2.40(a) and (b)(1), (b)(2), and (b)(4) by failing to obtain any veterinary medical care for two juvenile female leopards upon acquisition, and for failing to seek professional diagnosis, treatment, and guidance regarding euthanasia by the attending veterinarian, or any veterinarian, when suffering was detected.

Although it is not necessary in determining the above violation to determine the correctness of Respondent Stark's diagnosis of the leopard, his decision to "euthanize" the leopard, or the appropriateness of the manner in which he ultimately killed and disposed of the leopard; I cannot find Respondent Stark's testimony as to the circumstances surrounding the use of a bat to "euthanize" the female juvenile leopard credible. The record shows that Respondent Stark has changed his story on several occasions of the circumstances surrounding the death of the leopard and his reasoning for using blunt force trauma to the head to kill the leopard.[98] His

[98] *See* CX 6 (June 25, 2013 Inspection Report prepared by Dr. Arango, stating "Reportedly one of these leopards was found dead while the second was found gasping for air and was euthanized by the licensee. They were described as juvenile animals which came to the facility with metabolic bone disease, however, these animals were not examined by the Attending Veterinarian at any time after their arrival. The licensee stated that he did not seek recommendations regarding an appropriate feeding plan or veterinary treatment for this condition at any point that the animals were in his custody and the attending veterinarian was not contacted following their deaths."); CX 9 at 2 (Dr. Arango's affidavit stating that

various accounts of the events leading up to the killing, his reasoning to act as he did, and the facts of the killing itself are inconsistent and not credible.

b) Complaint Paragraphs 8c (January 1, 2012-September 30, 2013)

In the Complaint, para. 8c, Complainants allege that "Respondents

---

Respondent Stark told him that "he found one dead and the other was gasping for air, which he euthanized. He told me that he killed the cub by hitting it on the head with a bat"); CX 43 at 2 (Affidavit of Dr. Miller stating "Stark stated that, when needed, he euthanizes animals himself and that has never called the veterinarian to do this. . . . Stark stated that he sometimes uses gunshot, but that the 'bat method' works better. Stark described using a baseball bad to bludgeon animals to death as 'euthanasia' . . . Stark described that he had 'euthanized' the spotted leopard cubs acquired on 10/30/2012 (described as having a bone disease). Stark later stated that one of these cubs had died spontaneously (without euthanasia) while the other he 'euthanized' using this ["bat"] method when it became ill"); CX 41 at 1:39 -2:26 (WHAS 11 News Clip where the reporter states "according to Stark, one of his young leopards had been malnourished before she moved to Wildlife in Need. She progressively got worse and more aggressive." Respondent Stark states "for me to euthanize an animal I do not need to call a veterinarian . . . If I deem it necessary that an animal is beyond that point, that is my requirement"); CX 42 at 1 (Wildlife in Need, Inc. Facebook page posting, where Respondent Stark writes "regarding the leopard that I euthanized in 2012 . . . I did what I had to do in the situation . . .This leopard was previously diagnosed as terminal by a vet and was in extreme suffering. I always carry some form of staff, stick, or night stick with me to keep an animal directed to a safe distance if need be. For that reason and for times' sake this was the method used."), video (Wildlife in Need, Inc. Facebook posting video where Respondent Stark states that the leopard was "already diagnosed terminally ill" and he tried to save it and when he went in to the enclosure the leopard tried to attack him, was staggering, and fell into the bat, then went into a seizure, so he decided to "euthanize" it. Respondent Stark says "I could have easily went and called my veterinarian or whatever" but he chose to use the bat to avoid having the animal lay there suffering.); Tr. Vol. 7, 1935:25-1937:19 (where Respondent Stark testifies to finding one leopard gasping for air and reaching for its leg which he says shatters in his hand, so he "diagnoses" the leopards with metabolic bone disease and continues to treat at least one leopard with calcium supplements for one to two weeks. He then testifies that when he tried to feed the leopard it charged at him and ran into his bat, maybe broke its neck, was convulsing, and he used the bat to "euthanize" the leopard.), 2046:2-6 (where Respondent Stark testifies "it never was diagnosed as terminal, no.").

failed to employ an attending veterinarian to provide adequate veterinary care to respondents' animals" in violation of 9 C.F.R. §§ 2.40(a) and (b)(1). Complainant, via its Post-Hearing Brief, contends that not only did Respondents misrepresent that Dr. Gough was and had been the attending veterinarian for the Stark facility during the June 25, 2013 inspection,[99] but that Respondents then sent Dr. Miller another PVC on September 24, 2013 identifying Dr. Barbara Pepin as Respondents' attending veterinarian who, the record shows, stated she never agreed to be the Stark facility attending veterinarian.[100]

During the hearing, Dr. Pepin testified that she made a house call to the Stark facility, accompanied by her husband, for the sole purpose "to look at a dog that had been injured" by a lion with which he was housed.[101] Dr. Pepin also testified that, after examining the dog, she went to the Stark house to complete some paperwork and that Respondent Stark told her "he had to have a form signed, that somebody had walked through the facility and looked at it."[102] Dr. Pepin testified that she had a brief discussion with Respondent Stark about "a couple other exotic animals" at the facility, explaining that she was not an exotic animal veterinarian and that "hybrid animals were not eligible for rabies vaccinations[;]" but that after she entered the house she "filled out a blank on [the form] saying that - - what I prescribed and that further diagnostics . . . were declined and that he [Respondent Stark] was to come to the clinic the following day and pick

---

[99] *See* Complainant's Post-Hearing Brief at 42 (citing CX 6; CX 9; CX 11; CX 44; Tr. Vol. 2, 382:6-386:20).

[100] *Id.* at 43. I note that Dr. Miller testified that the PVC was emailed to Dr. Arango, but the date the PVC was received is unclear. *See* Tr. Vol. 2, 445:24-446:4.

[101] Tr. Vol. 1, 47:20-52:17. *See also* CX 8 (Dr. Pepin's September 23, 2013 Affidavit and two copies of the PVC: one copy has Dr. Pepin's initials indicating where the form contains her hand writing and notes "not mine" where there is added writing that is not her handwriting, and "unsure" where she cannot recall how in depth the conversation was about the topic indicated); Tr. Vol. 1, 49:18-23 (Dr. Pepin testified that she recommended that the dog be x-rayed but that her recommendation was rejected and she was told that the dog could not be removed from the property because the lion would get "very agitated" and "the housing with the lion might or might not hold him").

[102] Tr. Vol. 1, 52:20-53:6. *See also* CX 8.

up pain medicine and antibiotics for that dog."[103] Dr. Pepin testified that Respondent Stark never asked her to be the attending veterinarian for the Stark facility.[104] Dr. Pepin explained that it was not until after she was contacted by a USDA investigator that she requested copies of the documents she had signed and, upon review, realized the forms had added writing that was not her writing.[105] Dr. Pepin also testifies that she signed the "Attending Veterinarian Documentation Sheet for APHIS Form 7002" but understood that it was only meant to acknowledge that she looked at an animal at the facility and that acknowledgement was all she intended by her dated signature.[106]

Respondents generally contend that they "relied on and utilized veterinarians in exactly the manner needed for the circumstances" and "more than adequate plans for all animals involved was constructed, discussed, and implemented at all times."[107] Respondents also contend that "Dr. Pepin reviewed enrichment forms and regularly deferred to Respondent Tim Stark's vast experience and knowledge about proper treatment of exotics," and that the testimony of Dr. Pelphrey and Dr. Cook shows that "some attending veterinarian *was* effectively present in person or via ready communication at all times necessary, on who had direct or delegated authority for activities involving animals at Respondents' facility as defined under 9 C.F.R. Section 1.1."[108]

The record demonstrates that Dr. Rick Pelphrey did not become an attending veterinarian to the Stark facility until October 1, 2013.[109] Dr. Jill Cook testified that she met Respondent Stark sometime in the winter of

---

[103] Tr. Vol. 1, 54:8-17, 55:2-7, 56:2-13. *See also* CX 8.

[104] Tr. Vol. 1, 56:11-13. *See also* CX 8 at 3, 5; CX 14 at 1.

[105] Tr. Vol. 1, 59: 23-60:4. *See also* CX 8 at 5

[106] Tr. Vol. 1, 68:12-17, 71:23-72:19.

[107] Respondent's Post-Hearing Brief at 11 (citing "Transcript at 178:17-179:9 in Testimony of Tim Stark on 10/04/18"; RX 24, 27, 64), 12.

[108] *Id.* at 12-13. *See also* Tr. Vol. 7, 1808:6-15 (Christina Day testifying that Dr. Pepin said "she doesn't know these kinds of [exotic] animals and she's going to rely on your [Respondent Stark's] expertise in helping to take care of them.").

[109] Tr. Vol. 6, 1651:20-21, 1686, 5-9; RX 64.

2015, has provided veterinary care for multiple animals at Respondents' facility, that she has not had a problem with Respondent Stark or anyone affiliated with Respondents "disobeying any recommendations" she had for the care of those animals, but stated that she is not the attending veterinarian under the USDA Regulations.[110]

Respondent Stark's contention that Dr. Pepin "deferred" to his expertise in the treatment of exotic animals, is inconsistent with the record, including the testimony of Dr. Pepin, and is irrelevant to the present analysis of whether Respondents had an attending veterinarian during the time at issue. Dr. Pepin specifically noted that she and Respondent Stark discussed that she did not have expertise in exotic animals and did not wish to treat them.[111] She also testified that she did not know Christine Denford and never reviewed any enrichment forms as alleged by Ms. Denford in her Affidavit, RX 8.[112] As noted, Dr. Pepin stated, and Respondent Stark did not deny, that Respondent Stark never asked her to be his attending veterinarian.[113] I find that Dr. Pepin's testimony that she did not agree to become the attending veterinarian for Respondents is credible and the record shows that she did not function as an attending veterinarian during any period.

The Regulations, 9 C.F.R. §§ 2.40(a) and (b)(1), are unambiguous regarding the requirement that exhibitors "shall have an attending veterinarian who shall provide adequate veterinary care" as well as

---

[110] Tr. Vol. 6, 1643:4-20, 1639:22-1640:6, 1640:21-1641:1, 1643:20-22. Dr. Cook also testified that, at the time Respondent Stark asked her to treat his tigers he had an attending veterinarian, Dr. Pelphrey, and that she had never treated tigers before. Tr. Vol. 6, 1644:11-17.

[111] Tr. Vol. 1, 56:2-8, 82:3-6; CX 8 at 3.

[112] Tr. Vol. 1, 78:14-84:1.

[113] There seems to be some misunderstanding or miscommunication as to the point of Respondent Stark asking Dr. Pepin to be his attending veterinarian. Ms. Day testified that "the reason" Dr. Pepin was present on July 1, 2013 was "to be our primary vet." Tr. Vol. 7, 1809:16-22. Ms. Day does not explain how she came to have the understanding about Dr. Pepin's reason for the house call. However, Ms. Day also testified that she was not familiar with the forms. Tr. Vol. 7, 1815:4-8. Respondent Stark does not, either in testimony or elsewhere that I could identify, deny that he never asked Dr. Pepin to be his attending veterinarian.

"written program of veterinary care." Respondent Stark does not deny that he forged the PVC and Dr. Gough's signature presented at inspection on June 25, 2013, nor does he deny that he never specifically asked Dr. Pepin if she would be the facility's attending veterinarian. Here, it is apparent that Respondents misrepresented the relationship with qualified veterinarians to APHIS officials, falsely presenting Dr. Gough and Dr. Pepin as attending veterinarians, not once but twice. Respondent Stark's claims that "some attending veterinarian *was* effectively present in person or via ready communication at all times necessary" is inconsistent with the record prior to October 1, 2013 and does not comply with the Regulations. Therefore, I find that Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.40(a) and (b)(1), by failing to employ an attending veterinarian to provide adequate veterinary care to Respondents' animals on or about January 1, 2012 through on or about September 30, 2013.

c) Complaint Paragraph 8d (June 25, 2013)

Complainant alleges that, in violation of the Regulations, 9 C.F.R. §§ 2.40(a), (b)(2), and (b)(3) on or about June 25, 2013 Respondents "failed to obtain adequate veterinary care of a Great Pyrenees dog with a bleeding lesion on his nose, and although respondent Stark represented to APHIS inspectors that a veterinarian had examined the dog, respondents had no documentation of any such examination."[114] Complainants provide that during the inspection, Respondent Stark represented to Drs. Arango and Miller that he had sought a veterinarian's advice for the dog Bandit and was treating the dog with "zinc-oxide type sunblock" but could not produce any documentation showing the veterinarian's diagnosis or recommendations.[115] Complainant states that during her July 1, 2013 house call, Dr. Pepin testified that she evaluated the dog Bandit and noticed the lesions and scabs on his nose for which she recommended a

[114] Complaint ¶ 8d. The dog is identified as "Bandit" in Complainant's Post-Hearing Brief at 44.

[115] *See* CX 6 at 1. *See also* Tr. Vol. 2, 387:10-21 (Dr. Miller testifying about the dog Bandit's condition, that there was no documentation regarding the treatment of and care by a veterinarian of Bandit and confirming that Dr. Gough told her that he had never attended the dog).

course of treatment.[116] Complainant contends that Respondents failed to follow Dr. Pepin's recommendations as determined during Drs. Arango and Miller's September 24, 2013 inspection.[117]

Respondents do not address this specific allegation in their Post-Hearing Brief but generally contend that the treatment and care provided by the Respondents "should be given substantial deference in terms of assessing whether proper and appropriate treatment was provided."[118]

It has already been found, *supra*, that between January 1, 2012 and September 30, 2013, Respondents did not employ an attending veterinarian whose responsibility was to provide adequate veterinary care in violation of 9 C.F.R. § 2.40(a). The Regulations, 9 C.F.R. §§ 2.40(b)(2) and (b)(3), require that exhibitors maintain programs of veterinary care that include the "use of appropriate methods to prevent, control, diagnose, and treat disease and injuries" and "[d]aily observation of all animals to assess their heal and well-being . . . [p]rovided . . . a mechanism of direct and frequent communication is require so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian." Complainant's contention is that Respondents' representation that veterinary care was obtained for the dog Bandit's nose lesions was questionable due to the lack of documentation. However, Respondent Stark told the APHIS inspectors in June 2013 that, at the direction of an unidentified veterinarian, that the dog Bandit was being treated with zinc-oxide type sunblock, CX 6 at 2, which is the same recommendation provided by Dr. Pepin during her July 1, 2013 examination, CX 8 at 1-3.

Regarding the September 24, 2013 inspection, Dr. Arango testified that the dog Bandit's nose had scabbed over and "the open lesions looked improved."[119] Thus, although, according to Dr. Arango, Respondent Stark

---

[116] Complainant's Post-Hearing Brief at 45 (citing CX 8). Dr. Pepin also stated in her Affidavit that Respondent Start declined further diagnostics. CX 8 at 3.

[117] Tr. Vol. 2, 463:23-464:20; CX 14 at 46, 48, 50 (September 24, 2013 Inspection Report with photos). *See also* CX 6 at 2, 9-13.

[118] Respondents' Post-Hearing Brief at 15.

[119] Tr. Vol. 2, 464:3-8.

said that the dog Bandit's improvement was not due to him following Dr. Pepin's advice, it appears that Respondent Stark had a method to have the dog Bandit's nose lesions diagnosed by a veterinarian and treated, resulting in improvement. Therefore, I find that Respondents willfully violated 9 C.F.R. §§ 2.40(a) and (b)(3) by not having an attending veterinarian to provide adequate veterinary care or a mechanism for frequent communication with an attending veterinarian for the dog Bandit on or about June 25, 2013. However, the preponderance of evidence does not show that Respondents failed to have the dog Bandit diagnosed and treated by a veterinarian and the record does not demonstrate that Respondents violated 9 C.F.R. § 2.40(b)(2).

d) Complaint Paragraphs 8e-h (August 21 and 25, 2013)

Complainant alleges that, in violation of 9 C.F.R. §§ 2.40(a), (b)(2), and (b)(3), on or about August 25, 2013, Respondents failed to obtain adequate veterinary care for an ocelot, a serval, and a coatimundi, each of which died under unclear circumstances; and on or about August 25, 2013 through on or about September 3, 2013 Respondents failed to obtain adequate veterinary care for a male red kangaroo which also died due to unestablished causes.[120] Complainant contends that, during their September 24, 2013 inspection, Drs. Miller and Arango "documented that multiple animals had died of unknown or unconfirmed causes, . . . having been provided no veterinary care," and observed that Respondents "failed to have frequent and direct communications with their attending veterinarian as to timely attend to the animals' well-being."[121]

First, Complainant presented Dr. Miller's testimony about an ocelot that died on or about August 21, 2013 and about which Respondents told inspectors the cause of death was a "caging accident" in which the ocelot strangled in his cage.[122] Complainant contends that "Respondents had not sought any veterinary care for the ocelot, had not communicated with a veterinarian regarding the ocelot, and did not have a necropsy

[120] Complaint ¶ 8e-h.

[121] Complainant's Post-Hearing Brief at 45 (citing CX 14, 6; Tr. Vol. 2, 469-470).

[122] *Id.* (citing CX 14, 6; Tr. Vol. 2, 463:3-18).

performed."[123]

Second, Complainant state that a coatimundi and serval died on or about August 25, 2013 and contend that Respondents never sought veterinary care or communicated with a veterinarian about these animals and did not have necropsies performed to determine the cause of death.[124]

Third, Complainant states that a male red kangaroo, acquired on or about August 25, 2013, died on September 3, 2013 and that, although Respondent Stark told the USDA inspectors that the kangaroo had swollen feet shortly after he arrived, Respondent Stark "never had the kangaroo examined by a veterinarian" and instead chose to treat the kangaroo with an unknown dosage of Benadryl.[125]

Aside from their general contentions, [126] Respondents do not address these specific allegations in their Post-Hearing Brief or provide specific evidence to rebut these allegations.

It has already been found, *supra*, that between January 1, 2012 and September 30, 2013, in violation of 9 C.F.R. § 2.40(a), Respondents did not employ an attending veterinarian whose responsibility was to provide adequate veterinary care.

The Regulations, 9 C.F.R. §§ 2.40(b)(2) and (3), require that exhibitors maintain programs of veterinary care that include the "use of appropriate methods to prevent, control, diagnose, and treat disease and injuries" and "[d]aily observation of all animals to assess their health and well-being" which "may be accomplished by someone other than the attending veterinarian" but require "a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the

---

[123] *Id.*

[124] *Id.* at 45-46 (citing Tr. Vol. 2, 463:3-23; CX 14).

[125] *Id.* at 46 (citing Tr. Vol. 2, 461:21-463:2; CX 14).

[126] Respondents' Post-Hearing Brief at 15 (Respondents contend that their assessment of proper and appropriate treatment should be given deference). *See also* CX 6 at 2, 9-13.

attending veterinarian." Regarding the ocelot, serval, and coatimundi, each of which died due to unknown circumstances, Respondents did not seek out veterinarian advice or diagnosis either before or after death. The record demonstrates that Respondents could not identify the cause of death for these animals. The record also demonstrates that Respondents could not produce a program of adequate veterinary care that specified methods for identifying or treating illness for these animals. Thus, as to the ocelot, serval, and coatimundi, I find that Respondents violated 9 C.F.R. §§ 2.40(a), (b)(2), and (b)(3).

As to the male red kangaroo, Complainant contends, and the record shows, that Respondent Stark's method of applying Benadryl to treat the kangaroo's swollen feet was ineffective to prevent the kangaroo from dying. Respondent Stark could not explain the death of the kangaroo or reason for application of, or precise dosage of, Benadryl.[127] This aside from the fact that Respondent Stark was uncredentialed to diagnose and treat a kangaroo and never sought a veterinarian's care despite his knowledge of the kangaroo's ailment. Therefore, as to the red kangaroo, I find that Complainant has shown by a preponderance of the evidence that Respondents violated 9 C.F.R. §§ 2.40(a), (b)(2), and (b)(3).

e) Complaint Paragraphs 8i-k (September 24, 2013)

Complainant alleges that, on or about September 24, 2013, Respondents violated 9 C.F.R. § 2.40(b)(2) by maintaining expired medication for use on animals, and 9 C.F.R. §§ 2.40(a) and (b)(2) by failing to obtain adequate veterinary care for a Great Pyrenees dog and a tiger (Jumba).[128] Complainant contends that, during their September 24, 2013 inspection, Drs. Arango and Miller identified an expired medication, a de-wormer Ivermectin, as the "only bottle of medicine for use in animals that was present on respondent's premises."[129] During the same inspection, Complainant contends that Drs. Arango and Miller "found that one of respondents' tigers (Jumba) had visibly abnormal worn, broken and

[127] Tr. Vol. 2, 461:21-463:2; CX 14.

[128] Complaint ¶ 8i-k.

[129] Complainant's Post-Hearing Brief at 46 (citing Tr. Vol. 2, 460:9-461:14, 460:11-461:14; CX 14).

discolored canine teeth, as well as observable weight loss" and that Respondent told the APHIS inspectors he had never sought veterinary care for this tiger.[130]

The allegation in Complaint, para. 8j, is regarding the same dog Bandit and same facts already addressed in discussion of Complaint, para. 8d. Therefore, as there, here I find that Respondents willfully violated 9 C.F.R. § 2.40(a) by not having an attending veterinarian to provide adequate veterinary care for the dog Bandit on or about September 24, 2013, but the record does not demonstrate that Respondents violated 9 C.F.R. § 2.40(b)(2) by failing to have a veterinarian examine and treat the dog. Aside from their general contentions, [131] Respondents do not address these specific allegations in their Post-Hearing Brief or provide specific evidence to rebut these allegations.

In the September 24, 2014 Inspection Report, Dr. Arango states that Respondent Stark "stated that this [bottle of Ivermectin] was the only bottle of medication present on the property" and that when the expiration date of August 2013 was pointed out, Respondent Stark "stated that he had purchased it earlier in this year and did not realized it had expired."[132] Although Respondent Stark does not deny that the medication was the "only" medication on the property or that it was in fact expired, the record does not indicate whether this medication was actively being used to treat any animals on the property. Therefore, I find that Complainant did not show by a preponderance of the evidence that Respondents violated 9 C.F.R. § 2.40(b)(2)[133] by simply having the expired medication on the property.

As to the tiger Tumba, Dr. Arango observed that all four canine teeth "were broken or worn," particularly "the right lower canine was broken or worn unevenly to the gumline, and the other three canine teeth were all

---

[130] *Id.* (citing Tr. Vol. 2, 465:17-467:11; CX 14 at 52, 54 (photos)).

[131] Respondents' Post-Hearing Brief at 15 (Respondents contend that their assessment of proper and appropriate treatment should be given deference).

[132] CX 14 at 3. *See also* CX 14 at 44 (photo of medicine bottle).

[133] This Regulation concerns the "use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries."

badly damaged or worn."[134] Dr. Miller testified that along with the broken and worn canine teeth, she noticed that the tiger had visibly lost weight since the last inspection and that Respondent Stark told she and Dr. Arango that the tiger Tumba was approximately fifteen years old and had never been examined by any veterinarian for a dental condition.[135] The inspectors also state that Respondent Stark expressed that he didn't believe there was a need to have a veterinarian examine the tiger for dental issues because he had never observed any signs of difficulty eating or signs of pain.[136]

The inspection photos show that the tiger Tumba's canine teeth were severely worn and possibly broken.[137] In view of the record proof of the poor condition of the tiger Tumba's teeth, Respondent Stark's contentions that a veterinarian's opinion was not needed since he did not observe the tiger having any problems eating or signs of pain is inadequate to counterbalance Complainant's evidence that the tiger should have been examined by a veterinarian. Therefore, I find that Respondents violated 9 C.F.R. §§ 2.40(a) and (b)(2) by failing to obtain adequate veterinary care for the tiger Timba leading up to and on or about September 24, 2013.

f) Complaint Paragraphs 8l-m (October 8, 2015)

Complainant alleges that Respondents violated 9 C.F.R. §§ 2.40(a) and (b)(2) on or about October 8, 2015 by failing to obtain adequate veterinary care of a Great Dane dog and Fennec fox. Complainant contends that, during her compliance inspection of Respondents' property on October 8, 2015, ACI Houser observed "a Great Dane dog had crusted material and a thick green mucus exuding from both eyes, the dog's eyes had not been cleaned, and the dog had not been seen by a veterinarian for this condition[;]" and "a Fennec fox appeared very lethargic, and immobile in a corner of its enclosure, had very runny eyes with a greenish mucus discharge, its left ear appeared to have a scabby material sluffing from the

---

[134] CX 14 at 7. *See also* CX 14 at 52, 54 (photos of tiger's teeth).

[135] Tr. Vol. 2, 465:18-466:19.

[136] *Id.*; CX 14 at 7.

[137] CX 14 at 52, 54. *See also* Tr. Vol. 2, 468:14-25.

inside out of the ear, and the fox was thin, with a dull coat."[138] ACI Houser wrote in her October 8, 2015 Inspection Report that Respondent Stark indicated that the Fennec Fox's eyes were being treated by a veterinarian but that "a veterinarian had not been consulted in regards to the other issues."[139]

Aside from their general contentions, [140] Respondents do not address these specific allegations in their Post-Hearing Brief or provide specific evidence to rebut these allegations.

The October 8, 2015 inspection photos clearly show that the Fennec fox (CX 35 at 7) and Great Dane (CX 35 at 9) required the attention and treatment of a veterinarian for the reasons stated by ACI Houser. Based on the ACI Houser's statement, uncontradicted by Respondent Stark, that Respondent Stark stated he had a veterinarian treating the Fennec fox's eyes but not any of the other issues, and wholly failed to seek any veterinarian care of the Great Dane dog, the record shows that Respondents did not seek adequate veterinary care. Therefore, I find that Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.40(a) and (b)(2), by failing to obtain adequate veterinarian care for a Fennec fox and Great Dane dog as observed by inspectors on or about October 8, 2015.

g) Complaint Paragraphs 8n-p (January 20, 2016)

Complainant alleges that Respondents violated the Regulations, 9 C.F.R. §§ 2.40(a), (b)(2) and (b)(3), by failing to obtain veterinary care on or about January 20, 2016 for a female brown bear (Chloe), a red kangaroo, and three otters.[141]

Complainant contends that during a compliance inspection on January 20, 2016, Dr. Kirsten and ACI Houser "observed that a female brown bear

---

[138] Complainant's Post-Hearing Brief at 47 (citing CX 35, Tr. Vol. 3, 706:16-23; 707:1-3). *See* CX 35 at 8 (photo of fennec fox), 9 (photo of Great Dane).

[139] CX 35 at 1.

[140] Respondents' Post-Hearing Brief at 15 (Respondents contend that their assessment of proper and appropriate treatment should be given deference).

[141] Complaint ¶ 8n-p.

(Chloe) appeared to have sustained an injury on her left arm, as evidenced by fresh blood in her fur."[142]

Respondents contend that there was not blood on the bear and that there was no injury.[143] Respondent Stark also contends that the inspector's observation of blood on the bear, if there was any, could not be a violation of the Regulations because it was first seen during the inspection and he could not have known to contact his veterinarian until he was made aware of the issue.[144]

Complainant also contends that, during the exit interview on January 20, 2016, inspectors discovered that sometime between October 8, 2015 and the inspection a red kangaroo that was previously known to be ill and three otters died of unknown causes.[145] Complainant contends that Respondents knew the red kangaroo was ill but had "not obtained any veterinary medical care for the kangaroo and, following the death of the kangaroo, did not have a necropsy performed to determine the cause of the kangaroo's death."[146] Dr. Pelphrey, Respondents' attending veterinarian, testified he knew of the ill red kangaroo and consulted another practitioner in Kentucky but did not get the information needed to treat the kangaroo.[147]

---

[142] Complainant's Post-Hearing Brief at 47 (citing CX 36 at 2, 12-16; CX 39; Tr. Vol. 3, 716:21-717:17; 719:11-720:15; Tr. Vol. 5, 1487; 1601; 1603:2-5).

[143] RX 51 at 0:55, at 1:58 (Respondent Stark states that the bear had something to eat earlier in the day and may have had "raspberries or something" on her coat). *See also* Tr. Vol. 6, 1596:10-1604:16; RX 30, 31.

[144] *See* Tr. Vol. 6, 1602:24-1604:16; Respondents' Post-Hearing Brief at 24-5 (citing "Transcript at 32:1-34:15 in Testimony of Christina Day on 10/04/18"; RX 33; "Transcript at 150:8-152:21 in Testimony of Tim Stark on 10/04/18").

[145] Complainant's Post-Hearing Brief at 47-48 (citing Tr. Vol. 3, 717:20-718:3; CX 36; RX 57). *See* RX 57 at 4:27-5:48 (exit interview where Respondent Stark and Ms. Stark describe that the kangaroo was found ill and died within twenty-four hours, that the veterinarian Dr. Pelphrey was contacted but didn't say "a whole lot," and that the death and contact of the veterinarian are documented "in the file").

[146] *Id.*

[147] Tr. Vol. 6, 1697:13-1698:23.

Respondent Stark avers that he consulted Ms. Lynda Staker, author of "Macropod Husbandry, Healthcare, and Medicinals" as well as his attending veterinarian Dr. Pelphrey regarding the red kangaroo.[148] Respondent Stark states "[a]fter consulting my veterinarian on the death of this kangaroo we felt it conclusive that the animal died as a result of natural causes per the discussion with Ms. Staker and, for this reason, Dr. Pelphrey felt that a necropsy was not necessary."[149]

Complainant also contends that, as to the one adult and two pup otters, a veterinarian was never contacted regarding the adult otter, nor was a necropsy conducted though the cause of death was unknown.[150] The January 26, 2016 Inspection Report indicated that the death of the two otter pups may have been due to a "possible formula issue" but "a veterinarian was not contacted and the animals were not seen by the veterinarian during the time the animals died. No necropsy was conducted."[151] However, Complainants acknowledge that the evidence Respondents provided to show whether necropsies were performed on the deceased otters is contradictory: Respondent Stark stated that he had not had any necropsies done on the otters but that, after consulting with his veterinarian Dr. Pelphrey and the seller, they determined the deaths were related to the formula, RX 30 at 4 (unnumbered pages); Respondent Stark testified that "any time [Respondents] have a questionable death, [Respondents] do a necropsy," and that he had cut the otter open to see if it had anything lodged inside;[152] and Dr. Pelphrey testified to having performed a necropsy on the deceased otters, but determined that the otters died of

---

[148] RX 30 at 3-4 (pages unnumbered). However, note that Respondent Stark is not clear about whether Dr. Pelphrey was consulted before or after the kangaroo's death.

[149] *Id.* However, also note that during Dr. Pelphrey's testimony, he alluded that the lack of necropsy was due to transportation difficulties and did not mention a conclusion that the kangaroo had died from natural causes. Tr. Vol. 6, 1698:5-23.

[150] Complainant's Post-Hearing Brief at 49 (citing CX 36).

[151] CX 36 at 2.

[152] Tr. Vol. 7, 1947:20-24, 1944:13-1947:20.

"canine distemper virus."[153]

Respondents contend that, although the attending veterinarian, Dr. Pelphrey, was contacted regarding the baby otters, "they both died within hours of initial indicators of any complications" so there was no time for them to be seen or treated by Dr. Pelphrey.[154] Respondents explain the adult otter "died within **minutes** of showing any indication of issue" and not within hours, that it was "immediately tended to, but there was no time to seek veterinary assistance."[155] Respondents contend that the adult otter likely died of natural causes and Dr. Pelphrey was made aware of the otter's death.[156]

The record is conflicting as to whether the brown bear Chloe was, in fact, injured or in need of veterinary care on the date of inspection, January 20, 2016. The video, RX 51 at 0:05-0:30, shows ACI Houser along with Dr. Kirsten pointing out the blood on the bear, ACI Houser states that the blood could be smelled, and that the injury must have just happened; neither Ms. Stark nor anyone else present in the video disagrees that blood (or something) is visible. Additionally, the January 20, 2016 Inspection Report includes photos of the bear, CX 36 at 12-15, that indistinctly show an unknown reddish substance on the bear's fur. However, Respondents also present video evidence of the bear post-inspection, RX 51 at 1:45, showing the bear without any visible injury.

Respondent Stark's point is well taken that, if an injury had just happened at the time of inspection, he could not have failed to seek veterinarian care because of the immediate recency of the injury.[157] Respondent Stark states that the attending veterinarian was on the property the day before the inspection and did not observe an issue with the bear Chloe, *see* RX 30 at 3 (pages unnumbered). Complainant did not provide evidence that an entire day had gone by without the bear Chloe being

---

[153] Tr. Vol. 6, 1698:24-1702:6.

[154] RX 30 at 4 (pages unnumbered).

[155] *Id.* (emphasis in original).

[156] *Id.*

[157] *See supra* note 144.

observed by Respondents. Likewise, Complainant did not present any evidence showing that Respondents failed to provide a written program of veterinary care in place for this bear. Therefore, I find that the record does not demonstrate by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. §§ 2.40(a), (b)(2) and (b)(3), by failing to obtain adequate veterinary care for the bear Chloe on or about January 20, 2016.

As to the red kangaroo, Respondent Stark, in CX 30 at 4 (pages unnumbered), contends that he consulted with Ms. Staker, whom as noted above is the author of a volume on macropod husbandry and whom Respondent Stark understands to be an expert in macropods and, although the timing is unclear, also consulted with the attending veterinarian Dr. Phelprey who also consulted Ms. Staker. Although Respondent Stark does not deny knowing that the animal was sick before it died, he and Ms. Stark told inspectors that the kangaroo died within twenty-four hours.[158] The record is unclear as to whether Respondent Stark contacted his attending veterinarian Dr. Pelphrey before or after the kangaroo died. The record also shows that Respondents never sought a necropsy for the kangaroo to determine the cause of death. Complainant did not address whether the animal had any written program of veterinary care. Although Respondents had an attending veterinarian, Dr. Pelphrey, the record demonstrates that Dr. Pelphrey did not provide care for the kangaroo and Respondents did not otherwise obtain adequate veterinary care for the kangaroo. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. §§ 2.40(a), (b)(2) and (b)(3), by failing to obtain adequate veterinary care for a red kangaroo leading up to its death and the January 20, 2016 inspection.

Respondents' attending veterinarian, Dr. Pelphrey, testified that he was consulted post mortem regarding the otters, and explained it was possible that his determined cause of death, canine distemper virus, would not have displayed any symptoms leading up to death. [159] While the inconsistencies surrounding the observation, speed of death, and involvement of the attending veterinarian to determine the cause of death are concerning, I find Dr. Pelphrey's specific testimony regarding the deceased otters

[158] Tr. Vol. 3, 717:22-718:1; RX 57.

[159] Tr. Vol. 6, 1698:24-1702:6.

credible. Complainants did not present any evidence or address whether there was a lack of written program for veterinary care. Therefore, I find the record does not show by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. §§ 2.40(a), (b)(2) and (b)(3), by failing to obtain adequate veterinary care for three otters leading up to on or about January 20, 2016.

VI. Failure to Identify Dogs

Complainant alleges that Respondents willfully violated the Regulations, 9 C.F.R. § 2.50(c), by failing to identify dogs.[160] Dr. Miller testified, as corroborated in the September 23, 2013 Inspection Report by Dr. Arango, that the dogs at the facility (a Great Pyrenees, a wolf dog hybrid, and two coyote-dog hybrids) did not wear a collar with identification and no identification was posted on the dogs' enclosures as required.[161]

Although this allegation is not specifically addressed in Respondents' Post-Hearing Brief and was not specifically addressed during the hearing by Respondents, Respondents present two exhibits, RX 43 (photos of dog tags) and RX 44 (a document entitled "Helpful Reminder-Identification"), presumably to show that this violation was corrected. But the timing of the assumed correction is not clear from this proffered evidence.

The applicable regulation, 9 C.F.R. § 2.50(c), states "[a] class 'C' exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired." Complainant is correct in that the "Department's policy is that the subsequent correction of a condition not in compliance with the Act or the

---

[160] Complaint ¶ 9.

[161] Tr. Vol. 2, 470:19-471:3; CX 14 at 9, 11. Note that there are no specific photos of the dogs or their enclosures in CX 14 that I could find. Dr. Miller also stated that hybrid dogs are included in the Regulations' definition of dogs and require identification, Tr. Vol. 2, 470:13-18.

Dr. Miller also testified that the inspectors noticed the lack of identification during their June 2013 inspection but did not cite it in the Inspection Report to give Respondents an opportunity to understand the requirement and correct it. Tr. Vol. 2, 471:5-15.

regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. . . . While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation."[162] In consideration of penalty, I take into account both that the September 23, 2013 Inspection Report includes and demonstrates the first violation of this nature and that, sometime thereafter, Respondents corrected the violation. I find that the Respondents violated the Regulations, 9 C.F.R. § 2.50(c) by failing to identify the four dogs at their facility on September 23, 2013.

VII. Acquisition and Disposition Records Violations

Complainant alleges that Respondents willfully violated Regulations, 9 C.F.R. 2.75(b), by failing to make, keep, and maintain records or forms that fully and correctly disclose the date of disposal of two juvenile leopards between December 2012 and June 2013, the acquisition of forty-three animals in June 2013, the disposition of six animals in June 2013, and the acquisition of seven animals in September 2013.[163] Complainants also allege that Respondents violated Regulations, 9 C.F.R. 2.75(a)(2), by failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition and disposition of dogs.[164]

In general, Respondents contend that the "main and essential purpose" of the record keeping requirements "is simply to prevent stolen animals from being sold for medical research" and that there is "no evidence or supported allegations that Respondents had trafficked in stolen animals."[165] Respondents contend, *id.*, that, because inspections are

---

[162] *Hodgins*, 56 Agric. Dec. 1242, 1275-76 (U.S.D.A. 1997) (quoting *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 142 (U.S.D.A. 1996)). *See also* Complainant's Post-Hearing Brief at 53 (citing *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 175 (U.S.D.A. 2013)).

[163] Complaint ¶¶ 10-12, 14-15.

[164] Complaint ¶ 13.

[165] Respondents' Post-Hearing Brief at 16 (citing "7 USC Section 2140"; "9 CFR Section 2.75").

unannounced, in order to avoid allegations of recordkeeping violations licensees would "have to have records that are absolutely perfect at every moment of every day, with no paperwork, not even a single journal entry, left undone, even for the briefest period of time." Respondents aver that the violations were "nothing more than temporary and remediable discrepancies without real affect" and that Respondents should have been provided more opportunity to demonstrate compliance.[166] Respondents flatly contend, *id.* at 17, without providing any additional support, that there was no "preponderance of reliable evidence" to show that Respondents failed to keep records disclosing the acquisition or disposition of animals.

In the Reply Brief at 30, Complainant states that "[i]t is well settled that the purpose of the recordkeeping regulations is not exclusively to prevent trafficking in stolen animals."[167] Complainant contends, *id.* at 332, that Respondents' contentions are without merit because "[a]lthough respondents are required to be in compliance at all times"[168] the alleged violations were not, as Respondents claim, "without effect" and did not require Respondents to meet "absolute perfection" or an "impossible and unnecessary standard";[169] and Respondents were given opportunities to correct deficiencies in their records.[170]

---

[166] *Id.* at 17 (citing 5 U.S.C. § 558(c)(2); *Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421 (6th Cir. 2000)).

[167] Citing *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 118 (1996); *Browning*, 52 Agric. Dec. 129, 141-42 (U.S.D.A. 1993).

[168] Citing *Tri-State Zoological Park*, 72 Agric. Dec. 128, 175 (U.S.D.A. 2013) ("Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations.")

[169] Citing *White*, 73 Agric. Dec. 114, 148-50 (U.S.D.A. 2014).

[170] Explaining that the multiple allegations of non-compliance with recordkeeping requirements span a two-year period; contending that, according to Dr. Arango, "Respondents' recordkeeping was so lax that the inspectors themselves corrected and/or completed respondents records for them," Tr. Vol. 5, 1294:7-1296:11; and citing *Knaust*, 73 Agric. Dec. 92, 104 (2014) ("correction [of records] does not alter the fact that a violation occurred"); *Greenly*, 72 Agric. Dec. 603, 615-16 (U.S.D.A. 2013); *Davenport*, 57 Agric. Dec. 189, 218-19 (U.S.D.A. 1998).

a. Complaint Paragraph 10

In the Complaint, para. 10, Complainants allege that

> (1) respondents had records showing that they had acquired two juvenile leopards (each weighing 15 pounds) on October 31, 2012; (2) between June 18, 2013, and June 20, 2013, a juvenile leopard killed at least one domestic pet cat and several pet dogs in respondents' neighborhood; (3) on June 20, 2013, a juvenile leopard (weighing approximately 48 pounds) was shot and killed by respondents' neighbors; (4) respondent Stark insisted that the juvenile leopard was not his, and that his two leopards had suffered from metabolic bone disease, and had both died within a month of their arrival at respondents' facility; and (5) respondents had no records of the disposition of either leopard, no records of any diagnosis of metabolic bone disease made by any veterinarian, and no records of any veterinary medical treatment given to either leopard for metabolic bone disease, or for any other condition.

Complainant states that Respondents acquired two male juvenile leopards on October 31, 2012,[171] and APHIS determined that Respondents did not have any records regarding the disposition of either leopard, as well as no other record regarding illness or veterinarian treatment that might support Respondents claim that the two juvenile leopards acquired in 2012 died shortly thereafter.[172]

Respondents did not specifically address these allegations as to the

---

[171] Complainant's Post-Hearing Brief at 56 (citing CX 49 at 7; Tr. Vol. 5, 1277, 1289:2-5; Tr. Vol. 7, 2043).

[172] *Id.* at 57 (citing Tr. Vol. 5, 1282:20-1283:7). *See also* CX 49a (July 1, 2013 Animal Welfare Complaint).

I note that the leopards that Respondent Stark claimed died of metabolic bone disease were noted to be female, *see* Complaint ¶ 8a, whereas the leopards at question here, Complaint ¶ 10, are recorded as male in the acquisition documents, *see* CX 49 at 7.

leopards and have not provided any documentation regarding the disposition of the leopards.

The Regulations, 9 C.F.R. § 2.75(b), require that "[e]very . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals . . . in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer"; provided that exhibitors may use APHIS Form 7020, Record of Acquisition, Disposition, or Transport of Animals; and requires that each "exhibitor shall retain one copy of the record containing the information required by paragraph (b)(1) of this section."

As earlier determined, *supra*, Respondents had not provided any records regarding veterinary care or proof of illness for the leopards in question that Respondent Stark claims suffered of metabolic bone disease of which one died, and the other he "euthanized."[173] Respondents were well aware of the recordkeeping requirements, having maintained records of the acquisition of the two leopards, but failed to maintain any other records regarding the leopards care or disposition, leading to inconclusive results of an investigation regarding the leopard killed on a neighbor's property less than a mile from Respondents' facility. I find that Complainants demonstrated by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.75(b), by failing to make, keep, and maintain records or forms that fully and correctly disclose the disposition of two juvenile leopards.

b. Complaint Paragraphs 11-12 (June 25, 2013)

Complainant alleges that on or about June 25, 2013, Respondents violated 9 C.F.R. § 2.75(b) by "failing to make, keep and maintain records or forms that fully and correctly disclose the acquisition of forty-three animals" and that "disclose the disposition of six animals."[174] Complainant contends that, during their June 25, 2013 inspection, Drs. Miller and Arango observed forty-three animals for which Respondents did not have any records of acquisition (including no records of animal births on the

[173] *See supra* pages 26-30; Tr. Vol.7, 2041:21-2042:3.

[174] Complaint ¶¶ 11-12.

property), and also noted the absence of six animals for which Respondents had records of acquisition but did not have records of disposition.[175]

Respondents did not specifically address these allegations or produce the records at question.

The Regulations, 9 C.F.R. § 2.75(b), unambiguously require exhibitors to make, keep, and maintain records of acquisition, including "any offspring born of any animal while in his or her possession or under his or her control," and the disposition, including those euthanized, of animals in their possession. I find that the record demonstrates Respondents willfully violated 9 C.F.R. § 2.75(b) by failing to make, keep and maintain records or forms that fully and correctly disclose the acquisition of forty-three animals and the disposition of six animals as observed by inspectors on or about June 25, 2013.

c. Complaint Paragraph 13-15 (September 24, 2013)

Complainant alleges that Respondents willfully violated the Regulations, 9 C.F.R. § 2.75(a)(2), by "failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition and disposition of dogs."[176] Complainants also allege that on or about September 24, 2013, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) by "failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition of four animals" and "the disposition of three domestic pigs."[177]

---

[175] *See* CX 6 (June 25, 2013 Inspection Report) at 3-5; Tr. Vol. 2, 399:22-400:17 (where Dr. Miller testified that Respondent Stark's records were so disorganized that she and Dr. Arango helped him organize the records he did have to determine the number of acquisition records and disposition records by species). *See also* Tr. Vol. 2, 400-402 (where Dr. Miller testifies as to the importance of maintenance of acquisition and disposition records); Tr. Vol. 5, 1295:2-1296:11 (where Dr. Arango testifies that he spent a week helping Respondent Stark organize records); CX 13 (Records of Animals On Hand created by Dr. Arango when organizing the boxes of Respondent Stark's records).

[176] Complaint ¶ 13.

[177] *Id.* at ¶¶ 14-15.

Complainant provides CX 14 at 11, the September 24, 2013 Inspection Report, completed by Dr. Arango, which states that "dogs being maintained on the property are not being recorded on the APHIS 7005 form and the licensee does not have a variance to utilize a computerized record keeping system. Four dogs were observed in this facility collection. The information required regarding the acquisition source for these animals has not been documented in any other manner in the facility records." Dr. Arango further observes, CX at 11-13, "[a]t the time of inspection numerous (7) animals were missing either acquisition or disposition records" and details the missing records by species.

Respondents neither specifically addressed these allegations, nor have they produced any of the records at question.

As previously mentioned, the Regulations, 9 C.F.R. § 2.75(b), unambiguously require exhibitors to maintain records of the acquisition and disposition of their animals. The Regulations, 9 C.F.R. § 2.75(a)(2), are also clear that "exhibitor[s] shall use Record of Aquisition [sic] and Dogs and Cats on Hand (APHIS Form 7005) and Record of Disposition of Dogs and Cats (APHIS Form 7006) to make, keep, and maintain the information required by paragraph (a)(1) of this section" unless other computerized recordkeeping system is utilized. I find that the uncontroverted record demonstrates Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.75(a)(2) and (b)(1), by failing to make, keep and maintain records or forms that fully and correctly disclose acquisition and disposition of four dogs; the acquisition of one coatimundi, one guinea pig, and two domestic pigs; and the disposition of three domestic pigs as observed by inspectors on or about September 24, 2013.

VIII. Handling Violations

Complainant alleges Respondents willfully violated the handling regulations (9 C.F.R. § 2.131) on twenty-seven occasions between December 2012 and September 2015.[178] Of particular gravity, Complainant alleges that Respondents "failed to handle a juvenile female leopard as carefully as possible in a manner that does not cause trauma,

[178] Complaint ¶¶ 19(a)-(aa)

behavioral stress, physical harm, or unnecessary discomfort, and specifically, during a compliance inspection on June 25, 2013, respondent Stark represented to APHIS inspectors that he had 'euthanized' the juvenile female leopard by beating her to death with a baseball bat."[179] Complainant also alleges that Respondents failed to properly handle juvenile tigers during exhibition due to lack of distance or barriers between the animals and the public, resulting in injury to a member of the public by one of the tigers on January 10, 2014; three members of the public being bitten and scratched by the tigers on August 19, 2014; and multiple members of the public being scratched and bitten on September 13, 2015.[180]

Complainant contends, generally, that "[e]xhibits of exotic felids that offer actual or potential direct contact with people (and especially children, the elderly, and the infirm) present a great risk of physical injury to people (and consequently, to tigers)."[181] Complainant also avers that the "Secretary has determined that even young tigers are simply too large, strong, predatory, quick, and unpredictable for a person (and especially a child) 'to restrain the animal or for a member of the public in contact with [the animal] to have time to move to safety'"[182] and dangerous animals such as tigers are prone to injuring people and at risk of harm in return if not handled with sufficient barriers and/or distance between that animals and public.[183] Complainant contends that Respondents "expected their customers to sustain, at minimum, bites and scratches" and that such bites and scratches could be "serious or deadly" depending on the size of the

[179] Complaint ¶ 19(a).

[180] Complaint ¶¶ 19c, q, w.

[181] Complainant's Post-Hearing Brief at 70 (footnote omitted) (quoting and citing Tr. Vol.8, 2091:13-2092:5 (testimony of Dr. Laurie Gage) (other citations omitted); *The Int'l Siberian Tiger Found.*, 61 Agric. Dec. 53, 90 (U.S.D.A. 2002); *Zoocats, Inc.*, 68 Agric. Dec. 737, 746 (2009); *Palazzo*, 69 Agric. Dec. 173, 194 (U.S.D.A. 2010); *Tri-State Zoological Park of W. Md., Inc*., 72 Agric. Dec 128, 138 (2013)).

[182] *Id.* at 71 (citing *The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78 (U.S.D.A. 2002).

[183] *Id.* (citations omitted).

tiger and the size and condition of the person injured.[184] In addition, Complainant contends that "close contact with exotic felids such as tigers also poses a passive disease risk to both people and tigers."[185]

Generally, Respondents contend that the animals at the Stark facility were given "the best care, the best medical . . . everything we feel, you know, is the best top quality."[186] Respondents also aver that Respondent Stark is "one of the most highly experienced and highly qualified exotic animal handlers, trainers, and conservators of the region"[187] and contend that "[t]hat vast extent of experienced and personal development in the field is directly parallel to the ranges of experience proffered by other respondents and lauded in other enforcement cases where significant credit was given for just such credentials – and where reasonable mitigation of penalties was also granted for just such credentials."[188]

Complainant's Reply Brief states "it is well settled that a respondent's credentials or prior experience is irrelevant to whether there was violation or not."[189] The AWA and Regulations thereunder do not prohibit the

---

[184] *Id.* at 73 (citing Tr. Vol. 8, 2093:2-5, 2165:3-15, 2105:22-2506:6).

[185] *Id.* at 76 (citing www.aphis.usda.gov/ac/bigcatq&a.html ("Commonly Asked Big Cat Questions"); Tr. Vol. 8, 2093, 2094:13-2095:5; Shoemaker, A.H., Maruska, E.J. and R. Rockwell, *Minimum Husbandry Guidelines for Mammals: Large Felids* (American Association of Zoos and Aquariums, 1997) ("Annual vaccinations should include prophylaxis against feline panleukopenia (distemper)"); *Siberian Tiger Species Survival Plan* (American Association of Zoo Veterinarians, 2002)("The domestic feline viral diseases that effect tigers include . . . Panleukopenia.")).

[186] Respondents' Post-Hearing Brief at 22-23 (internal quotations omitted) (citing "Transcript at 6:10-15 in Testimony of Timothy Stark on 10/05/18).

[187] *Id.* at 23 (citing "Transcript at 124:15-126:3 in Testimony of Tim Stark on 10/04/2018").

[188] *Id.* (citing *White*, 49 Agric. Dec. 123, 150 (U.S.D.A. 1990)).

[189] Complainant's Reply Brief at 40 (citing *Lang*, 57 Agric. Dec. 91 (U.S.D.A. 1998)). Complainant also avers that the "1990 decision in *Gus White* is inapposite" because 1) the respondent's experience was only one of many mitigating factors, 2) respondents made efforts to comply and had fewer and less grave violations, 3) the Judicial Officer found that violations were due to a lack

exhibition of tigers and do not prohibit direct contact between tigers and the public. At issue here is whether Respondents violated the AWA and Regulations as written and as demonstrated by a preponderance of the evidence on each occasion alleged. If Respondents did violate the AWA and Regulations on any of the occasions alleged, Respondent Stark's experience or self-ascribed expertise is of little significance in light of his obligations as a licensee.

a. Complaint Paragraph 19a (December 1, 2012)

The Complaint, para. 19a, alleges that on or about December 1, 2012 Respondents violated 9 C.F.R. § 2.131(b)(1) by "euthanizing" a juvenile female leopard by "beating her to death with a baseball bat." Complainant requests to incorporate the evidenced described regarding alleged violations of the veterinary care Regulations surrounding the same incident.[190] Complainant contends that the killing of the juvenile leopard with a baseball bat, or similar object, "is clearly not careful handling" and "clearly caused trauma," and that Respondent Starks' "conflicting version and justification of his actions raise an inference that killing the leopard (especially in the manner in which it was accomplished) was utterly unnecessary."[191]

As discussed, *supra*, Respondent Stark contends that he performed a "humane euthanasia" of the leopard which was necessary to quickly end "the patent distress and irremediable physical pain of a dying animal."[192] Respondent Stark presents RX 5, AVMA Guidelines for Euthanasia of Animals 2013 Edition, citing page 36, which he states considers "manually applied blunt force trauma to the head" an acceptable form of

---

of resources rather than "obstinacy," and 4) respondents were still issued a cease and desist order, assessed a civil penalty, and their license was suspended and later revoked in 2014. *Id.* at 40-41.

[190] *See* Complainant's Post-Hearing Brief at 36-42. *See also supra* pp. 26-30.

[191] *Id.* at 77-78.

[192] Respondents' Post-Hearing Brief at 25 (citing "Transcript at 159:14-167:2 in Testimony of Tim Stark on 10/04/18").

euthanasia.[193]

I previously determined *supra*, pp. 29-30, that Respondent Stark's testimony regarding the circumstances leading up to the killing of the leopard with a bat, and his stated reasons for killing the leopard, were not credible. Dr. Miller testified for Complainant[194] that, although the AVMA Guidelines provide that manually applied blunt force trauma to the head can be a proper form of euthanasia, *see* RX 5 at 36, it is not the proper method to accomplish euthanasia in the instant circumstance as use of blunt force trauma to the head is usually more appropriate for "small laboratory animals with thin craniums" and "young piglets." The AVMA Guidelines state, RX 5 at 36, "[e]uthanasia by manually applied blunt force trauma to the head must be evaluated in terms of the anatomic features of the species on which it is to be performed, the skill of those performing it, the number of animals to be euthanized, and the environment in which it is to be conducted" and that personnel performing such method "must be properly trained and monitored for proficiency" but that "the AVMA encourages those using manually applied blunt force trauma to the head as a euthanasia method to actively search for alternate approaches." The information provided by the AVMA regarding the use of blunt force trauma to the head as a method for euthanasia does not align or support Respondent Stark's lay opinion that it was necessary in the situation or that such method was appropriate for a large feline.

I find that record demonstrates by a preponderance of the evidence Respondents failed to handle the leopard as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort and violated 9 C.F.R. § 2.131(b)(1) by using blunt force trauma to the head as the method of "euthanizing" the leopard.

---

[193] *Id.* (internal quotations omitted). Respondents also refer to, *id.*, "scientific studies [that] also support the method when used in urgent conditions" (citing Cors, J.C., Gruber, A.D., Günther, R., Meyer-Kühling, B., Esser, K.H., & Rautenschlein, S. (2015), Electroencephalographic evaluation of the effectiveness of blunt trauma to induce loss of consciousness for on-farm killing of chickens and turkeys, *Poultry Science, 94(2)*, 147-155). The cited study does not appear relevant to the instant case.

[194] Tr. Vol. 2, 389:2-393:10; 556:24-558:2; 436:10-439:8; *see also* CX 43.

b. Complaint Paragraphs 19b-d (January 10, 2014)

Complainant contends that, on or about January 10, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.131(c)(1), by having insufficient barriers or distance between the tigers and general public, and allowing direct contact with loose tigers;[195] 9 C.F.R. § 2.131(b)(1), by failing to handle the juvenile tigers as carefully as possible when they allowed tigers "to be loose among multiple persons of all ages, potentially subjecting the animals to stress, trauma, harm and discomfort" and allowed the crowd of attendees to tap the tigers on the nose to correct behavior;[196] 9 C.F.R. § 2.131(c)(3), by exposing the tigers to "rough and excessive public handling for periods of time that was detrimental to their health and well-being" because the tigers, according to Mr. Charles Grimley, a member of the public, participated in at least three forty-five minutes sessions that day and the tigers were "apparently" not given a rest period or option to participate.[197]

Complainant presents the testimony of Mr. Grimley, who testifies to have attended a thirty to forty-five minutes tiger playtime session at Respondents' facility on January 10, 2014 with his daughter and wife.[198] Mr. Grimley testified that there were about twenty-five attendees during the session; three juvenile tigers which he understood to be about sixteen weeks old and estimated to be about fifty pounds and three and a half feet long; and that Respondent Stark along with two other employees, who stayed outside of the chain-link fenced space or room, were present.[199] Mr. Grimley recalled that he was instructed to "tap" the tigers on the "nose bridge" if the tigers became rough with the audience to distract them, that

---

[195] *See* Complainant's Post-Hearing Brief at 79 (citing *Zoocats, Inc*., 68 Agric. Dec. 737, 745-46 (U.S.D.A. 2009)).

[196] *Id.* at 80 (citing *Zoocats*, 68 Agric. Dec. at 747).

[197] *Id.* (citing Tr. Vol. 2, 290).

[198] Tr. Vol. 2, 288:24-290:2. *See also* CX 17 (correspondence and photos of the tiger playtime session from Mr. Grimley), 17a-f (videos of tiger playtime session).

[199] Tr. Vol. 2, 294-96, 293:22-294:1. Mr. Grimley also testified that there was a sloth, monkey, and a couple of ring-tailed lemurs present, *id.,* and a baby kangaroo that was present without barrier between the kangaroo and tigers, *id*. at 294:15-20.

he was not asked to sanitize his hands prior to the session, despite bottle feeding the tigers, and he did not observe any of the trainers or handlers sanitizing their hands.[200] Mr. Grimley also testified that, during the session, his daughter received a "small puncture wound on her wrist" for which he took her to the doctor to have the wound cleaned and bandaged.[201]

Respondents do not specifically address the allegations for January 10, 2014 but contend generally that "testimony by Respondents' witnesses Melisa Stark, Jessica Amin, and Tim Stark reflected that thorough, conscientious, responsible, and exemplary careful handling was provided for all animals."[202] During his cross-examination of Mr. Grimley, Respondent Stark suggested that Mr. Grimley's daughter may have been pressured by Brigette from Second Chances to file a complaint, but Mr. Grimley said that he did not "believe so."[203]

It is clear from the videos that Respondents failed to provide adequate distance or barriers during the tiger playtime session on or about January 10, 2014. The photos and videos of the event show the juvenile tigers pouncing on one another and the attendees, gnawing on an attendee's (Mr. Grimley's daughter's) hand, and attendees, a large group that had not sanitized their hands prior to interaction, being allowed to pet, hold, grab, or touch three tigers with only Respondent Stark inside the enclosure to supervise.[204] This type of handling is rough and excessive, and does not present "minimal risk of harm to the animals and the public." I reject

---

[200] Tr. Vol. 2, 291:21-292:10, 2944-11. Mr. Grimley also testified that he and his wife have a cat and a dog at home, and his daughter has three cats and a dog. *Id*. at 292:18-19.

[201] Tr. Vol. 2, 297:13-19.

[202] Respondents' Post-Hearing Brief at 24 (citing "Transcripts at 64:4-65:2, 68:19-69:9 in Testimony of Jessica Amin on 10/04/18; RX 68").

[203] *See* Tr. Vol. 2, 309:6-23. Respondent Stark also appears to contend, through his cross-examination of Mr. Grimley, that attendees can expect to get bitten or scratched as when playing with any other kind of house pet and it is not customary to sanitize hands before handling the animals. *Id.* at 314-16.

[204] *See* CX 17b at 0:05-9 (shows tiger chewing on Mr. Grimley's daughter's thumb), at 0:31-35 (tiger jumps on back of attendee).

Respondent Stark's apparent contention that the handling of an exotic animal (i.e. the need for sanitization or the expectation of bites or scratches) is the same as that of a domestic pet.[205] Respondent Stark's indifference or expectation of injury during baby tiger playtime is a direct contradiction of the Regulations, 9 C.F.R. §§ 2.131(c)(1), which require minimal risk to the animals and the public.

I agree with Complainant that the handling of the tigers in this instance, where a large number of attendees with minimal instruction and supervision by experienced handlers were allowed to touch or reprimand tigers that became aggressive, was not "done as expeditiously and carefully as possible in a manner that does not cause trauma . . . behavioral stress . . . or unnecessary discomfort." 9 C.F.R. § 2.131(b)(1). Therefore, I find that the record shows Respondent willfully violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3), on or about January 10, 2014, during a tiger playtime session by failing to handle juvenile tigers in a manner that does not cause trauma behavioral stress, physical harm or unnecessary discomfort; by failing to handle the juvenile tigers with minimal risk of harm to the animals and the public and without any distances or barriers between the animals and the public; and by exposing the juvenile tigers to rough or excessive public handling.

c. Complaint Paragraphs 19e-h (January 14, 2014)

Complainant alleges that on or about January 14, 2014 Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (b)(2)(i), (c)(1), and (c)(3), during a "tiger baby playtime" session. [206] Complainant contends that Respondents willfully violated the Regulations by failing to provide sufficient barriers or distance between the animals and the public, allowing

---

[205] The record shows that Respondent Stark has communicated to members of the public that it is expected for attendees of his tiger playtime sessions to walk away with an injury *See* CX 17d at 0:05-10 (Respondent Stark asks if attendee is bleeding and when she says "yeah" he responds "cool"), CX 17f at 0:34 (shows attendee's bleeding puncture wound, Respondent Stark says "if you leave here and you're not bleeding a little bit you didn't have fun"); *see also* Tr. Vol. 2, 319:11-22.

[206] Complaint ¶¶ 19e-h.

the animals and public, including children, to come into direct contact;[207] by not handling tigers as carefully as possible, allowing the tigers to be "loose among multiple persons of all ages, potentially subjecting the animals to stress, trauma, harm and discomfort" by putting "tigers in a position to be reprimanded by a crowd of customers who had no training or education as to how to handle tigers carefully, or what to do in the event of an injury" and also exhibited a sloth and two lemurs in a way that "would cause them stress and unnecessary discomfort, by placing them adjacent to loose tigers."[208] Complainants also contend that Respondents violated the Regulations by using physical abuse to handle the animals, hitting the tigers and instructing their customers to hit the tigers if they became aggressive;[209] and exposed the tigers to rough or excessive handling by not providing a rest period or option not to participate.[210]

Complainant presents the testimony of Nicole Pollitt and Brigette Brouillard who each testified to having attended Respondents' baby tiger playtime session along with "about 40 some people from toddler to adult age" on or about January 14, 2014.[211] The witnesses explained that they were instructed to "tap" or "slap" the tigers in the face if they became aggressive.[212] Ms. Pollitt testified that she did not sanitize her hands before the interaction and that Respondent Stark was the only employee present inside the enclosure.[213] Both witnesses testified that during the session Respondent Stark brought in a young kangaroo, expressing surprise that

---

[207] *See* Complainant's Post-Hearing Brief at 82 (quoting CX 15 ("I witnessed that Stark would toss the tiger(s) onto the customer to let the customer deal with it/them while they took the picture.")); and citing *Zoocats, Inc.,* 68 Agric. Dec. 737, 745 (U.S.D.A. 2009); *Perry,* 72 Agric. Dec. 635, 656-57 (U.S.D.A. 2013)).

[208] *Id.* at 82 (citing CX 15).

[209] *Id*. at 83 (citing CX 15, 16; *Zoocats*, 68 Agric. Dec. at 746).

[210] *Id.* (citing *Perry*, 72 Agric. Dec. 635, 656 (2013)).

[211] CX 15 at 1; Tr. Vol. 1, 170-71; Tr. Vol. 2, 322. *See also* CX 15, 16.

[212] *See* CX 15 at 1 ("He [Stark]said that if a cub is too aggressive to slap it on the face."); CX 16 at 3 ("A few times, when people complained about the bus being too aggressive, he [Stark] would tell them to smack them."); Tr. Vol. 1, 174:8-10; Tr. Vol. 2, 327:22-24.

[213] Tr. Vol. 2, 325:15-17, 325:25-326:7.

Respondent Stark would bring in an animal possibly considered 'prey' to the tigers in such close proximity.[214] In an affidavit, one of the witnesses noted that there was a sloth in a "too small" cage on the wall with two lemurs and that the "lemurs were pacing in the cage throughout the event; they seemed agitated."[215]

Aside from their general contentions, [216] Respondents do not specifically address the allegations for or provide any specific evidence to rebut these allegations.

The photos of the event, CX 15 and 16, show that the tigers and kangaroo were allowed to be in direct contact with the public without barriers or distance, with the public having the ability to touch and hit/reprimand the animals while the animals could roam around and jump on or even bite attendees with limited supervision by facility personnel.[217] This placed the kangaroo, tigers, and the public at risk of injury or harm and also subjected the animals possible behavioral stress and unnecessary discomfort.[218] The preponderance of evidence shows that Respondents' practice of "tapping" or "slapping" the tigers on the nose to correct

---

[214] *See* Tr. Vol. 1, 176; Tr. Vol. 2, 329. *See also* CX 15 at 1-3, 16 at 25-26 (where both witnesses describe the kangaroo as "nervous" and trying to get away).

[215] CX 15 at 3. *See also* CX 16 at 3 ("I asked Stark if he ever let the sloth out of its cage, which I thought was too small. He responded something to the effect that: no, I cannot handle that bitch.")

[216] Respondents' Post-Hearing Brief at 24 (citing "Transcripts at 64:4-65:2, 68:19-69:9 in Testimony of Jessica Amin on 10/04/18; RX 68"), 25 (citing "Transcript at 119:7-12 in Testimony of Timothy Stark on 10/05/18") (where Respondents contend they provided conscientious, responsible, and exemplary careful handling for all animals; that they handled every animal with minimal risk of harm to the animal and the public; and they made sure to address what periods of time and what conditions were necessary to adhere to in order to be consistent with each animal's good health and well-being).

[217] *See* CX 16 7-9 (tiger chewing on attendee's shoe), 15 (tiger chewing on camera strap). I note that there seems to be some lack of evidence about the ages of the attendees, but at this time this point is not fully relevant. *See* Tr. Vol. 2, 347-50.

[218] *See* CX 15 at 1, 16 at 1 (noting that the room was crowded with spectators); CX 16 at 26 (photo of a tiger drinking a bottle in a crowded area of attendees and next to the kangaroo).

aggressive behavior, and allowing attendees to do the same, amounts to "rough or excessive handling." There is not a preponderance of evidence in the record that demonstrates this practice amounts to the more serious violation of physical abuse. [219] There was no evidence presented as to whether the kangaroo was subjected to reprimand or otherwise handled roughly.

Therefore, I find that on or about January 14, 2014 Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3) during a "tiger baby playtime" session by failing to handle juvenile tigers and a juvenile kangaroo as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort; failing to handle juvenile tigers and a juvenile kangaroo without any distance or barriers between the animals and the public and with minimal risk of harm to the animals and the public; and exposing juvenile tigers to rough or excessive public handling. I find that Complainant's did not prove by a preponderance of the evidence that Respondents used physical abuse to train, work, or otherwise handle animals in violation of the Regulations, 9 C.F.R. § 2.131(b)(2)(i).

Lastly, there is insufficient evidence in the record to find that the sloth was in a cage too small for its size—the record contains no evidence that the witness had a reliable basis or background for stating the cage was too small for the sloth—or that the lemurs were actually "stressed" or even bothered by the proximity of the tigers or the spectators. I find that Complainant did not prove by a preponderance of the evidence that Respondents violated 9 C.F.R. §§ 2.131(b)(1) and (c)(3) during a "tiger baby playtime" session by failing to handle a sloth and two lemurs as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort; or subjecting a juvenile kangaroo to rough or excessive handling.

d. Complaint Paragraphs 19i-k (January 15, 2014)

The Complaint alleges that on or about January 15, 2014, during a

---

[219] *See Palazzo*, 69 Agric. Dec. 105, 107 (U.S.D.A. 2010) (where spraying a tiger with water to encourage it to enter an enclosure was not found to be "the more serious violation of the use of physical abuse").

"tiger baby playtime," Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3).[220] Complainant contends that Respondents willfully violated the Regulations, by exhibiting juvenile tigers without any distance or barriers between the tigers and the public, allowing direct contact between the public and tigers, resulting in an injury to two members of the public, Ms. AnnMarie Maldini and her then-fiancé's brother.[221] Complainant also contends that Respondents did not handle the tigers as carefully as possible and subjected the tigers to excessive public handling by allowing the tigers to "be loose among multiple persons of all ages, potentially subjecting the animals to stress, trauma, harm and discomfort" and allowed a "crowd of customers" to reprimand the tigers who "had no training or education as to how to handle tigers."[222]

Complainant presented the testimony of Ms. Maldini, who explained that she attended a baby tiger playtime session at Respondents' facility on January 15, 2014 with her then-fiancé and his brother.[223] Ms. Maldini testified that she thought there was "probably 20 to 30" attendees present, that the caged room seemed "crowded," and that Respondent Stark was the only employee in the "cage" while two others stood outside.[224] Ms. Maldini testified that she was only told what to do if a tiger "tried to scratch or bite or nip" her "while it was happening":

> then, one got really close to me and scratched me. So then, I yelled, and that made it worse. So Mr. Starks [sic] told me to hit it on the nose. And I was a little bit scared to do that because that's where its mouth is. But finally, once I was, like, standing up, which also wasn't helpful, and screaming, I hit it on the nose, and then I asked him for the gate to be opened so I could leave because I didn't

---

[220] Complaint ¶¶ 19i-k.

[221] Complainant's Post-Hearing Brief at 84-85 (citing *Perry*, 72 Agric. Dec. 635, 655 (U.S.D.A. 2013); CX 20; CX 18 at 8-13 and 27-36; CX 19 at 5-12, 29-30).

[222] *Id.* at 85-86.

[223] Tr. Vol. 1, 237-239. *See also* CX 20.

[224] Tr. Vol. 1, 239:17-240:4, 242:12-16.

want to be in there.[225]

Ms. Maldini explained that none of the employees assisted her with removing the tiger and she "was pretty shaken" because the gate was latched closed and a "worker on the other side" had to open the gate to let her out.[226] Ms. Maldini stated that she "felt unsafe."[227] Ms. Maldini also testified that her now brother-in-law was also either scratched or bitten after she left.[228]

Aside from their general contentions, [229] Respondents do not specifically address the allegations for or provide any specific evidence to rebut these allegations.

The preponderance of evidence shows that Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3), on or about January 15, 2014 during a baby tiger playtime session by allowing a large group of participants to have direct contact with juvenile tigers, without any distance or barriers between the animals and public, resulting in injuries to two members of the public; and by hitting the tigers, and allowing the attendees to reprimand/hit the tigers, when the tigers acted aggressively.

e. Complaint Paragraphs 19l-n (January 17, 2014)

The Complaint alleges that on or about January 17, 2014, Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3) during a "tiger baby playtime" by failing "to handle three juvenile tigers as carefully as possible in a manner that does not cause trauma, behavioral

---

[225] Tr. Vol. 1, 241:14-242:11. Ms. Maldini described the three tigers as 15 weeks old, about "the size of a big dog, like a German Shepard," and "70-pouds-ish." *Id.* at 243:9-14, 243:18-20, 244:6-9. *See also* CX 18 at 8-13, 27-36 (photos of Ms. Maldini's injuries and the tiger playtime session).

[226] Tr. Vol. 1, 245:23-246:10.

[227] Tr. Vol. 1, 247:20-21.

[228] Tr. Vol. 1, 246:16-25. *See also* CX 18 at 33 (photo of scratch on attendee's hip).

[229] Respondents' Post-Hearing Brief at 24 and *supra* note 216.

stress, physical harm, or unnecessary discomfort[;]" failing to handle "juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public . . . without any distance or barriers between the animals and the public[;]" and exposing "juvenile tigers to rough or excessive public handling."[230]

Complainant states that ACI Houser and Dr. Arango attempted to conduct a "focused inspection" on January 17, 2014 during a tiger exhibition and, although they were not "allow[ed]" to view the exhibition, ACI Houser and Dr. Arango were able to see the tigers and the areas where the exhibition was conducted.[231] Complainant states that Respondents explained to inspectors that the sessions usually last "30 minutes (with a 30 minute break) throughout the day," that Respondents told inspectors they have followed this routine every day since the tigers were seven weeks old, and that Respondent Stark stated that he tells the public they may get scratched or nipped by the cubs but that "he did not consider anything to be an injury and harmful to the public" and "a little blood is nothing."[232] Complainant contends that, as determined by the APHIS inspectors, the tigers used for tiger playtime sessions are "too large, too strong and aggressive to have direct contact with the public with minimal risk of harm."[233] Complainant contends that the inspection "as well as respondents' own descriptions of their tiger exhibitions" confirms the alleged violations.

Aside from their general contentions, [234] Respondents do not specifically address the allegations for or provide any specific evidence to rebut these allegations.

While I find this evidence and Respondents own admissions of their manner of conducting tiger exhibitions probative to prior alleged

---

[230] Complaint ¶¶ 19l-n.

[231] Complainant's Post-Hearing Brief at 86-87 (citing CX 12, 18, 19; Tr. Vol. 3, 624-25).

[232] *Id.* at 87 (quoting CX 12 at 11-12 (internal quotations omitted); citing CX 18, 19).

[233] *Id.* at 88 (quoting CX 18).

[234] Respondents' Post-Hearing Brief at 24 and *supra* note 216.

violations, I do not find the record sufficient to show that Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (c)(3), on or about January 17, 2014. Although Complainant provides Respondents' statements regarding how a baby tiger playtime is "usually" conducted, Complainant does not provide evidence or witness testimony of specific violations occurring on January 17, 2014 during a specified event.

f. Complaint Paragraphs 19o-t (August 19, 2014)

The Complaint alleges that on or about August 19, 2014, Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (b)(2)(i), (c)(1), (c)(3), and (d)(1) during exhibition by failing "to handle two juvenile tigers, a coatimundi, three nonhuman primates, a kangaroo, and a lemur as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort[;]" using "physical abuse to handle two juvenile tigers, and five nonhuman primates (two lemurs, a macaque, a capuchin, and a vervet)[;]" failing to handle juvenile tigers, five nonhuman primates (two lemurs, a macaque, a capuchin, and a vervet), a kangaroo, and a coatimundi "during exhibition, with minimal risk of harm to the animals and the public . . . without any distance or barriers between the animals and the public[;]" exposing "juvenile tigers to rough or excessive public handling[;]" and exhibiting "two juvenile tigers, a coatimundi, two nonhuman primates, a kangaroo, and a lemur for periods of time and under conditions that were inconsistent with the tigers' good health and well-being."[235]

Complainant contends that, despite inspector directions in the January 17, 2014 Inspection Report to "not allow members of the public to work, handle or discipline the animals by using physical reprimand to keep the animals from getting too aggressive" and to "have sufficient knowledgeable, responsible and readily identifiable staff in attendance," Respondents continued to allow direct contact with the animals and were told to physically reprimand such animals with little supervision by experienced employees.[236] As support for these allegations, Complainant

---

[235] Complaint ¶¶ 19o-t.

[236] *See* Complainant's Post Hearing Brief at 89-91 (citing CX 18, 19 at 3 (regarding previous instructions and warnings); CX 23-27, 53 (documenting the August 2014 visit by inspectors)).

presents the testimony of Dr. Kerry McHenry and ACI Randy Coleman who purchased tickets to and attended a Tiger Playtime event and an Exotic Animal Encounter on August 19, 2014. Dr. McHenry testified that during the tiger playtime there was "[a] lot of people in a very small space. Rambunctious, aggressive tigers running loose. People getting clawed and bitten. Tigers being poked and prodded."[237] Dr. McHenry observed that the tigers were "aggressive, rambunctious," "intimately close" to the event attendees, and "were being interacted with unrelentingly by the people."[238] Dr. McHenry recalled that a young boy was bitten on the head, a woman was bitten on her face, and another man was bitten on the leg.[239] Dr. McHenry also noted that the tigers "would have experienced increased stress" as they were in an unnatural situation, that the tigers seemed "overwhelmed and overstimulated."[240]

ACI Coleman testified that when the tiger playtime session started, Respondent Stark introduced himself, and that Respondent Stark "deputized" the attendees as a loophole to the directions given by the USDA inspector.[241] ACI Coleman testified that Respondent Stark brought in a fourteen-week old tiger and started to bounce it on his knee, that the cub began to growl and hiss, and that Respondent Stark said he would show the crowd what a "pissed off tiger" looked like.[242] ACI Coleman stated that the tiger playtime lasted about forty-five minutes, there were about twenty-five members of the public present, and during that time one of the tiger cubs bit or scratched him on the back and that a young boy,

---

[237] Tr. Vol. 3, 903:19-22.

[238] Tr. Vol. 3, 905-06.

[239] Tr. Vol. 3, 906:12-19.

[240] Tr. Vol. 3, 907-08.

[241] Specifically, ACI Coleman testified that Respondent Stark "said, 'All I can tell you is protect yourself.' And he said that, 'What you're going to see, the USDA -- my USDA inspector does not like.' He mentioned that he was not allowed to tell us how to train animals, but he had figured out a way around that. And then, he said, 'So I officially deputize you-all as tiger trainers.' He said, 'So that's the way I get around – that's the loophole that I found.' That wording is the wording he used. And at that time he placed two middle fingers in the air and said, 'That's what I think about the government.'" Tr. Vol. 4, 1141:13-24.

[242] Tr. Vol. 4, 1142:18-1143:10. *See also* CX 23, 24, 25.

about ten years old, was bitten on the thigh.[243] ACI Coleman testified that he estimated the two tigers were about thirty to thirty-five pounds, "they were definitely too big, too strong to be in direct contact with the public like they were without any barriers or distance between them and the -- and the public."[244] ACI Coleman also testified that he and Dr. McHenry attended an exotic animal encounter during which Respondent Stark introduced several animals, including a juvenile coatimundi, rhesus macaque, a grivet monkey, a capuchin, a kangaroo, and a ring-tailed lemur, and allowed most of the animals to come into direct contact with the public. ACI Coleman stated that there was a danger to the public in the possibility of being bitten or scratched and a danger to the animals that, if they did bite a human, they may have to be euthanized to be tested for rabies.[245]

In addition to their general contentions, [246] Respondents seem to contend that APHIS inspectors failed to follow protocol as outlined in the 2013 USDA Animal Care inspection Guide (APHIS Training Manual), RX 4, by not announcing their presence to Respondent Stark and proceeding to include the details of their observations from the August 19, 2014 attendance to the tiger playtime and exotic animal encounter in the August 20, 2014 Inspection Report.[247] Respondents do not otherwise provide any specific evidence to rebut the evidence offered by Complainant regarding the August 19, 2014 allegations.

Complainant contends that the AWA "gives the Secretary of Agriculture broad enforcement authority, and directs the Secretary to conduct such inspections and investigations as are necessary to determine

---

[243] Tr. Vol. 4, 1144:2-11.

[244] Tr. Vol. 4, 1145:13-19. ACI Coleman also testified that the attendees would hit the tigers in self-defense if the tigers nipped at them and that no employee stepped in to make sure injuries were not significant. *Id.* at 1147-48.

[245] Tr. Vol. 4, 1149:8-1151:13. *See also* CX 26.

[246] Respondents' Post-Hearing Brief at 24 and *supra* note 216.

[247] *See* Tr. Vol. 4, 1197:8-1198:9. ACI Coleman testifies, in answer to Respondent Stark's cross-examination, that he "did not conduct an inspection" on August 19, 2014 and thus did not need to announce his presence to the licensee, Respondent Stark. *See* Tr. Vol. 4, 1195.

whether persons regulated under the Act are in compliance or not," that "it is well settled that warrantless inspections of businesses regulated under the AWA are reasonable because the scope of the AWA's regulation of the animal industry is pervasive," and that the "AWA itself puts regulated businesses on notice that they will be subject to periodic inspections and investigations as are necessary to determine whether violations have occurred or are occurring."[248] Complainant contends that it is standard practice for inspectors to pay as a member of the public and attend animal exhibitions for AWA regulated entities without announcing their presence to the licensee.[249]

The AWA and the Regulations promulgated thereunder do not restrict APHIS inspectors from attending animal exhibitions open to the public as paying customers and do not restrict APHIS inspectors for reporting their observations for use in inspection reports. In fact, as Complainant points out, the AWA, 7 U.S.C. § 2146(a), gives wide discretion to the Secretary to conduct inspections and investigations as needed to accomplish the purpose of the AWA. Further, as Complainant points out in the Post-Hearing Brief at 20, guidelines do "not add to, delete from, or change current regulatory requirements or standards, nor does it establish policy."[250] Therefore, I find the evidence submitted regarding Dr. McHenry and ACI Coleman's observations during their attendance to the tiger playtime and exotic animal encounter events on August 19, 2014 to be relevant and properly submitted as a part of the August 20, 2014 Inspection Report submitted by ACI Houser.

The record fully supports and I, thus, find that on or about August 19, 2014, during exhibition Respondents violated the following Regulations: 9 C.F.R. § 2.131(b)(1) by failing to handle two juvenile tigers, nonhuman

---

[248] Complainant's Post-Hearing Brief at 14-15 (citing 7 U.S.C. § 2146(a); *Lesser v. Espy*, 34 F.3d 1301, 1306, 1308-09 (7th Cir. 1994)).

[249] *Id*. at 16-17 (citing *The Int'l Siberian Tiger Found., Inc*., 61 Agric. Dec. 53 (U.S.D.A. 2002); *Greenly*, 72 Agric. Dec. 603, 609 (U.S.D.A. 2013); *Palazzo*, 69 Agric. Dec 173 (2010)). Complainant also noted that "attending and observing an animal exhibition is not, per se, a routine compliance inspection, although it may occur in conjunction with one and be memorialized on APHIS's standard inspection report form." *Id.* (citing Tr. Vol. 4, 1177:20-1178:19).

[250] Quoting *Schmidt*, 66 Agric. Dec. 159, 214 (U.S.D.A. 2007).

primates and a lemur as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort;[251] 9 C.F.R. § 2.131(c)(1) by failing to handle juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, without any distance or barriers between the animals and the public, and also failed to handle nonhuman primates, a kangaroo, and a coatimundi during exhibition, with minimal risk of harm to the animals and the public, without any distance or barriers between the animals and the public;[252] and 9 C.F.R. § 2.131(c)(3) by exposing juvenile tigers to rough or excessive public handling.[253]

I find that Complainant failed to show by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. §§

---

[251] CX 53 (video clip of Respondent Stark sitting on a chair and riling up a juvenile tiger, roughly holding and wiggling the tiger by the scruff of the neck), (video clip of Respondent Stark holding a small nonhuman primate by the legs and tail, saying "come on brat"), (video clip of Respondent stark dangling a lemur from a leash, then allowing it to jump from him to the attendee's laps); CX 25, 26.

[252] CX 53 (video clip of Respondent Stark sitting on a chair and riling up a juvenile tiger, roughly holding and wiggling the tiger by the scruff of the neck, then throwing the growling, upset tiger onto a member of the public's lap), (video clip of small nonhuman primate running across attendee's laps and stopping to be face to face with a man), (video clip of Respondent stark dangling a lemur from a leash, then allowing it to jump from him to the attendees' laps), (video of coatimundi running across the attendees' laps and eating out of the attendees' hands unleashed); CX 23 at 21 (photo of red kangaroo allowed to roam free with children present and allowed to pet the kangaroo); CX 24 (videos of the public, including young children, interacting with the tigers: feeding tigers, tigers jumping on attendees, tigers biting attendees, including young children, and nipping at their clothes, attendees letting tigers chew on their hands, attendees and hitting the tigers on the face in reprimand when nipped or scratched); CX 25, 26.

[253] CX 53 (video clip of Respondent Stark sitting on a chair and riling up a juvenile tiger, roughly holding and wiggling the tiger by the scruff of the neck, then throwing the growling, upset tiger onto a member of the public's lap); CX 24 (videos of the public, including young children, interacting with the tigers: feeding tigers, tigers jumping on attendees, tigers biting attendees, including young children, and nipping at their clothes, attendees letting tigers chew on their hands, attendees and hitting the tigers on the face in reprimand when nipped or scratched); CX 25, 26.

2.131(b)(2)(i) and (d)(1), by using physical abuse to work animals or that the periods of time and conditions of exhibition were not consistent with animals' health and well-being during exhibition on or about August 19, 2014. While the evidence shows that Respondents subjected the animals to rough or excessive handling, there is not enough evidence to show that animals were subjected to the more severe violation of abuse.

g. Complaint Paragraphs 19u-aa (September 13, 2015)

The Complaint alleges that on or about September 13, 2015, Respondents violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (b)(2)(i), (c)(1), (c)(3), and (d)(1) during exhibition by failing "to handle four juvenile tigers and one juvenile capuchin monkey as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort[;]" using "physical abuse to handle juvenile tigers[;]" failing to handle juvenile tigers and one juvenile capuchin "during exhibition, with minimal risk of harm to the animals and the public . . . without any distance or barriers between the animals and the public[;]" exhibiting four juvenile tigers to "playtime" and photo session without an adequate rest period and exposing multiple young or immature animals to "rough or excessive public handling[;]" and exhibiting "four juvenile tigers and a juvenile capuchin monkey for periods of time and under conditions that were inconsistent with the animals' good health and well-being."[254]

Complainant presents the testimony of Dr. Cynthia DiGesualdo who paid and attended Respondents' animal exhibition on September 13, 2015 with APHIS Investigator Charles Willey. Dr. DiGesualdo testified that, during the tiger playtime, there were about forty to fifty members of the public present, including a "tiny" baby, toddler, and children under ten years old. [255] She also observed, *id.*, that of the seven attendants present all appeared to be teenagers or in their early twenties, but Respondent Stark was not present. She testified that a little girl of about eight or nine years old as well as a woman were bitten by tigers during the playtime; that the tigers, according to the schedule online, were exhibited throughout eleven

[254] Complaint ¶¶ 19u-aa.

[255] Tr. Vol. 4, 1030:21-1032:5. *See also* CX 33 at 1; CX 31 (video "man with baby in arms, small children," video "showing number of people in room")

tiger playtime sessions with only one hour scheduled for break; that one of the handlers would roughhouse the tigers to get them to become more active but when the attendees would do the same the tigers would get "smack[ed]" on the nose with a whip as reprimand; and that the tigers seemed exhausted by the end of the session as they were dragged around by their feet.[256] Dr. DiGesualdo also expressed her concerns regarding a capuchin that was allowed to sit on the shoulders of the attendees, including the children, because of the risk of bites and the stress it appeared to cause the capuchin.[257]

In support of the allegations, Complainant introduced the testimony of expert witness Dr. Laurie Gage who reviewed the videos and commented that the baby in the room was "shocking" and said that having a baby with sixteen- to fourteen-week-old tigers is "just not responsible" where members of the public expect to be safe during an exhibition.[258] Dr. Gage also testified that she has never seen a "tiger so comatose that you would just be able to drag it across the room without it having any response

---

[256] Tr. Vol. 4, 1032:16-1033:14, 1037:2-14, 1035:7-1036:13, 1042:10-25, 1043:5-13. *See also* CX 31 (video "girl says ow," video "cub being pulled across the room," video "cub being pulled by feet," video "cub comatose and yawning," video "dragging sleeping white tiger out," video "dragging sleeping yellow tiger out," video "hard swat with a crop," video "tiger bites man's hip," video "tiger being drug," video "tiger cub not moving," video "tiger swatted with crop," video "tigers slapped with crops," video "tired cup, baby on ground," video "trying to bite and swats," video "very exhausted tiger," video "white cub being pulled," video "white cub crashed and burned"); CX 33 at 1-2. Dr. DiGesualdo also testified that, in her opinion, the exhibitions were not positive for the welfare of the tigers because "they're pulled way from their mother; they're being over worked; they're stressed; they're tired; they're exhausted. I just -- as a veterinarian, this is not how I would recommend somebody raise a tiger cub." Tr. Vol. 4, 1037:25-1038:5. Dr. DiGesualdo also stated that she was unsure whether the tigers were switched out during the day or if the same tigers were exhibited. Tr. Vol. 4, 1045:2-7.

[257] Tr. Vol. 4 1033:15-1034:6, 1059:12-18; CX 32 (video "Capuchin on child's shoulder," video "monkey and scared kid's head"); CX 33 at 2 (saying that the monkey seemed to become agitated but that the handler continued placing it on children for photos).

[258] *See* Complainant's Post-Hearing Brief at 92-3 (citing Tr. Vol. 8, 2106:19-2107:13, 2160:22-2162:5).

whatsoever."[259]

In addition to their general contentions,[260] Respondents contend that APHIS inspectors failed to follow protocol as outlined in the 2013 USDA Animal Care inspection Guide, RX 4, by not announcing their presence to Respondent Stark and contend that the "under cover" inspection on September 13, 2015 and recorded in the September 14, 2015 Inspection Report, CX 30, was "illegal."[261] Respondents also contend that the "purported 'dragging' of the tiger cubs" was "justifiable" and not abuse, and that the "personal opinion by any Complainant witness that the witness simply *felt* that 'dragging' an animal must be abuse, or that 'slapping an animal or using a riding crop would cause an animal distress', lacks foundation as objective scientific evidence of actual distress to a specific animal and is thus irrelevant to any determination to be made in this adjudication on the improper handling of such animals."[262]

As set out in the immediately previous section of this Decision, I find the evidence submitted by Complainant regarding Dr. DiGesualdo and investigator Wiley's observations during their attendance to the tiger playtime event on September 13, 2014 relevant and properly submitted and entered into the record as a part of the September 14, 2014 Inspection Report submitted by Dr. DiGesualdo.

Therefore, I find that Respondents willfully violated the Regulations, 9 C.F.R. §§ 2.131(b)(1), (c)(3), and (d)(1), by failing to handle four juvenile tigers and one juvenile capuchin monkey as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort; by exhibiting four juvenile tigers to "playtime"

---

[259] Tr. Vol. 8, 2103:25-2104:3.

[260] Respondents' Post-Hearing Brief at 24 and *supra* note 216.

[261] *See* Tr. Vol. 7, 1916:16-1917:20, 1957:23-1958:17, 1959:5-1960:2, 1961:13-14.

[262] Respondents' Post-Hearing Brief at 24 (citing "Transcript at 82:12-83:1 in Testimony of Jessica Amin on 10/04/18"; RX 58 (video explaining why handlers use "dragging" to maneuver tigers around and stating that this helps avoid "unnecessary" or incorrect picking up)). *See also* RX 68 (photos of riding crop); Tr. Vol. 7, 1849:19-25, 1851:22-1853:8.

and photo session without an adequate rest period and exposing multiple young or immature animals to rough or excessive public handling; and by exhibiting four juvenile tigers for periods of time and under conditions that were inconsistent with the animals' good health and well-being. It is clear from the evidence provided that the tigers were not handled as carefully as possible and were exposed to excessive public handling as the videos, CX 31-32, show the tigers being roused by roughhousing with both handlers and the attendees, then reprimanded with slaps from the handlers using riding crops, and hits from the attendees. Although it is unclear whether the same four juvenile tigers were exhibited during every session all day long, the evidence provided, CX 31-32 video clips, also show that the tigers were over exerted and, despite their exhaustion, were left to be touched by the public in a noisy and full room.

Thus the record fully supports and I find that Respondents willfully violated the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle juvenile tigers and one juvenile capuchin during exhibition, with minimal risk of harm to the animals and the public, without any distance or barriers between the animals and the public. Of grave concern is the allowance of the infant in the room with loose juvenile tigers nearly twice its size and even allowed on the floor amongst the loose tigers. Also concerning is the allowance of the participation of small children who are encouraged to touch, lay down with, and taunt the tigers. I agree with Complainant witness Dr. Gage, whose background as a large felid expert is exemplary[263] and whose testimony I find highly credible, that such allowance by the Respondents is simply not responsible. In fact, Respondent Stark seems to be aware that participants should not be so young and pointed out himself that participants must be sixteen years old according to Respondents' policy for participation, a requirement that was clearly not adhered to during this playtime session.[264]

I find that the Complainant did not demonstrate by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. § 2.131(b)(2)(i) on or about September 13, 2015 by using physical abuse to work or otherwise handle animals. While I note that the videos showing

[263] Tr. Vol. 8, 2083-90.

[264] *See* Tr. Vol. 2, 345:24-346:16 (referencing CX 15 at 9, an email from Wildlife in Need, Inc. stating that "[p]articipants must be at least 16 years old").

the handlers dragging sleeping tigers into, out of, and across the room, CX 31-32, is somewhat disturbing, based on Respondents' video explaining this method of maneuver, RX 58, it appears that the tigers are trained to be maneuvered this way without resistance. While I agree with Complainant that there is no requirement to introduce "objective scientific evidence of actual distress,"[265] Complainant has the burden of proof to show that dragging the tigers was improper handling and amounted to "abuse" as termed in the Regulations. The testimony from Complainant's expert witness Dr. Gage was not fully supportive of this allegation; although she stated that the dragging seemed to be because the tigers were exhausted, she did not indicate it was abusive.[266]

Respondents' witness testified that Respondents were already notified that the use of riding crops was "unacceptable in any fashion" by Dr. Kirsten and ACI Houser and that Respondents have "ceased the use of riding crops."[267] Nonetheless, although Complainant's expert witness Dr. Gage testified that the tapping with riding crops served as a negative reinforcement, deterring the tigers from doing what was natural and was possibly confusing for them, she did not indicate that the use of riding crops was abusive.[268] I agree that the use of riding crops amounts to rough or excessive handling, but the record is not sufficient to show that the use of riding crops during this session amounts to the more serious violation of physical abuse within the meaning of the Regulations.

IX. Failure to Meet Standards

Complainant alleges that Respondents willfully violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards (9 C.F.R. pt. 3) on multiple occasions as observed by APHIS inspectors, including failing to meet Standards for adequate housing of animals, proper diet,

---

[265] *See* Complainant's Reply Brief at 41 (citing Respondent's Post-Hearing Brief at 24).

[266] Tr. Vol. 8, 2102-04.

[267] Tr. Vol. 7, 1852:25-1853:8. However, this testimony is unclear regarding the timing, for instance, it is unclear if the use of riding crops "ceased" previously and was resumed or if it ceased after this session in 2015.

[268] Tr. Vol. 8 at 2101.

adequate protection of food supply, appropriate exercise plans, appropriate environmental enhancement in accordance with currently-accepted professional standards, potable water supply, and provision of a sufficient number of adequately trained employees. [269]

In their Post-Hearing Brief, Respondents do not specifically address each allegation in the Complaint, but in summary generally contend that:

> The record as a whole demonstrates that Respondents substantially complied with all regulations regarding the size and environmental specifications of facilities where animals are housed or kept; complied with the need for adequate barriers, the feeding and watering of animals, sanitation requirements, and the size of enclosures and manner used to transport animals. [270]

and that "Respondent Tim Stark has had a perfect record for over 13 years as a licensee."[271]

In response, Complainant avers that the "record here establishes respondents' noncompliance, and the fact that Mr. Stark previously passed inspections is irrelevant to whether the alleged violations occurred in this case."[272]

At issue here is each allegation and whether Complainant has met its burden of proof as to each allegation. If Complainant has moved forward to establish a *prima facie* violation by a preponderance of the evidence, in

---

[269] Complaint ¶¶ 20-27.

I note that Complainant and Complainant's witnesses used the term "performance standard" throughout testimony and reports. Any reference to or use of the words "performance standards" or "standards" are not to be confused with the regulation Standards (9 C.F.R. pt. 3) referred to hereinafter capitalized.

[270] Respondents' Post-Hearing Brief at 28.

[271] *Id.* (citing "Transcript at 127:11-13 in Testimony of Tim Stark on 10/04/18"; RX 59, 60, 61).

[272] Complainant's Reply Brief at 48 (citing *Lang,* 7 Agric. Dec. 91 (U.S.D.A. 1998)).

order to prevail, Respondents must specifically rebut the evidence provided to establish the violation so that the preponderance of evidence in the record is that there is no violation.[273] As further explained below, in most instances Respondents' general claims of compliance are not enough to rebut evidence provided by Complainant establishing violations on the record.

a. Complaint Paragraph 20 (February 29, 2012)

The Complaint alleges that on or about February 29, 2012, Respondents failed to meet the minimum Standards with respect to structural strength and containment.[274] Specifically, Complainant asserts that Respondents housed six tigers and one lion in enclosures that were not constructed of such material and strength as appropriate and in a manner that would contain the animals.[275] Complainant provides the February 29, 2012 Inspection Report, CX 4 and 4a, in which former ACI Elizabeth Taylor observed:

> There are currently 3 large felid enclosure [sic] containing 6 tigers & lion that are all 12' in height. None of the enclosures have hot wire around the top, and [[276]] do not have any type of platform close enough to the fence to use as a jumping off point. These enclosures need to be modified to prevent possible escape. A potential escape would invariably provide a risk to the well-being or the life of the animal, and, additionally, a risk to the safety of

---

[273] *See Terranova*, *supra* n. 8, 2019 WL 4580195, at *15 (explaining that, while the complainant has the burden of proof and must come forward with evidence sufficient for a *prima facie* case, once complainant has met this burden, the burden shifts to respondent to rebut complainant's *prima facie* showing)

[274] *See* Complaint at 15 ¶ 20.

[275] *See* Complainant's Post-Hearing Brief at 104 (citing Complaint ¶ 20; CX 4 and 4a).

[276] It appears to the undersigned that the more appropriate word here would be "but," rather than "and," as "not have any type of platform close enough to the fence to use as a jumping off point" would make the enclosure more secure, not less secure.

> the public.

Photographs taken by ACI Taylor at the time of inspection corroborate her findings.[277]

Aside from their general contentions,[278] Respondents do not address the allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

That Complainant did not present "evidence of any animal escaping confinement"[279] is immaterial; actual escape is not a requisite element to establish a violation of 9 C.F.R. § 3.125(a).[280] Section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) requires that facilities:

> must be constructed of such material and strength as appropriate for the animals involved. The indoor and

---

[277] *See* CX 4a at 6-7 (photos of enclosures).

[278] Respondents' Post-Hearing Brief at 18 (citing "Transcript at 242:10-243:22 in Testimony of Tim Stark on 10/04018") (stating "there was no preponderance of reliable evidence at all that Respondents maintained animals in enclosures that were not constructed of such material and strength as appropriate for those species, or in a manner that would somehow not contain those animals" and that there is "no objective evidence of any animal ever escaping confinement," contending that such evidence "would be required to meet that specific standard."). *See also* Respondents' Proposed Findings & Conclusions at 5, ¶ 15.

[279] Respondents' Post-Hearing Brief at 18.

[280] *See Terranova Enters., Inc.*, 78 Agric. Dec. 248, 301-02, 328-29 (U.S.D.A. 2019) (holding that the ALJ erred by rejecting violations on the basis that no "animals were actually sick, injured, or suffering . . . because of the non-compliance") ("In so doing, the ALJ completely missed the point of the Regulations and Standards: prevention. The purpose of requiring those who have custody of animals subject to the Act to maintain their facilities in a manner that meets the *minimum* Standards is to ensure against the potential harm to animals from substandard conditions and treatment.") (citing *Hodgins v. U.S. Dep't of Agric.*, No. 97-3899, 238 F.3d 421 (Table), 2000 WL 1785733, at *3 (6th Cir. Nov. 20, 2000); *Zimmerman v. U.S. Dep't of Agric.*, No. 98-3100, 173 F.3d 422 (Table), 57 Agric. Dec. 869, 873 (3d Cir. Dec. 21, 1998); *Mitchell*, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001)).

> outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

ACI Taylor observed that the enclosure fence was twelve feet high and did not have a "hot wire" at the top; she therefore concluded that the fence was insufficient to contain the animals.[281] Ms. Taylor testified that she had a lengthy discussion with Respondent Stark about the inadequacies of the enclosures as documented in her report and her inspection findings were based on "some guidance that they [enclosures] were going to need to be taller and either have kick-ins or something else added." But ACI Taylor did not describe the justification, context, or source of such "guidance" and Complainant did not otherwise provide such information. It may be that Complainant intends to contend that USDA or APHIS has established an interpretation of 9 C.F.R. § 3.125(a) that would require a hot wire, specific height of fence, or kick-ins that Respondent would be required to comply with and which I would be required to enforce, but Complainant has failed to expressly make that contention or bring forward support that such an interpretation has officially been made by the agency, much less that such interpretation would be binding on Respondents or me.

ACI Taylor, in fact, testified that "there wasn't any definitive, 'This is what you have to have to have a tiger.'" and "there wasn't exact regulations per se for exact enclosures. They just needed to contain the animal."[282] ACI Taylor did not provide further explanation regarding the necessity, in her opinion, of a "hot wire" to contain the animals. Further, the undersigned cannot identify any other of Complainant's allegations where 9 C.F.R. § 3.125(a) is alleged to have been violated solely based on the absence of a "hot wire." Therefore, I find that, as to this allegation, Complainants failed to show by a preponderance of the evidence that Respondents' tiger enclosures were insufficient to contain the animals and violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a).

b. Complaint Paragraphs 21a-d (June 25, 2013)

---

[281] CX 4 and CX 4a.

[282] Tr. Vol. 6, 1608:14-18, 1609:17-25.

The Complaint alleges that on or about June 25, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet multiple Standards.[283]

1. Written plan for environmental enhancement

Complainant asserts that Respondents failed to have a written plan for environmental enrichment of Respondents' primates available for APHIS inspectors.[284] Complainant's evidence comprises the June 25, 2013 inspection report of ACI Juan Arango,[285] as well as Dr. Arango's testimony.[286] In his inspection report, Dr. Arango noted:

> Although a large number [of] items were present in the nonhuman primate cages including various children's toys, a swing, and numerous empty plastic bottles, there is *no documentation of an environmental and psychological enrichment plan* to promote the well-being of non-human primates (NHP Enrichment Plan). Lack of adequate enrichment can lead to high levels of stress in nonhuman primates affecting both their health and well-being. Nonhuman Primate Enrichment plans must be in accordance with professionally accepted standards and directed by the attending veterinarian. Written documentation of this enrichment plan is necessary to ensure that all primates are receiving enrichment as directed and in accordance with these standards and that animal health and welfare is not put at risk through the use of inappropriate or unsafe attempted enrichment.

---

[283] *See generally* Complaint at 16 ¶ 21.

[284] *See* Complaint at 16 ¶ 20a ("Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement to promote the psychological well-being of nonhuman primates, in accordance with the currently-accepted professional standards, and made available to APHIS upon request."). *See also* Complainant's Post-Hearing Brief at 117-118.

[285] CX 6.

[286] Tr. Vol. 2, 403-05.

CX 6 at 5 (emphasis added). He described the non-compliance in further detail at hearing:

> Mr. Stark had a number of primates on his facility . . . at the time of inspection, and including a capuchin monkey, lemurs, a baboon. Given -- all of those are required to have . . . an environmental enhancement plan to promote psychological well-being.
>
> Those species -- the primates are a -- a fairly high order complex animal species. They require a significant amount of mental stimulation and . . . environmental enrichment in order to prevent problems developing. And so it is included in the Animal Welfare Act that such exhibitors, as well as dealers in research facilities, have to . . . develop and document a written plan of appropriate environmental enrichment that promotes that psychological well-being.
>
> The plan has to be made in accordance with currently accepted professional standards . . . And it has to be directed by the attending veterinarian, as well as made available to APHIS officials. In this case, Mr. Stark had a large number of things in the primates' enclosures, including toys and plastic bottles and -- and several other things.

But he had no written plan.

Transcript at 403-04 (emphasis added).

Respondents do not specifically address these allegations but contend generally that they "developed, documented, and followed readily appropriate plans for environmental enhancement to promote the psychological well-being of nonhuman primates in accordance with currently-accepted professional standards and the record reflects that an

enriched environment was provided."[287] Respondents also aver, *id*., that "the environmental conditions present at Respondents' facility indeed exceeded the criteria suggested in modern scientific studies." [288] Respondents contend that the "evidence therefore readily establishes that Respondents had in place an adequate plan for environmental enhancement."[289]

The Standards, 9 C.F.R. § 3.81, require, in pertinent part, that:

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

9 C.F.R. § 3.81 (emphasis added).

Despite Respondents' claims that they "developed, documented, and followed" an enrichment plan, Respondents have not produced evidence of any such documented plans. Whether Respondents "provided" an "enriched environment" is not at issue.[290] As Dr. Arango testified: "that written plan is important again because it ensures that the attending

---

[287] Respondents' Post-Hearing Brief at 26 (citing "Transcript at 28:6-21 in Testimony of Christina Day on 10/04/18"). *See also* Respondents' Proposed Findings & Conclusions at 4-5, ¶ 14.

[288] Citing Bloomsmith, M.A., Brent, I., Y., & Schapiro, S.F. (1991). Guidelines for developing and managing and environmental enrichment program for nonhuman primates. *Laboratory Animal Science*, 41(4), 372-77.

[289] *Id.* (citing *Tri-State Zoological Park of W. Maryland Inc*., 71 Agric. Dec. 915, 963 (U.S.D.A. 2012).

[290] Respondents' Post-Hearing Brief at 26; Respondents' Proposed Findings & Conclusions at 5 ¶ 14.

veterinarians have something to actually review, but also because enrichment items, if done improperly, can also . . . prevent danger to those animals."[291]

The standard is specific in requiring a documental plan that must be provided to APHIS on request,[292] and the evidence of record shows that Respondents did not have one in existence.[293] Respondents have failed to rebut this showing. Accordingly, I find that the Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.81.

2. Tiger Enclosures

Complainant contends that Respondents housed seven tigers and one lion "in enclosures that were not constructed of such material strength as appropriate for those species, and in a manner that would contain those animals."[294] Dr. Arango explained the noncompliance in his inspection report, as follows:

> At the time of inspection for large felid enclosures (containing a total of 7 Tigers and 1 Lion) were constructed with fencing that was less than 12 feet high. Each of these enclosures is constructed of heavy gauge wire that measured 11 feet 3 inches tall. . . .
>
> None of these pens had any angled top fencing (kick-in) or any species appropriate high tensile smooth electrical wire to provide additional deterrents for escape. These enclosures are similar in height to those where tigers or

[291] Tr. Vol. 2, 404:13-17. I also note that it has been previously established that Respondents did not have an attending veterinarian on June 25, 2013, *see supra* discussion regarding Complaint para. 17.

[292] *See* 9 C.F.R. § 3.81.

[293] *See* Tr. Vol. 2, 404, 405 ("And again, in this particular case, Mr. Stark had no written plan.").

[294] Complainant's Post-Hearing Brief at 104 (citing Complaint at 16 ¶ 21b; C.F.R. § 3.125(a)).

> lions have documented escapes. An escape places the animal's life in jeopardy and may endanger the safety of the public.

CX 6 at 5-6. Photographs included in the inspection report corroborate Dr. Arango's observations.[295]

At hearing, APHIS veterinarian Dr. Dana Miller testified that "a 16-foot straight up enclosure would be deemed compliant at the time of inspection," or, alternatively, an enclosure that measures "12 feet with a 3-foot kick in."[296] Respondents' pens, however, measured just eleven feet and three inches – and did not have a kick-in.[297] Dr. Miller also explained: "[t]he other concern I did have is that some of the . . . platforms and climbing structures for these animals are pretty close to the . . . wall of the enclosure," which "effectively reduces the height even more."[298] Further, Dr. Miller testified to her concerned that the platforms and climbing structures "would create a ledge that the animal would actually be able to climb if it was motivated."[299]

As to the fence height "noncompliance" Complainant alleges, Respondents seem to contend generally that there is no such requirement in the AWA statute or Regulations.[300] Aside from their other general contentions,[301] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

The Standards, 9 C.F.R. § 3.125(a), require that facilities "must be

---

[295] *See* CX 6 at 13, 16, 19-29.

[296] Tr. Vol. 2, 413:20-24.

[297] CX 6 at 6; Tr. Vol. 2, 419:5-12.

[298] Tr. Vol. 2, 419:16-420:1.

[299] Tr. Vol. 2, 421:23-24.

[300] *See* RX 56 at :53-4:20 (video of January 20, 2016 exit interview where Respondent Stark argues with inspectors, stating that such fence height requirements are not in the "Blue Book," referring to the book containing AWA Statutes and Regulations); *see also* Tr. Vol. 3, 861-64.

[301] Respondents' Post-Hearing Brief at 18; see *supra* note 278.

constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals."[302] That Complainant presented no "evidence of any animal escaping confinement" is immaterial; such evidence is not required to prove a violation of 9 C.F.R. § 3.125(a).[303]

The language of the Standard, 9 C.F.R. § 3.125(a), does not include any specific fence height required to "contain the animals." Dr. Miller testified that, at the time of this inspection, APHIS had "some written policies that were available through the inspection guide . . . that stated, . . . what things would . . . be compliant, and it actually was a 16-foot straight up enclosure would be deemed compliant at the time of inspection, 12 feet with a 3-foot kick-in, so a horizon piece that comes over to prevent the animal from just jumping."[304] She also testified that this such fence height specifications were based on instances of other big cat escapes at other facilities that were reviewed by big cat specialists.[305]

Dr. Miller did not specifically identify in which "inspection guide" the referenced "written policies" were set out; exactly who in the USDA organizations developed and/or issued those fence height specifications, and on what basis and with what support; or the specific intended use of such fence height specifications. Complaint did not otherwise provide such information for the record. However, Respondent provides a document detailing fence height specifications for lions and tigers, RX 2, entitled "Lion and Tiger Enclosure Heights and Kick-Ins Inspection," (hereinafter referred to as "Lion and Tiger Enclosure Guidelines") which appears to be a guidance document issued by APHIS.[306] The Lion and

---

[302] 9 C.F.R. § 3.125(a).

[303] *See supra* note 280 and accompanying text.

[304] Tr. Vol. 2, 413:12-414:1.

[305] *Id.*

[306] I note that Respondents contend in various manners at various points that they never received these guidelines, see RX 56. However, Complainant's witnesses state that the guidelines were provided to Respondents and Respondents certainly had possession of them to submit them into the record. *See* Tr. Vol. 3 828:12-23; Tr. Vol. 6, 1528.

Tiger Enclosure Guidelines, RX 2, reference back to the USDA, APHIS, Animal Welfare Inspection Guide,[307] which states at section 1.1 "Purpose":

> The Inspection Guide is not a Regulation or Standard and **does not rise to the level of policy**. It serves as a tool to improve the quality and uniformity of inspections, documentation, and administration of the Animal Care Program.
>
> The Inspection Guide is designed to facilitate the decision-making process. It cannot, and is not intended to, replace the inspector's professional judgment.
>
> The Inspection Guide **summarizes** current regulatory and procedural criteria for USDA licensed/registered facilities, and provides examples of inspection processes for verifying compliance. It does **not** add to, delete from, or change current Regulations or Standards. [Emphasis added.]

At section 1.2 "Disclaimer," it states:

> The Animal Welfare Inspection Guide is intended to be a reference document to assist the inspector. The Inspection Guide does not supersede the Animal Welfare Act (AWA), the AWA Regulations and Standards, AC policies and other guidance, the Required Inspection Procedures, standard procedures, or the inspector's professional judgment. All inspection decisions must be justified by applicable sections of the AWA and/or the AWA Regulations and Standards.

Complainant may intend to contend that such written guidance constitutes binding USDA or APHIS interpretations of 9 C.F.R. §

---

[307] *See* U.S. Dep't of Agric., *Animal Welfare Inspection Guide*, https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf (last visited Jan. 28, 2020).

3.125(a), but Complainant does not expressly so argue, and does not provide any explanation for why such an interpretation would be legally binding upon AWA licensees or upon me in making a determination of whether Respondents violated the AWA and the Regulations. As quoted immediately above, such guidance could scarcely be more explicit that it is not intended to provide binding rules distinct from the AWA and Regulations. It explicitly states that it does not "rise to the level of policy." Additionally, although the Lion and Tiger Enclosure Guidelines, RX 2, state at 1 "[t]his guidance is a distillation of a well-established interpretation of the AWA regulations and standards," Complainant does not expressly argue such, and the record does not otherwise support that this guidance is official USDA interpretation of the AWA Regulations and Standards.

Because Complainant does not specifically contend or set out that the height, "kick-in", or "hot-wire" requirements are enforceable "policy" based on, or interpretive rule of, the Standard, 9 C.F.R. § 3.125(a), in this decision I do not have to reach this issue.[308] In these circumstances, I evaluate the record, including Dr. Miller's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the regulations, specifically Standard, 9 C.F.R. § 3.125(a).

Dr. Miller does not testify, and Complainant does not otherwise provide expert testimony or other evidence, to explain why a fence of

[308] In other words, I will not address whether the APHIS guidance (also referred to as "policies" or "performance standards," even though that guidance specifically states it does not establish policy or Standards) regarding enclosure fence height relied upon, in part, by Dr. Miller in finding that Respondents violated the Standard, 9 C.F.R. § 3.125(a), are APHIS "interpretive rules" under the Administrative Procedure Act, 5 U.S.C. § 553, that might, on one hand, be argued to bind Respondents and me, or on the other hand, might be argued to not be so binding. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2420 (2019) (stating "An interpretive rule itself never forms 'the basis for an enforcement action'—because, as just noted, such a rule does not impose any 'legally binding requirements' on private parties.") (citing *National Min. Assn. v. McCarthy*, 758 F.3d 243, 251 (CADC 2014)); *Hoctor v. U.S. Dep't of Agric.,* 82 F.3d 165 (7th Cir. 1996) (holding that USDA "rule governing minimum height of enclosures for dangerous animals was a substantive rule subject to the notice and comment procedures set forth in the Administrative Procedure Act (APA).").

eleven feet and three inches could not contain a lion or tiger but a fence of twelve feet with a three foot "kick-in" would. However, Dr. Miller testified, and Complainant provided photographic evidence, that climbing structures within the enclosures were close to the wall of the enclosure, as well as cross bars on the tiger enclosure side of the fence, providing a possible "launching pad" or ledge for tigers to scale or jump over the enclosure fence.[309] While the evidence presented regarding fence height alone does not demonstrate whether the enclosures could contain the animals, the record demonstrates that the enclosure was not sufficient to contain the animals due to the platforms and ledge that could provide the animals with a "launching pad" for escape.

I, therefore, find that the inspection report, photographs, and testimony presented by Complainant are reliable evidence of the alleged violation—evidence that Respondents failed to rebut. Accordingly, I find that Complainant showed by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a).

3. Perimeter fences

Complainant asserts that Respondents housed multiple tigers in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect the tigers from injury, to function as a secondary containment system, and to prevent the animals from physical contact with persons or other animals outside the fence.[310] The noncompliance was documented in Dr. Arango's inspection report, as follows:

> A 12-foot high perimeter fence was present around the portion of the facility housing the majority of the tigers. At the time of inspection there were large amounts of building materials present in the area between the tigers and primary enclosures and the perimeter fence. This building material included numerous chain link fence panels that were leaning at an angle against the side of the

[309] Tr. Vol. 2, 419:13-420:3, 421:17-25; CX 6 at 13, 16, 19-29.

[310] Complaint at 16 ¶ 21c.

> perimeter fence facing in towards the enclosures functionally forming a ramp up the perimeter fence. Other piles of fencing panels and wood for building were stacked near the foot of the perimeter fence in a manner that would allow animals to use it as a platform to jump from. Depending on their orientation, these panels effectively reduced the perimeter height by 3 to 8 feet. The present of these building materials prevents the perimeter fence from functioning as an adequate secondary containment system for the animals at this facility.
>
> One gate present in the perimeter fence (for the portion of the facility that houses the majority of the tigers) was constructed of vertical bars. Gaps were present underneath this gate which ranged from 3 to 9 inches. These gaps are large enough that it could allow the entry of an unauthorized person or animal.
>
> A substantial perimeter fence that is maintained in good repair and is not less than 8 feet in height is required for all potentially dangerous animals. This perimeter fencing protects the animals by ensuring that in the event of an accidental escape there is a secondary containment mechanism to prevent the animal from leaving the property and endangering public safety and thereby placing the animal's life in jeopardy. Correct this by removing all construction materials or other debris that is within close proximity to the perimeter fence, and by modifying the gate to prevent unauthorized entry.

CX 6. Photographs taken on the date of inspection corroborate Dr. Arango's findings,[311] as does Dr. Miller's testimony:

> In Mr. Stark's facility, he actually had a 12-foot tall perimeter fence, which was great, in the majority of these areas. However, there was so much construction debris,

[311] *See* CX 6 at 17, 33-37.

> fencing material, those large spools, things like that were right up against the fences or very close to them, and some of those stacks were tall enough that they were effectively reducing the perimeter height by as much as 3 to 8 feet.
>
> So even though it was a 12-foot height, when you have a ramp -- or a -- a gate or something leaning against it at an angle, our concern is that's making a ramp essentially that would allow an animal to escape more easily. The perimeter fence requirement itself -- and what it says in there is the fence must be constructed so it protects animals and the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals as -- at the facility, and so that it can function as a secondary containment system for animals in the facility.
>
> So essentially, that perimeter fences functions both to keep people out of the facility that shouldn't be in, and keep them from contacting the animals. And were an animal to escape, . . . it provides some secondary containment, which would give you enough time to hopefully recapture that animal and return it to its enclosure and prevent complete escape from the facility. So my -- our concern very much so was that having all of that debris made it so that it could not perform that function of secondary containment.
>
> And then we also had several areas where there were gaps underneath the fence or around the gate that were large enough that a person or an animal like a dog or raccoon could enter the facility, as well. So we had some failures in both aspects, even though there was a tall fence present.

Transcript at 424:6-425:22. When asked what problem a dog or raccoon might cause by gaining entry, Dr. Miller explained:

> It's multifold. . . . Raccoon or cat, both of them can carry

> diseases that would potentially impact the animal, so fecal contamination or direct diseases. Raccoons can carry distemper.
>
> There were canines at the facilities. So . . . that would be a disease of concern if you have wild raccoons coming on and off at will. And then, as far as . . . a person, I think that's -- both injury to the animal and the person.

Transcript Vol. 1, at 426:13-23.

Aside from their general contentions,[312] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence provided by Complainant.

The Standards, 9 C.F.R. § 3.127(d), provide, in pertinent part, that outdoor facilities:

> 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 in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for animals in the facility.

9 C.F.R. § 3.127(d).

Complainant demonstrates by a preponderance of the evidence that the perimeter fence surrounding Respondents' tiger enclosure was inadequate to contain them. Although the actual fence measured more than eight feet, the presence of building materials throughout the area effectively reduced the perimeter height preventing the fence from providing secondary

[312] Respondents' Post-Hearing Brief at 18; see *supra* note 278.

containment. Moreover, gaps in the fencing allowed opportunities for other animals or unauthorized persons to enter.

While Complainant presented documentary, photographic, and testimonial evidence that the tiger perimeter fence failed to meet the minimum Standards set out in 9 C.F.R. § 3.127(d), as mentioned, Respondents set forth no specific evidence to rebut that showing. Respondents maintain that Complainant failed to present evidence "of any animal escaping confinement," but, again, evidence of an actual escape is not required to establish a violation.[313] Accordingly, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(d).

4. Diet for animals

Complainant asserts that Respondents fed large carnivores a diet that was not prepared with consideration for the age, species, condition, size, and type of animals.[314] Dr. Arango wrote in his inspection report:

> The licensee stated that he feeds a variety of feed material to the various animals maintained on the property. The large carnivores are generally fed a mixed diet consisting of donated recently expired meat products from human food channels and road kill with vitamin / mineral supplementation. There is no written guidance from the attending veterinarian for feeding the large felids. A species specific feeding plan(s) which includes the amount and type of meat provided as well as any additional necessary vitamin or mineral supplementation is necessary when feeding a non-commercially prepared diet for large felids to ensure that the diet is of sufficient quantity and nutritive value to maintain the animals in good health. The licensee must obtain from the veterinarian written guidance for the feeding of the large cats. This feeding plan must address the species, size, condition, and type of animal in order to ensure

[313] *See supra* note 280 and accompanying text.

[314] Complaint at 16 ¶ 21d.

> appropriate care and feeding for all felids in the facility.

CX 6. Dr. Miller testified to this at hearing and explained that "use of expired products could have been a concern for these animals."[315]

Aside from Respondents' general contentions,[316] Respondents do not address this allegation specifically or provide specific evidence to rebut Complainant's evidence. Respondents simply aver, *id.*, without evidentiary support, that "a more than appropriate diet was provided at all times for all the large carnivores" and that Respondents were "adhering regularly to modern scientific standards about the provision of carcasses."[317]

At issue here with whether Respondents complied with the terms of the text of the regulation Standards as written and not whether Respondents' practice of providing partially intact carcasses is in fact "modern scientific standards" as Respondents contend. The Standards, 9 C.F.R. § 3.129(a), require that:

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

---

[315] Tr. Vol. 2, 429:16-17.

[316] Respondents' Post-Hearing Brief at 18 (where Respondents contend "[t]here was no preponderance of reliable evidence that Respondents fed large carnivores a diet that was not prepared with consideration for the age, species, conditions, size, and type of those specific animals"). *See also* Respondents' Proposed Findings & Conclusions at 5 ¶ 17.

[317] Respondents cited: "Transcript at 9:21-11:7 in Testimony of Timothy Stark on 10/05/18"; "McPhee, M.E., (2002). Intact carcasses as enrichment for large felids: Effect on on-and of-exhibit behaviors. *Zoo Biology: Published in affiliation with the American Zoo and Aquarium Association*, 21(1), 37-47."

9 C.F.R. § 3.129(a).

Contrary to Respondents' assertion, the record, including the Inspection Report, CX 6, and Dr. Miller's testimony, demonstrates that an appropriate diet was not provided for large carnivores at all times. Accordingly, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.129(a).

c. Complaint Paragraphs 22a-p (September 24, 2013)

The Complaint alleges that on or about September 24, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to comply with multiple provisions of the Standards.[318]

1. Food storage for dogs

Complainant contends that on September 24, 2013, Respondents failed to meet the minimum Standards for storage of foods for dogs.[319] In particular, Complainant asserts that Respondents failed to store supplies of food for dogs in facilities that adequately protect the supplies of food from deterioration, molding, or contamination by vermin.[320] Dr. Miller testified that there was an "excessive accumulation of rodent feces on the floor" in the dry storage room,[321] which was "especially bad around the feed containers";[322] that "dog food bags were left open or had no . . . lid on them"; [323] and that "there were even rodent feces on some of those open bags."[324] Photographs taken at the time of inspection corroborate Dr. Miller's testimony and clearly depict the rodent feces and open containers**,** evidencing that Respondents failed to protect the supplies from spoilage,

---

[318] *See generally* Complaint at 16-18 ¶ 22.

[319] Complainant's Post-Hearing Brief at 96 (citing Complaint at 16 ¶ 22a; 9 C.F.R. § 3.1(e)).

[320] Complaint at 16 ¶ 22a.

[321] Tr. Vol. 2, 473:5-7.

[322] Tr. Vol. 2, 473:9-10.

[323] Tr. Vol. 2, 473:17-18.

[324] Tr. Vol. 2, 473:19-20.

contamination, and vermin infestation.[325]

Aside from their general contentions,[326] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence. Respondents simply and generally aver that their witnesses have testified that food areas were clean or being cleaned during each inspection.[327] Respondents also argue that alleged violations were "based upon appearances and not proof of actual and potential risk to animals or visitors" and that there is no evidence of the animals ever having been "physically sickened by foodstuffs, and nothing to suggest even minor conditions were not corrected."[328]

The preponderance of the evidence supports the alleged violation, and

---

[325] CX 14 at 56, 58, 60, 62, 64, 68, 70, 72; *see* Tr. Vol. 2, 473:21-475:21.

[326] Respondents' Post-Hearing Brief at 19 (where Respondents contend that there is "no preponderance of reliable evidence that Respondents ever failed to store adequate supplies of food for their animals in facilities that adequately protected the food from deterioration, molding, or contamination by vermin" and there is "[n]o objective evidence of any actual health contamination" as "Complainant failed to actually conduct any testing of any food or any food storage materials."). *See also* Respondents' Proposed Findings & Conclusions at 5-6 ¶ 18.

[327] *Id.* (citing "Transcript at 29:15-30:15 in Testimony of Day on 10/04/19").

[328] *Id.* (citing "Transcript at 34:5-16 in Testimony of Tim Stark on 10/04/18; *Hoctor*, 56 Agric Dec. 416 (U.S.D.A. 1977)). Noting that I do not find any relevance of *Hoctor* to the instant allegations.

Respondents state, *id.,* that the "personal opinions" of Complainant's witnesses "speculated that deterioration, molding, or contamination by vermin 'could occur' in the undetermined future" was "impermissible opinion which lacks foundation as objective scientific evidence" Respondents do not specifically cite to any testimony that they perceived to be speculation or "impermissible opinion." Respondents also state: "Even Complainant's own expert, Dr. Laurie Gage, was compelled to admit that Respondents' sanitation procedures were compliant" (citing "Transcript at 122:5-18 in Testimony of Laurie Gage on 10/05/18"). Reviewing the uncorrected, improperly formatted version of the transcript to which Respondents cite, the cited testimony is Dr. Gage discussing when she does and does not sanitize her hands before touching an animal. Dr. Gage does not there "admit" in any way that Respondents' sanitation procedures were compliant with the regulations.

Respondents offer no specific evidence to the contrary. A claim of compliance is not sufficient to counterbalance a record replete with evidence of non-compliance. The Standards, 9 C.F.R. § 3.1(e), require, in pertinent part, that:

> Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. . . . All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage.

Moreover, Complainant need not submit "objective evidence of any actual health contamination"[329] to establish a violation. As the Judicial Officer recently held: "[t]he housekeeping Standards relate to protection and prevention; evidence of actual rodent or pest infestation is not required."[330] Therefore, I conclude the preponderance of the evidence shows that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), and failed to meet the Standards, 9 C.F.R. § 3.1(e), by failing to store supplies of food for dogs in facilities that adequately protect the supplies from deterioration, molding, or contamination by vermin.

2. Moisture in hybrid-dog enclosures

Complainant contends that Respondents housed three hybrid dogs in enclosures with surfaces that were not impervious to moisture.[331] Dr. Miller testified that:

the area that Mr. Stark was keeping those dogs in was constructed of unsealed wood. None of that wood was impervious to water. It had what

---

[329] Respondents' Proposed Findings & Conclusions at 5 ¶ 18.

[330] *Terranova Enters., Inc.*, 78 Agric. Dec. 248, 325 (U.S.D.A. 2019). Noting, however, that here signs of vermin infestation, such as littering of feces, was observed in and around the open containers of food.

[331] Complainant's Post-Hearing Brief at 97 (citing Complaint at 17 ¶ 22b).

appeared to be a dirt floor on it . . . it was really gross . . . there was an accumulation of feces, cobwebs, dust, debris. There were bones littering the floor. It had an odor coming from it and in certain areas it was actually wet and damp.

Tr. 476:25-477:9. Further, Dr. Arango documented Respondents' noncompliance in the September 24, 2013 Inspection Report, noting in particular that:

Walls and flooring constructed of unsealed wood and dirt which are permeable to moisture provide an optimal area for bacterial and fungal growth both of which can cause disease in the dogs housed in these enclosures. Ultimately the failure to construct dog enclosures out of surfaces that are impervious to moisture results in an ability to properly clean and sanitize the primary enclosures and creates a risk of disease and illness.

CX 14 at 15. Photographs taken during the inspection corroborate Dr. Miller's testimony and the inspection report.[332]

Aside from their general contentions, [333] Respondents do not address this allegation or provide any specific evidence to rebut Complainant's evidence.

The record provides no support for Respondents' claims of compliance, and the preponderance of evidence in the record is to the contrary. The Standards, 9 C.F.R. § 3.3(e)(1), require that:

---

[332] *See* CX 14 at 74, 76.

[333] Respondents' Post Hearing Brief at 20 (contending that there "was no preponderance of reliable evidence that Respondents housed any animal in enclosures with surfaces that were not impervious to moisture" and that "unrebutted testimony by Respondents' veterinarians reflected that more than adequate . . . shelter [was] provided for all of the animals involved, and met or exceeded scientific standards per industry standard publications.") (citing Hosey, G., Me.fi, V., & Pankhurst, S. (2013. *Zoo animals: behavior, management, and welfare.* Oxford University Press.). *See also* Respondents' Proposed Findings & Conclusions at 6 ¶ 19.

> The following areas in sheltered housing facilities must be impervious to moisture:
>
> (i) Indoor floor areas in contact with the animals;
>
> (ii) Outdoor floor areas in contact with the animals, when the floors are not exposed to direct sun, or are made of hard material such as wire, wood, metal, or concrete; and
>
> (iii) All walls, boxes, houses, dens, and other surfaces in contact with the animals.

9 C.F.R. § 3.3(e)(1). Complainant provided reliable evidence showing that Respondents housed three hybrid dogs in enclosures with surfaces that were not impervious to moisture. Therefore, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.3(e)(1).

3. Exercise plan for dogs

Complainant contends that Respondents failed to develop, document, and follow an appropriate plan for exercise for dogs, as required by 9 C.F.R. § 3.8.[334] During the hearing, Dr. Miller testified: "[n]ot only did [Respondents] not have an attending veterinarian again, but [they] also had no written exercise plan."[335] The September 24, 2013 inspection report shows the same[336] and further states that "[e]xercise is necessary to benefit the health, comfort, and well-being of the dogs."[337]

Aside from their general contentions, [338] Respondents do not

---

[334] Complainant's Post-Hearing Brief at 99 (citing Complaint at 17 ¶ 22c).

[335] Tr. Vol. 2, 487:13-15.

[336] *See* CX 14 at 17-19.

[337] *See* CX 14 at 19.

[338] Respondents' Proposed Findings & Conclusions at 6 ¶ 20 (contending that "[t]here is no preponderance of reliable evidence that Respondents failed to

specifically address this allegation or provide any specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.8, require in relevant part, that "exhibitors . . . must develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise" and that such written plan "must be approved by the attending veterinarian" and "made available to APHIS upon request." The record is clear that Respondents had no such plan. [339] Accordingly, I find that the Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.8.

4. Cleaning and sanitation of food receptacles for hybrid dogs

Complainant contends that Respondents failed to clean and sanitize food receptacles for three hybrid dogs as required by the Standards.[340] Dr. Miller described Respondents' food receptacle for hybrid dogs as follows:

> It was actually made of a very large blue and white cooler that, in fact, could not be easily removed from the enclosure itself. It had -- it was affixed to the chainlink using sections of garden hose that were woven through the chainlink and then actually screwed into the cooler that was holding it up. So it wasn't like you could actually just take that feed out, that feeder out and clean it very well every two weeks as -- as in accordance with those prescribed methods which include either disinfection by a steam or a chemical disinfectant follow -- you know, followed by a chemical disinfectant during which, you know, contact time is important and things like that.

---

develop, document, and follow an appropriate plan for exercise for any animal at any time relevant to this adjudication."). In their reply Brief, Respondents also state "there was no preponderance of reliable evidence that Respondents did not have an attending veterinarian at any time relevant to this adjudication." Respondents' Reply Brief at 13. As discussed *supra*, Dr. Miller testified to the contrary.

[339] *See* CX 14 at 17-19; Tr. Vol. 2, 487:9-13.

[340] Complainant's Post-Hearing Brief at 99 (citing Complaint at 17 ¶ 22d).

> When we asked Mr. Stark about how they were cleaned because there was a -- I mean, just a huge buildup of organic material, dust, grime, dirt, there was a lot of food waste in it. It was a huge container with -- just filled with dog food, as well.
>
> Mr. Stark said on a weekly basis his volunteers go into the enclosure, remove all of the food, and then clean and sanitize that feeder. That statement did not seem consistent either with what we observed on the feeder itself or the ease of cleaning. So this -- clearly, if it was true that they were going in weekly, then weekly was not often enough.

Tr. 491:5-492:8. Photographs from the September 24, 2013 inspection corroborate Dr. Miller's assessment.[341] The Inspection Report explains that "[a]ccumulated organic debris provides an optimal area for the growth of bacterial and fungal pathogens that can easily contaminate food when present on feed receptacles creating a disease hazard for the dogs."[342]

Aside from their general contentions, [343] Respondents do not address this allegation specifically and do not provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.9(b), require, in pertinent part, that:

> Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must be either made of a durable material that can be

---

[341] *See* CX 14 at 82, 84, 86, 88, 90, 92.

[342] CX 14 at 19.

[343] Respondents' Proposed Findings & Conclusions at 6 ¶ 21 (stating "[t]here is no preponderance of reliable evidence that Respondents failed to clean and sanitize food receptacles or any primary enclosure for any animal at any time relevant to this adjudication."); *see also* Respondents' Reply Brief at 18-20.

> easily cleaned and sanitized or be disposable.

9 C.F.R. § 3.9(b). The record reflects that the food receptacle used for the hybrid dogs was not easily cleaned and sanitized due to its structure, and Respondents failed to regularly clean and sanitize it. Accordingly, I find that the Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.9.

5. Sanitization of primary enclosures for hybrid dogs

Complainant contends that Respondents failed to sanitize used primary enclosures for three hybrid dogs as required by 9 C.F.R. § 3.11(b)(2).[344] Dr. Arango documented in the September 24, 2013 Inspection Report:

> Three dogs . . . are housed in a sheltered primary enclosure towards the bears. All hard surfaces in this building including chain link fencing, raised platforms, floors, walls, and support beams have a moderate to heavy accumulation of dirt, dust, cobwebs, organic material, and hair. The accumulated debris is evidence that current cleaning and sanitation protocols are inadequate to prevent their accumulation. Accumulated organic debris provides an optimal area for the growth of bacterial and fungal pathogens creating a disease hazard for the dogs. Additionally, this accumulated debris can attract pests including flies and vermin as well as contributes to odors within the facility.

CX 14 at 21.

The photographs and Dr. Miller's testimony corroborate the Inspection Report.[345] Looking at one such photograph, Dr. Miller observed: "So you can actually see a bone, again concerning because the dogs will be potentially picking that up and chewing it, and it's laying in

---

[344] Complainant's Post-Hearing Brief at 100 (citing Complaint ¶ 22e).

[345] *See* CX 14 at 94, 96, 98; Tr. 495:14-496:11.

contaminant."[346] Dr. Miller also testified that the enclosure was located in "an area where the sunlight does not penetrate in order to sanitize."[347]

Aside from their general contentions, [348] Respondents do not address this allegation specifically and do not provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.11(b)(2), require that:

> Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

The Standards, 9 C.F.R. § 3.11(b)(3), also require that hard surfaces of primary enclosures be sanitized using one of three methods: 1) live steam under pressure, 2) washing with hot water and soap/detergent, and 3) washing with appropriate detergent and disinfectants, or other product that accomplishes the same purpose.

The record demonstrates Respondents failed to clean and sanitize its hybrid-dog enclosure. Therefore, I find the preponderance of the evidence establishes Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.11(b)(2).

6. Written plan for environmental enhancement

Complainant contends that Respondents failed to have a written plan for the environmental enrichment of nonhuman primates available for inspection.[349] Complainant contends that although Respondents had a document that "include[d] various items for enrichment of nonhuman

---

[346] Tr. Vol. 2, 495:21-24; *see* CX 14 at 96.

[347] Tr. Vol. 2, 496:10-11; *see* CX 14 at 98.

[348] *See supra* note 343.

[349] Complainant's Post-Hearing Brief at 102 (citing Complaint at 17 ¶ 22f).

primates," this document failed to meet the requirements of 9 C.F.R. § 3.81 because it was not evaluated by an attending veterinarian.[350] This was a repeat violation.[351] As Dr. Arango documented in the Inspection Report, CX 14 at 21,

> During inspection the licensee stated that he created this document and that he had not had it evaluated by the attending veterinarian. At this time there has been no guidance or input from the attending veterinarian regarding the plan for environmental enhancement to promote psychological well-being of nonhuman primates. Enrichment plans must be in accordance with professionally accepted standards as cited in appropriate professional journals and must be directed by the attending veterinarian.

Aside from their general contentions,[352] Respondents do not address this allegation specifically. Respondents presented the testimony of Christina Densford, a volunteer at Respondents' facility, and from Respondent Stark as evidence to rebut Complainant's evidence of noncompliance. Ms. Densford testified that she was generally responsible for providing the enrichment but admitted that, apart from her experience with Respondent Stark, she had no training in handling AWA-regulated animals.[353] Respondent Stark said nothing about an attending veterinarian in his testimony; he mainly described how the inspectors conducted their inspection and cited Respondents for a "repeat" noncompliance.[354]

It is clear that Respondents failed to retain an attending veterinarian to direct the enrichment plan and the failure to do so constitutes

---

[350] CX 14 at 21. *See also* Tr. Vol. 2, 494:5-8 (Dr. Miller testified that "the requirement is that the enrichment needs to be directed by the attending veterinarian, and Mr. Stark had no attending veterinarians.").

[351] *See* CX 14 at 21.

[352] *See supra* discussion regarding Complaint paras. 21a-d, p. 80, and *supra* notes 287-89.

[353] *See* Tr. Vol. 7, 1816:1-14, 1823:10-24.

[354] *See* Tr. Vol. 7, 2005-2006.

noncompliance with the Standards, 9 C.F.R. § 3.81, which require an environmental enrichment plan in accordance with professional standards and "as directed by the attending veterinarian." Therefore, I find the evidence of record establishes that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.81.

7. Tiger Enclosures

Complainant contends that Respondents housed seven tigers and one lion in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals.[355] Complainant also contends that Respondents housed four tigers in an enclosure with a resting platform placed close to the side of the enclosure such that it could provide a means for the tigers to escape.[356] Complainant provided the Inspection Report, CX 14, completed by Dr. Arango, which documented the following:

> None of these pens had any angled top fencing (kick-in) or any species appropriate high tensile smooth electrical wire to provide additional deterrents for escape. These enclosures are similar in height to those where tigers or lions have had documented escapes.
> . . . .
> These enclosures are not tall enough to properly contain the animals as these adult tigers could easily jump out of the enclosure if they were motivated to do so.

CX 14 at 23. This is also a repeat violation, which Dr. Miller testified to at hearing.[357]The Inspection Report, *id.*, also noted that "a large resting platform" was "too close to the side" of one of Respondents' tiger pens. Dr. Arango explained, *id.*, that "[t]he current placement of this platform combined with its height and the adjacent wire covered cage provides a potential opportunity for escape." At hearing, Dr. Miller testified about the dangers of such a platform:

---

[355] Complainant's Post- Hearing Brief at 104 (citing Complaint at 17 ¶ 22g).

[356] Complainant's Brief at 105 (citing Complaint at 17 ¶ 22h).

[357] *See* CX 14 at 23.

> our concern in particular with these elevated platforms is that they are both high enough, which having some height and some elevated platforms can be . . . close enough to the primary enclosure fence wall that . . . it could potentially provide a pretty easy platform for that tiger to escape the enclosure if it was motivated.

Tr. Vol. 2, 497:24-498:7.

Aside from their general contentions,[358] Respondents do not address this allegation specifically or provide specific evidence to the evidence offered by Complainant.

The Standards, 9 C.F.R. § 3.125(a), require that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." A preponderance of the evidence shows that Respondents' tiger enclosures failed to comply with section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)).

As previously discussed, *supra* pp. 85-87,[359] because Complainant does not specifically contend or set out that the alleged height, "kick-in," or "hot wire" requirements set out in APHIS guidance[360] are enforceable "policy" or guidance based on, or interpretive rules of, the Standard, 9 C.F.R. § 3.125(a), in this decision I do not reach the issue of whether these are enforceable requirements apart from what is required by the Regulations and Standards themselves.[361] In these circumstances, I evaluate the record, including Drs. Miller and Arango's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

---

[358] Respondents' Post-Hearing Brief at 18; see *supra* note 278.

[359] In discussion regarding Complaint ¶¶ 22g-h.

[360] *See* RX 2.

[361] *See supra* note 308.

Dr. Miller's testimony, as well as the photographic evidence provided detailing how the platforms could be used to provide a potential means of escape, show that the tiger enclosures were insufficient to contain the animals as required by the regulation. Further, that Complainant did not present "evidence of any animal escaping confinement"[362] is immaterial; actual escape is not a requisite element to establish a violation of 9 C.F.R. § 3.125(a).[363] Accordingly, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a).

8. Food storage

Complainant contends that on September 24, 2013, Respondents failed to meet the minimum Standards with regard to food storage.[364] First, the September 24, 2013 Inspection Report notes that several types of meat, including both unidentified ground red meat and whole poultry products, "were observed in the freezer unsealed and frozen in buckets."[365]

> These types of meat are being fed to the lions, tigers, servals, ocelots, and bobcats (per the Nutrition and Enrichment Fact sheet supplied by the licensee). The red meat had areas of brown-grey discoloration that appeared dry/desiccated. The poultry was frozen in a large box of ice and had areas on the exposed extremities that appeared lighter colored and similarly dried. The license [sic] stated that this meat was recently received and would be fed before the end of the week; however, the meat products observed in the freezer did not have a date of receipt/ freezing or a use by date. Failure to properly seal frozen foods and prolonged storage of perishable foods (even when frozen) can result in freezer burn, desiccation, and oxidation causing alteration of the food's palatability and nutritive value. Perishable food must be maintained in a

[362] Respondent's Proposed Findings & Conclusions at 5 ¶ 15.

[363] *See supra* note 280.

[364] *See* Complaint at 17 ¶ 22i.

[365] CX 14 at 25.

> manner that prevents against deterioration in order to ensure that food remains palatable and wholesome.

CX 14 at 25. At the hearing, Dr. Miller explained that the inspectors' primary concern was that the storage was "not really preventing deterioration of those food stuffs even though they were frozen."[366] Photographs taken at the time of inspection, as well as Dr. Miller's testimony, corroborate the inspection-report findings.[367]

Second, the Inspection Report reflects issues with Respondents' dry-food storage:

> The dry food storage room has an excessive accumulation of rodent feces on the floor. The accumulation is worst in all corners of the room, along the walls, and around the feed storage containers. Additionally, there is rodent feces present on the lids of the feed storage containers and the countertop. Numerous metal barrels were being used as feed storage containers. Although the majority of feed containers have lids, one container was present without a lid. Several open bags of commercial dog food were observed in this container and rodent feces were present on the bags of feed. In addition to being fed to dogs, commercial dog food being fed to several wild and exotic animal species including the bears, foxes, and African Crested Porcupine (per the Nutrition and enrichment fact sheet supplied by the licensee). The licensee stated that he uses mouse poison for rodent control, and while multiple bags containing rodenticide were observed in the room, the significant accumulation of rodent feces particularly on the tops of feed containers indicates that rodent control is inadequate at this time.

CX 14 at 25. Dr. Miller testified that Respondent Stark "confirmed that

---

[366] Tr. Vol. 2, 500:18-20; *see* Tr. Vol. 2, 500:13-16 ("The poultry was frozen in large blocks of ice and . . . was not covered by anything but just big chickens sticking out that were not covered[.]").

[367] *See* Tr. Vol. 2, 500-501; CX 14 at 108, 112, 114.

the dog food was both being fed to the . . . dogs at the facility, as well as several other species of non-human primate."[368] The presence of rodent feces on and around open food containers, as clearly depicted in the inspection photographs, indicates that Respondents failed to protect the food supplies from spoilage, contamination, and vermin infestation.[369] As Dr. Arango stated in the inspection report: "[r]odents are a known source of multiple diseases for other mammals which can be transmitted through urine, feces, and fleas. Contamination of feed with rodent feces poses a health risk to the animals through potential disease transmission."[370]

Aside from their general contentions,[371] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

As set out above, the record evidence demonstrates noncompliance with the Standards for food storage. There is no requirement for inspectors to conduct any testing of food or food storage materials as Respondents suggest in their general contentions.[372] Therefore, I find that the preponderance of evidence establishes that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(c).

9. Perimeter fences

Complainant contends that Respondents housed multiple tigers in facilities that did not comply with the minimum Standards for perimeter

---

[368] Tr. Vol. 2, 499:15-20.

[369] *See* CX 14 at 56, 58, 60, 62, 64, 66, 68, 70, 72, 116.

[370] CX 14 at 25.

[371] Respondents' Post-Hearing Brief at 19 (contending alleged violations were "based upon appearances and not proof of actual and potential risk to animals or visitors" and that there is no evidence of the animals ever having been "physically sickened by foodstuffs, and nothing to suggest even minor conditions were not corrected.") (citing "Transcript at 29:15-30:15 in Testimony of Day on 10/04/19"; "Transcript at 34:5-16 in Testimony of Tim Stark on 10/04/18; *Hoctor*, 56 Agric. Dec. 416 (U.S.D.A. 1977)); *see also supra* note 326.

[372] *See* 9 C.F.R. § 3.125(c).

fences.[373] The Complainant also alleges that Respondents housed a lion, two tigers, one leopard, and four bears in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence.[374]

First, the Complainant alleges that Respondents' tiger facility was not enclosed by an adequate perimeter fence and, specifically, there was a gap of three to six inches between one of the gates and the fence.[375] Dr. Arango documented the noncompliance in the September 24, 2013 Inspection Report as follows:[376]

> A 12-foot high perimeter fence was present around the portion of the facility housing the majority of the tigers. One gate (constructed out of vertical bars) present in this area of perimeter fence was cited on the previous report for gaps present at side of this gate which ranged from 3 to 9 inches. While the licensee reduced the size of gaps under and above this gate, a significant gap remains at the locking side of this gate. This remaining gap is large enough that it could allow the entry of an unauthorized person or animal.

Dr. Miller testified to the same.[377]

Second, Dr. Arango documented the height issue in the inspection report, observing:

> An 8-foot high perimeter fence surrounds the portion of

---

[373] *See* Complaint at 18 ¶ 22j.

[374] Complaint at 18 ¶ 22k.

[375] Complaint at 18 ¶ 22j.

[376] *See* CX 14 at 27. *See also* CX 14 at 138 (photo of significant gap between the fencing and the gate).

[377] *See* Tr. Vol. 2, 510:4-9.

> the facility which contains the majority of the animals (including one lion, two tigers, one leopard, 4 bears, and all other species). One area of this perimeter fence (nearest to the leopard enclosure) was constructed of chain link that was only 69 inches (5'9"). Three unsecured single strands of wire were present above the chain link. These were placed at 4 inches,16 inches, and 23 inches above the top of the chain link. The licensee stated that these used to be electrified wire, however, the electricity has been off to these wires. Vining plants were observed growing along and between these wires. These wires were easily movable and not taut enough to prevent an animal or person from shifting them to allow entry or exit through this area of the fence. For that reason the wire strands are inadequate to act as a structural barrier and not included in the height of this perimeter fence. Perimeter fencing must be a minimum of 8 feet high for dangerous animals (or written approval must be obtained from the APHIS administrator).

CX 14 at 27. At the hearing, Dr. Miller testified to having "pretty big concerns"[378] about the height of the fence and opined that it "would be an area that a person or an animal could pretty easily cross through."[379] With regard to structural issues, Dr. Arango observed:

> At the time of the inspection there were large amounts of building materials present and equipment storage present leaning against the perimeter fence in the area adjacent to the dry feed storage room, freezer and lion / dog enclosure. This portion of the facility includes primary enclosures for several dangerous animals . . . The building material included numerous chain link fence rolls, plastic tanks, plastic barrels, one wooden industrial cable spool, and several solidified concrete bags. *These materials were adjacent to or leaning against the side of the perimeter*

[378] Tr. Vol. 2, 507:24-25.

[379] Tr. Vol. 2, 508:16-17.

> *fence facing in towards the enclosures functionally forming a platform to climb or jump over the perimeter fence. These materials and rolls effectively reduced the perimeter height by 3 to 6 feet. The presence of these building materials prevents the perimeter fence from functioning as an adequate secondary containment system for the animals at this facility.*

CX 14 at 27-29 (emphasis added). Moreover, Dr. Miller testified that this was a repeat violation.[380] Together with Dr. Miller's testimony, photographs taken on the date of inspection support Dr. Arango's findings.[381]

Aside from their general contentions,[382] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

That Complainant did not present evidence of an actual animal escape is immaterial to whether Respondents violated the Standard.[383] As set out above, the preponderance of the evidence shows that Respondents failed to meet this Standard, 9 C.F.R. § 3.127(d), by housing multiple tigers in facilities not enclosed by an adequate perimeter fence and housing a lion, two tigers, one leopard, and four bears in facilities not enclosed by an adequate perimeter fence that would prevent animals from physical contact with persons or other animals outside the fence. Therefore, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(d).

10.Diet for animals

Complainant contends that Respondents failed to provide animals a diet that was wholesome, palatable, and free from contamination and

---

[380] Tr. Vol. 2, 507:4-14.

[381] *See* CX 14 at 120, 122, 124, 126, 128, 132, 134, 136, 140, 142, 144, 146, 148; Tr. Vol. 2, 508:5-511:11.

[382] Respondents' Post-Hearing Brief at 18; see *supra* note 278.

[383] Respondents' Proposed Findings & Conclusions at 5 ¶ 16. *See supra* note 280.

prepared with consideration for the age, species, condition, size, and type of animals in violation of the Regulations, 9 C.F.R.§ 2.100(a), failing to meet the Standards, 9 C.F.R. § 3.129(a).[384]

At hearing, Dr. Miller testified that Respondents were feeding the same diet to their big cats as they had been at the time of the previous inspection.[385] According to Dr. Miller, Respondents "still didn't have a feeding plan that was directed by an attending veterinarian or weighed in on in any way giving consideration to the species and age and condition of those animals,"[386] which "have some pretty specialized feeding requirements."[387] As noted in the Inspection Report, CX 14 at 29:

> A species specific feeding plan(s) which includes the amount and type of meats provided as well as any additional necessary vitamin or mineral supplementation is necessary when feeding a non-commercially prepared diet for large felids to ensure that the diet is of sufficient quantity and nutritive value to maintain the animals in good health. The licensee must obtain from the veterinarian written guidance for the feeding of the large cats. This feeding plan must address the species, size, condition, and type of animal in order to ensure appropriate care and feeding for all felids in the facility.

Aside from Respondents' general contentions,[388] Respondents do not

---

[384] Complainant's Post-Hearing Brief at 124 (citing Complaint at 18 ¶ 22l).

[385] *See* Tr. Vol. 2, 513:4-9.

[386] Tr. Vol. 2, 513:6-9.

[387] Tr. Vol. 2, 513:10-11.

[388] Respondents' Post-Hearing Brief at 18 (also contending that "a more than appropriate diet was provided at all times for all the large carnivores" and that Respondents were "adhering regularly to modern scientific standards about the provision of carcasses.") (citing "Transcript at 9:21-11:7 in Testimony of Timothy Stark on 10/05/18"; McPhee, M.E., (2002). Intact carcasses as enrichment for large felids: Effect on on-and of-exhibit behaviors. *Zoo Biology: Published in*

address this allegation specifically and provide little evidence to rebut Complainant's evidence. Other than Respondent Stark's own testimony regarding the variety of meats fed to the large cats, including store bought meat and road kill of a variety of species,[389] Respondents offer no other support for to show that they complied with the regulation by ensuring a diet "prepared with consideration for the age, species, condition, size, and type of the animal" and as directed by an attending veterinarian.[390] Therefore, I find that the preponderance of the evidence is that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.129.

11.Potable water for bears, tigers, and lion

Complainant contends that on September 24, 2013, Respondents failed to provide potable water to bears, tigers, and a lion.[391] At hearing, Dr. Miller described the water issues as follows:

> [t]here was water sources present, but the water wouldn't necessarily be potable or drinkable for the animals. And while it's not required at all times for every species, it -- the water receptacles that are there need to be clean and sanitary.

Tr. 513:22-514:2. The inspection report describes the bears' only water source – a pond – as "murky," with "an abundance of vegetative growth on the surface" and "a strong odor coming from the enclosure."[392] Further, the report notes that "[n]o potable water was observed in the majority of the tigers' enclosures" as the water was "excessively green" and "there were numerous mosquitos and mosquito larvae present on and just below

---

affiliation with the American Zoo and Aquarium Association, 21(1), 37-47); *see supra* note 316.

[389] Tr. Vol. 8, 2059: 6-2060:11.

[390] 9 C.F.R. § 3.129(a).

[391] Complainant's Post-Hearing Brief at 125 (citing Complaint at 18 ¶¶ 22m, 22n, 22o).

[392] CX 14 at 31.

the surface of the water."[393]

Respondents assert that "[u]nrebutted testimony by Respondents' veterinarians reflected that more than adequate water . . . was provided for all animals involved at all times relevant to this adjudication."[394] However, Respondents provide no citations to the record for any such veterinarian's testimony, and I am unable to locate such testimony in the record. Respondent Stark, who is not a veterinarian, did not contend that the water was not green but testified that green water is potable and that Respondents' water is changed more often than it might appear.[395] Similarly, while Ms. Christina Densford testified that one of her responsibilities as a volunteer at Respondents' facility was to ensure that water and feeding receptacles are clean and sanitized,[396] Ms. Densford did not testify whether the water was green at the time of the inspections, and she is neither a veterinarian nor qualified to opine on whether such green water would be potable.[397]

The Standards, 9 C.F.R. § 3.130, require:

> If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering

---

[393] *Id.* (also noting "The turbidity of the water was sufficient to prevent visualization of the bottom of the container even though each container was relatively shallow (less than 3 feet deep"). *See also* Tr. Vol. 2, 515:6-11 ("I also made the notation that the facilities should be concerned about the mosquito breeding, as well just given the fact that big cats are sensitive to West Nile Virus and things like that. So it's an additional risk for those animals, although not directly about the water."); CX 14 at 150, 152, 154, 156, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183 (photos of green water in animal enclosures); Tr. Vol. 2, 513:2-518:20.

[394] Respondents' Proposed Findings & Conclusions at 6 ¶ 21.

[395] *See* Tr. Vol. 8, 2078:17-2081:16.

[396] Tr. Vol. 7, 1829:20-1830:2.

[397] Ms. Densford testified that she is a Special Ed teacher and has "a bachelors in art therapy, minors in philosophy and psychology, a masters of arts and certification in behavioral analysis and education." Tr. 1805:19-24.

> shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

As the record demonstrates, particularly the photographic evidence of water receptacles holding green water that is, in some instances, laden with mosquitos,[398] Respondents failed to meet the Standards by keeping water receptacles clean and sanitary. Therefore, I conclude the preponderance of the evidence shows that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.130.

12. Employees

The Complaint alleges that Respondents failed to employ a sufficient number of adequately trained employees in accordance with the Standards.[399] Complainant provides the Inspection Report, CX 14 at 31-33, and the testimony of Dr. Miller, who stated:

> We had asked Mr. Stark to provide us with a list of the employees at the facility, including the volunteers. We wanted to assess how many people are actually taking care of a collection of this size. Mr. Stark stated that he had no additional paid staff, and that he was not willing to provide us with a list of volunteers, because he thought that that was a violation of their privacy.
>
> He stated that he, personally, directs all of the animal care, and that volunteers are only allowed to do food preparation and to guide visitors through the facility. That did conflict with other statements he made during the inspection, however, where he also described that the volunteers go into the dog hybrid enclosure in order to clean those receptacles and take them out. So we did have some conflicting statements as far as whether there

[398] CX 14 at 150, 152, 154, 156, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183.

[399] Complaint at 18 ¶ 22p.

> actually was volunteer interaction.
>
> . . . . Given the large number of noncompliances, the significance of them, the extent of them, how many enclosures were filthy, how many, you know, water receptacles that needed to be filled and all, it was pretty clear that this would not be something that a s ingle person was able to keep up with, and either that the employees and staff were -- there was either an insufficient number of inadequate training and experience in order to be able to carry out these -- these activities, and therefore, that Mr. Stark did not have sufficient employees.

Tr. Vol. 2, 518:25-520:1-12.

As further support, Complainant's Proposed Findings of Fact, Conclusions of Law, and Order; and Request to Take Official Notice, includes materials "referenced in complainant's supporting brief, which are the subject of complainant's request to take official notice, pursuant to 7 C.F.R. § l.14 l(h)(6)." The attached materials include federal tax returns for 2014-2017 filed by respondent Wildlife in Need Wildlife in Deed, Inc., "which are publicly available government records."[400] Complainant avers that these tax returns demonstrate that no employees were hired by Respondents.[401] Respondents "specifically object to Complainant's caption request to take official notice of matter where no such actual request then in fact was presented anywhere in the brief of in the proposed findings." As the 2014-2017 federal tax returns filed by Respondent Wildlife in Need Wildlife in Deed, Inc. are publicly available government records and Respondents did not advance a specific objection to review of these documents, I hereby take official notice of the 2014-2017 federal tax returns filed by Respondent Wildlife in Need Wildlife in Deed, Inc.

Respondents generally contend that "whenever circumstances required, or whenever APHIS recommended additional assistance by employees, Respondents met and exceeded that condition" and aver that, despite these efforts, "APHIS inspectors still would nevertheless demand

---

[400] Complainant's Post-Hearing Brief at 129.

[401] Complainant's Reply Brief at 39.

an unsupportably [sic] high standard for compliance that included the topic of the number of employees."[402] Respondents further contend that "no staffing problems arose" but that "[m]ore than necessary numbers of extra workers and volunteers helped round out the significant groups of people attending daily to the animals."[403] Respondents aver that it is the inspectors' "interpretation of the regulations requiring a particular number of employees to do all those tasks at every moment of the day [that] has been held by the Courts to go way too far."[404]

Respondents do not deny that they have few, if any, full-time employees.[405] Respondents' contentions that "no staffing problems arose" is inconsistent with Dr. Miller's testimony and record evidence.[406] Moreover, Neither Ms. Stark, Ms. Amin, nor Respondent Stark gave testimony that would support a finding that Respondents employed a sufficient number of adequately trained employees for the facility.

Respondents' contentions that APHIS requirements for a sufficient number of adequately trained employees is merely an "interpretation" of the standards by the inspectors and an unreasonable expectation that employees should be conducting regulated tasks "at every moment of every day" is without merit. The Standards, 9 C.F.R. § 3.132, require that a "sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth" in the Standards and that "[s]uch practices shall be under a supervisor who has a background in animal care."[407] Respondents cited

---

[402] Respondents' Post-Hearing Brief at 21 (citing "Transcript at 71:3-9 in Testimony of Jessica Amin on 10/04/18"; "Transcript at 25:16-19 in Testimony of Tim Stark on 10/05/18 identifying 60 volunteers"; RX 24, 27,64). *See also* Respondents' Proposed Findings & Conclusions at 6 ¶ 23.

[403] *Id.* (citing "Transcript at 93:13-96:2 in Testimony of Jessica Amin on 10/04/18").

[404] *Id.* at 22 (referring to sanitation related regulations, 9 C.F.R. §§ 3.1(c)(3) and 3.11(a); citing *Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421 (6th Cir 2000)).

[405] Tr. Vol. 7, 1874:12-1875:11 (Ms. Amin testifying as to the number of full-time employees she recalls being on staff with Respondents over the years).

[406] *See* Tr. Vol. 2, 518:25-520:1-12; CX 14.

[407] 9 C.F.R. § 3.132.

Hodgins, in which the 6th Circuit observed that an inspector's interpretation that cleaning be performed three times per day "goes too far."[408] However, here the inspectors' were not making such interpretations. Dr. Miller's testimony was clear that the violation was found not because of an expectation that tasks must be done "at every moment of everyday"[409] but because of the general overall lack of upkeep at the facility, the number and significance of violations, made it apparent that there were not enough trained employees to maintain the facility.[410] The preponderance of the evidence shows that Respondents failed to employ a sufficient number of adequately trained employees as required that would permit them to maintain a "professionally acceptable level of husbandry practices" set forth in the Standards. Therefore, I find that Respondents violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.132.

d. Complaint Paragraphs 23a-i (May 6, 2014)

Complainant alleges that "on or about May 6, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a) by failing to meet the Standards," including 9 C.F.R. §§ 3.3(e)(1), 3.10, 3.11(b)(2), 3.125(a), 3.127(a), and 3.130.[411]

1. Moisture in hybrid-dog enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1), by housing "three dogs in enclosures with surfaces that were not impervious to moisture."[412] Complainant provides the May 6, 2014 Inspection Report competed by ACI Houser, including photographs, observing a repeat violation regarding the enclosure for the three wolf-dog and two coyote-dog hybrids in which the shelter that was

---

[408] *Hodgins v. U.S. Dep't of Agric*., 2000 WL 1785733, *28, 238 F.3d 421 (Table) (6th Cir. 2000).

[409] Respondents' Post-Hearing Brief at 22.

[410] *See* Tr. Vol. 2, 520:1-12.

[411] Complaint at 18-19, ¶¶ 23a-i.

[412] Complaint at 19, ¶ 23a.

constructed of unsealed wood that is not impervious to water with support posts that have been chewed, and the dirt floor does not have access to direct sunlight and cannot be sanitized.[413] ACI Houser explained that:

> hybrids are considered dogs. And under the dog regulation, every surface they come in contact with has to be impervious to moisture. It has to be sealed. Also, because of the dog regulation, it requires daily spot cleaning. So, when they're in an enclosure, if they go, you know -- if they -- if they defecate that day, at least once a day -- once a day, they need to at least spot clean and pick up the solids so that they're not stepping in it. They can't get away from it.[414]

Aside from their general contentions, [415] Respondents do not address this allegation or provide any specific evidence to rebut Complainant's evidence.

Respondents' general contentions are unsupported by the record and Complainants show by a preponderance of the evidence that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1), because their facilities that were not impervious to moisture. Thus, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.3(e)(1).

2. Potable water for animals

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130, by failing "to provide potable water to a dog"[416] and failing to "provide potable water to multiple tigers, four bears, one cougar, and one lion."[417] ACI Houser testified that this was a repeat

---

[413] CX 22 at 1. *See also* CX 22 at 5-6 (photos of the hybrid dog enclosure).

[414] Tr. Vol. 3, 666:18-667:2.

[415] Respondents' Post Hearing Brief at 20; *see supra* note 333.

[416] Complainant's Post-Hearing Brief at 100 (Citing CX 22).

[417] Complaint at 19, ¶ 23i.

citation and that:

> There were several -- all of the tiger water pools; 3 enclosures 1, 2, 3, 4, and 5, and including the bears, a cougar, the lion and -- and dog waters; all of these waters were full of green algae to where they actually had floating -- floating pads of algae. And this -- we -- we require that animals have potable water. They have to have water accessible to them that's clean to drink. And -- and when there's algae floating and – and pods of algae, that is not acceptable for numerous reasons. And this was something that Mr. Stark had stated that he -- it had been about three weeks or so since he had gotten to that due to construction issues.[418]

Aside from Respondents' general contentions, [419] they do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

---

[418] Tr. Vol. 3, 677:1-15 (referencing CX 22 at 3). Noting that the Inspection Report, CX 22, does not cite 9 C.F.R. § 3.10. *See also* Tr. Vol. 3, 678:2-25 (referencing CX 22 at 7 (photo of "Floating algae in drinking water tub in cougar enclosure with a dark green color and algal debris/foam on top"), 8 (photo of "Algae along bottom and gloating in tiger enclosure 2 water tub/bath pool causing water to be green), 12 (photo of "Bear enclosure with pond" green with algae)); CX 22 at 9 (photo of tiger enclosure 4 with green water in tub), 10 (photo of tiger enclosure 5 with green water in tub).

[419] Respondents' Post-Hearing Brief at 19 (contending that "violations were based upon appearances and not proof of actual and potential risk to animals or visitors, and Complainant failed to substantiate these violations by a preponderance of the evidence in the requisite manner[;]" that "the record confirmed that Complainant failed to establish how the conditions which the inspectors described posed any true sanitation or health risks to any animal at Respondents facility[;]" and that "[n]o testing of the water was conducted, and regardless of inspector's personal concerns about potable water, the record fails to establish the actual amount of content of any water source, or that the water contained algae.") (citing *Tri-State Zoological Park of W. Maryland Inc.*, 71 Agric. Dec. 915, 954 (U.S.D.A. 2012); citing "Transcript at 34:5-16 in Testimony of Tim Stark on 10/04/18"; *Hoctor*, 56 Agric. Dec. 416 (U.S.D.A. 1977)). *See also* Respondents' Proposed Findings & Conclusions at 6 ¶ 22.

I reject Respondents' general contentions. The Standards do not require that inspectors test water and do not require inspectors to "establish the actual amount of content of any water source." The Standards, 9 C.F.R. §§ 3.10 and 3.130 require that potable water be provided and that "all water receptacles must be kept clean and sanitized" or "sanitary."

The record, including the photos of the green water in the enclosures, CX 22 at 7-9, 10, and 12, demonstrate that that the water receptacles were not "kept clean and sanitized." Therefore, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130.

2. Sanitization of primary enclosures for hybrid dogs

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.11(b)(2), by failing "to clean and sanitize two enclosures housing five hybrid dogs as required."[420] ACI Houser testified that this is a repeat violation and "in that sheltered enclosure, there was an accumulation of debris and feces that has not been cleaned for at least, you know, two or three days, from what Mr. Stark advised."[421] The Inspection Report, CX 22 at 2-3, completed by ACI Houser states that the enclosure has "an accumulation of more than 2 days of fecal material and hair." The Inspection Report, *id.*, explained that: "[a]ccumulated organic debris provides an optimal area for the growth of bacterial and fungal pathogens creating a disease hazard for the dogs. Additionally, this accumulated debris can attract pests including flies and vermin as well as contributes to odors within the facility."

Aside from their general contentions, [422] Respondents do not address this allegation specifically and do not provide specific evidence to rebut Complainant's evidence.

---

[420] Complainant's Post-Hearing Brief at 101 (citing Complaint ¶ 23c; CX 22 at 1; Tr. Vol. 3, 667).

[421] Tr. Vol. 3, 666:10-13 (referencing CX 22 at 1-2).

[422] Respondents' Post-Hearing Brief at 19; s*ee supra* note 343.

I reject Respondents' general contentions. Claims of compliance without more are not enough to rebut the evidence of noncompliance provided by Complainant. The Standards, 9 C.F.R. § 3.11(b)(2), require sanitization of food and water receptacles for dogs "at least once every 2 weeks." or as necessary to "prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards." While Complainant contends, CX 22 at 1, that the enclosure had not been cleaned in at least two days, the fact of the accumulation of debris, food waste, and excreta is a preponderance of the evidence to the contrary. Thus, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.11(b)(2).

3. Tiger, Lion and Bear Enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.125(a), by housing tigers and lions in "enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals" and housing bears and tigers in enclosures that were not maintained in good repair.[423] Complainant notes that "[a]lthough respondents had corrected tiger pens 2 and 3, tiger pens 1, 4, and 5 and lion pen 1 still had the same noncompliances as documented in the previous report."[424] ACI Houser testified these violations were repeat, and observed that:

> There were various tiger and lion pens that their fence height were not according to how our – our performance standards were being looked at that time. They were under 12 feet, and we required that they be at least 16 feet high – straight high, or at least, you know, 12 feet with 3-foot kick-ins. This was something that had been discussed in previous reports – previous inspections.[425]

---

[423] Complainant's Post-Hearing Brief at 106 (citing Complaint ¶ 23d; CX 22). *See also* Complaint at ¶¶ 23d-g.

[424] *Id.* (citing CX 22 at 2; Tr. Vol. 3, 670:11-671:10). *See also* Tr. Vol. 3, 673:19-24 (referencing CX 22 at 10 (photo of tiger enclosure 5 with fence less than 12 feet)).

[425] Tr. Vol. 3, 670:13-22.

ACI Houser also testified that in the bear enclosure:

> there were several pieces of 2x4 and timber with two to three inches of nail sticking through the boards that were face-up. So the -- the nails were sticking up, and they were -- it was littered throughout that enclosure, primarily over a walking path that's worn. And I actually observed the bears frequently step over those nails of the board in pacing back and forth to the fence.[426]

ACI Houser observed that a tiger enclosure contained a wooden spool that had

> several protruding nails poking through, as well as the -- the spool has degraded to such a point that if an animal was going to continue to step and climb on it, they could get stabbed or their -- you know, from the protruding wood points, or get their leg stuck in the center of the spool.[427]

As to the fence height "noncompliance" Complainant alleges, Respondents seem to generally contend that there is no such requirement in the AWA statute or Regulations.[428] Aside from their other general

---

[426] Tr. Vol. 3, 671:18-672:5. *See also* Tr. Vol. 3, 672:16-19 (referencing CX 22 at 4 (photo of boards with nails sticking out in bear enclosure), 674:2-13 (referencing CX 22 at 11 (photo of bear in enclosure stepping over board with nails), 674:16-675:2 (referencing CX 22 at 12 (photo of bear enclosure littered with boards, broken pieces of wood)).

[427] Tr. Vol. 3, 672:23-673:14 (referencing CX 22 at 9 (photo of tiger enclosure 4 with broken spool with nails and broken boards exposed as well as no kick-ins and fences with height under 12 feet)). *See also* Tr. Vol. 3, 675:4-12 (referencing CX 22 at 13 (photo of broken spook in tiger enclosure)).

[428] *See* RX 56 at :53-4:20 (video of January 20, 2016 exit interview where Respondent Stark argues with inspectors, stating that such fence height requirements are not in the "Blue Book," referring to the book containing AWA Statutes and Regulations); *see also* Tr. Vol. 3, 861-864.

contentions,[429] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

The Standards, 9 C.F.R. § 3.125(a), require that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals."[430] That Complainant presented no "evidence of any animal escaping confinement" is immaterial; such evidence is not required to prove a violation of 9 C.F.R. § 3.125(a).[431]

As previously discussed, *supra* pp. 85-87,[432] because Complainant does not specifically contend or set out that the alleged height, "kick-in," or "hot wire" requirements set out in APHIS guidance[433] —referred to by APHIS inspectors as "performance standards" or "written policy"[434]—are enforceable "policy" based on, or interpretive rules of, the Standard, 9 C.F.R. § 3.125(a), in this decision I do not reach the issue of whether these are enforceable requirements apart from what is required by the Regulations and Standards themselves.[435] In these circumstances, I evaluate the record, including ACI Houser's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

---

[429] Respondents' Post-Hearing Brief at 18; see *supra* n. 278.

[430] 9 C.F.R. § 3.125(a).

[431] *See supra* note 280 and accompanying text.

[432] In discussion regarding Complaint ¶¶ 22g-h.

[433] *See* RX 2.

[434] *See* Tr. Vol. 2, 413:12-414:1 (where Dr. Miller refers to the alleged height requirements as "written policy"); Tr. Vol. 3, 670:11-22 (where ACI Houser refers to the alleged height requirements as "performance standards").

To reiterate, although Complainant and Complainant's witnesses used the term "performance standard" throughout testimony and reports, any reference to or use of the words "performance standards" or "standards" are not to be confused with the regulation Standards (9 C.F.R. pt. 3) referred to capitalized.

[435] *See supra* note308.

Complainant's evidence of dangerous debris found in the animal enclosures, including ACI Houser's testimony and photographs of the boards with protruding nails in the bear enclosure and spools with jagged nails in the tiger enclosure, shows that Respondents failed to maintain the facilities "in good repair." However, the evidence provided by Complainant, including inspector's testimony and report stating that the fence height not meet that set out in the alleged "performance standards,"[436] does not show that the enclosures were not "constructed of such material and of such strength as appropriate . . . [or] maintained in good repair to protect the animals from injury and to contain the animals," 9 C.F.R. § 3.125(a). ACI Houser does not explain, and Complainant does not otherwise provide expert testimony or evidence, as to why the current fence could not contain the animals. I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a) as to the bear enclosure and tiger enclosures containing dangerous debris; but Complainant did not show by a preponderance of evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a) as to the tiger and lion enclosures' ability to contain the animals.

---

[436] ACI Houser, as mentioned, refers to the height, kick-in, and hot-wire "requirements" as "performance standards." Other inspectors have also referred to these "requirements" as "performance standards," *see* RX 56 (video of January 20, 2016 exit interview). However, Complainant has not addressed the source of such "performance standards," the authority from which they stem, the enforceability of such, or whether they are binding on licensees or me. *See* Tr. Vol. 3, 861:9-864:17 (where Respondent Stark, in cross-examination of ACI Houser, asks in reference to RX 2, entitled "Lion and Tiger Enclosure Heights and Kick-Ins Inspection," whether these "performance standards" are "actually considered." ACI Houser says that it is "information . . .that our agency sent to all licensees in regards to the charges in the performance standards and what you need to do to become compliant for the future" but is otherwise unable to testify as to whether such "performance standards" are policy, guidance, or regulation); Tr. Vol. 6, 1533:3-1535:25 (where Respondent Stark, in cross-examination of Dr. Kirsten, asks where the height requirements are stated in the "Blue Book" and Dr. Kirsten attempts to explain in various ways that the "Blue Book" contains the Regulations and Standards and that the height requirement is a "performance standard," but otherwise does explain why the "performance standard" should be or is enforceable).

4. Enclosures with inadequate shade

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.127(a) by "hous[ing] twelve animals (eight foxes, one cougar, and three porcupines) in enclosures that did not provide them with adequate shade."[437] ACI Houser testified that, during the inspection, she observed that none of these enclosures had shade, "the sun was beating down on top of them," and that, even though the foxes had plastic igloos, such shelter would be too hot to seek shelter.[438] ACI Houser explained that Respondent Stark corrected the lack of shade by the end of the inspection.[439]

Aside from their general contentions, [440] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.127(a) require that "sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight." Here, it appears that

---

[437] Complaint at 19, ¶ 23h.

[438] Tr. Vol. 3, 675:25-676:11.

[439] Tr. Vol. 3, 676:12-23; CX 22 at 3.

[440] Respondents' Post-Hearing Brief at 19-20 (contending that "violations were based upon appearances and not proof of actual and potential risk to animals or visitors, and Complainant failed to substantiate these violations by a preponderance of the evidence in the requisite manner" and that "[t]here was no preponderance of reliable evidence that Respondents . . . failed to provide . . . adequate shade or shelter for any animal" but that "unrebutted testimony by Respondents' veterinarians reflected that more than adequate . . . shade, and shelter were provided for all of the animals involved, and met or exceeded scientific standards per industry standard publications.") (citing *Tri-State Zoological Park of W. Md., Inc.*, 71 Agric. Dec. 915, 954 (U.S.D.A. 2012); Hosey, G., Me.fi, V., & Pankhurst, S. (2013. *Zoo animals: behavior, management, and welfare.* Oxford University Press.). *See also* Respondents' Proposed Findings & Conclusions at 6 ¶ 22.

I note that Respondents do not cite to the "unrebutted" veterinarian testimony regarding this matter and a search of the transcripts did not reveal relevant testimony by Respondents' veterinarian Dr. Pelphrey.

Respondents immediately corrected the lack of shade for the specified enclosures during the inspection. While subsequent correction of a violation does not obviate the violation,[441] it is considered for the purposes of penalties. I find that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(a).

e. Complaint Paragraphs 24a-f (August 20, 2014)

Complainant alleges that "on or about August 20, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a) by failing to meet the Standards," including 9 C.F.R. §§ 3.3(e)(1), 3.10, 3.125(a), and 3.130.[442]

1. Moisture in hybrid-dog enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1), by housing "three dogs in enclosures with surfaces that were not impervious to moisture."[443] Complainant provides the testimony of ACI Houser who observed that these housing issues, regarding the enclosures of dog hybrids and coyote-dogs, were repeat violations; ACI Houser stated "nothing had been changed . . . [n]othing had been sealed . . . he did not repair the issue from the last inspection."[444] Aside from their general contentions, [445] Respondents do not address this allegation or provide specific evidence to rebut Complainant's evidence. Respondents' general contentions are unsupported by the record and Complainants show by a preponderance of the evidence that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1), by maintaining facilities that are impervious to moisture. Thus, I find Respondents violated the

---

[441] *Hodgins*, 1997 WL 392606, at *22 (quoting *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 142 (U.S.D.A. 1996)).

[442] Complaint at 19-20, ¶¶ 24a-f.

[443] Complainant's Post-Hearing Brief at 97 (Citing Complaint ¶ 24a).

[444] Tr. Vol. 3, 688:4-9 (referencing CX 23 at 2). *See also* Tr. Vol. 3, 689:19-690:2 (referencing CX 23 at 6 (photo of "hybrid wolf enclosure with unsealed wood and buildup of excreta and old food")), 690:9-15 (referencing CX 23 at 8 (photo of "unsealed wood and chewed posts in hybrid dog enclosure.")).

[445] Respondents' Post Hearing Brief at 20; *see supra* note 333.

Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.3(e)(1).

2. Potable water for animals

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130, by failing "to provide potable water to a dog"[446] and failing to "provide potable water to multiple tigers, four bears, two cougars, and one lion."[447] ACI Houser testified that this was a repeat citation and that:

> Now all of the tiger enclosures: 1, 2, 3, 4, and 5 were full of algae. The bears, the cougars, the lion, and . . . the eight foxes and the cougar and the porcupines al -- also had the algae. But basically the conditions were the same if not a little worse.[448]

Aside from Respondents' general contentions, [449] they do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

I reject Respondents' general contentions. The Standards do not require that inspectors test water and do not require inspectors to "establish the actual amount of content of any water source." The Standards, 9 C.F.R. §§ 3.10 and 3.130 require that potable water be provided and that "all water

---

[446] Complainant's Post-Hearing Brief at 100 (Citing CX 23).

[447] Complaint at 20 ¶ 24f.

[448] Tr. Vol. 3, 689:7-14 (referencing CX 23 at 4). Noting that the Inspection Report, CX 23, does not cite 9 C.F.R. § 3.10. *See also* Tr. 691:6-692:3 (referencing CX 23 at 11 (photo of "Cougar 1 water with floating algae"), 12 (photo of "Lion enclosure 1 with . . . algae in water tank for lion and dog"), 13 (photo of "All water buckets(6) in fox enclosures with floating algae), 14 (photo of "Tiger enclosure 5 . . .with water tanks with floating algae")); CX 23 at 16 (photo of "Tiger enclosure 4 with pool and drinking water fool of floating algae and algae buildup in tank"), 17 (photo of "Black leopard water tank full of floating algae and algae buildup. Has not been cleaned 6-8 days."), 19 (photo of "Floating algae and algae buildup in cougar 2 water.").

[449] Respondents' Post-Hearing Brief at 19; *see supra* note 419.

receptacles must be kept clean and sanitized" or "sanitary."

The record, especially the photos of the green water in the enclosure, CX 29 at 11-14, clearly demonstrates that that the water receptacles were not "kept clean and sanitized." Thus, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130.

3. Sanitization of primary enclosures for hybrid dogs

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.11(b)(2), by failing "to clean and sanitize two enclosures housing five hybrid dogs as required."[450] ACI Houser testified that this is a repeat violation and "the enclosure with five dogs and hybrids, still [had] a large accumulation of fecal debris and food."[451] The Inspection Report, CX 23 at 3, completed by ACI Houser states that the enclosure has "an accumulation of more than 2 days of fecal material and hair" and the "meat that was put into the enclosure had an accumulation of fly eggs due to the heat and moisture over the past 2 days, and has not been eaten or the left over waste removed." The Inspection Report, *id.*, explained that: "[a]ccumulated organic debris provides an optimal area for the growth of bacterial and fungal pathogens creating a disease hazard for the dogs. Additionally, this accumulated debris can attract pests including flies and vermin as well as contributes to odors within the facility."

Aside from their general contentions, [452] Respondents do not address this allegation specifically and do not provide specific evidence to rebut Complainant's evidence.

I reject Respondents' general contentions. Claims of compliance without more are not enough to rebut the evidence of noncompliance provided by Complainant. The Standards, 9 C.F.R. § 3.11(b)(2), require

---

[450] Complainant's Post-Hearing Brief at 117 (citing Complaint ¶ 24(c); CX 23; Tr. Vol. 3, 688:14-18).

[451] Tr. Vol. 3, 688:14-18, 689:22-690:2 (referencing CX 23 at 3, 6 (photo of enclosure)).

[452] Respondents' Post-Hearing Brief at 19-20; s*ee supra* note 343.

that sanitization of water receptacles for dogs and cats "to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards." While Complainant contends, CX 23 at 3, that the enclosure had not been cleaned in at least two days, it is apparent that accumulation of debris, food waste, and excreta had accumulated. Thus, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.11(b)(2).

4. Tiger, Lion, and Bear Enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.125(a), by housing lions and tigers "in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals" and bears in an enclosure "with a wooden walkway that was in disrepair, and there were broken pieces of wood with exposed nails inside the bear enclosure." [453]

ACI Houser testified that some of these violations were repeat, including "tigers pen 4, tiger pen five, and 1 that were still out of compliance" and "the bear enclosure with the pond that had all of the wooden boards and nails sticking through, that -- all of that was still lying on the -- on the ground. None of that had been picked up."[454] ACI Houser also testified that, during the inspection, she observed that the fence height in the lion enclosure had not been repaired.[455]

Aside from their general contentions,[456] Respondents do not address this allegation specifically or provide specific evidence to rebut the

---

[453] Complainant's Post-Hearing Brief at 122 (citing Complaint ¶¶ 24d, 24e; CX 23; Tr. 688:21-689:4).

[454] Tr. Vol. 3, 688:21-689:4 (referencing CX 23 at 3-4). *See also* Tr. 690:24-691:5 (referencing CX 23 at 9-10 (photos of the bear enclosure where boards are left with nails in them).

[455] Tr. Vol. 3, 691:8-14 (referencing CX 23 at 12 (photo of the lion enclosure fence)), 692:6-9 (referencing CX 23 14-15 (photos of fence enclosures less than 12 feet in height)).

[456] Respondents' Post-Hearing Brief at 18; see *supra* note 278. *See also supra* note 428.

evidence offered by Complainant.

The Standard, 9 C.F.R. § 3.125(a), requires that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." There is no requirement that there be proof an animal has escaped an enclosure to show that a licensee has failed to meet the Standards.[457]

As previously discussed, *supra* pp. 85-87,[458] and *supra* pp. 117-120,[459] in this decision I do not reach the issue of whether the fence height, "kick-in" and "hot-wire" "performance standards" are enforceable requirements apart from what is required by the Regulations and Standards themselves.[460] In these circumstances, I evaluate the record, including ACI Houser's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

Complainant's evidence of dangerous debris found in the animal enclosures, including ACI Houser's testimony and photographs of the boards with protruding nails in the bear enclosure, shows that Respondents failed to maintain the facilities "in good repair." However, the record evidence does not show that the lion and tiger enclosures, particularly the existing fence, could not contain the animals as constructed. I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a) as to the bear enclosure; but Complainant did not show by a preponderance of evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a) as to the tiger and lion enclosures.

f. Complaint Paragraphs 25a-g (July 27, 2015)

---

[457] *See supra* note 280 and accompanying text.

[458] In discussion regarding Complaint ¶¶ 22g-h.

[459] In discussion regarding Complaint ¶¶ 23d-g.

[460] *See supra* note 308.

Complainant alleges that "on or about July 25, 2015, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a) by failing to meet the Standards," including 9 C.F.R. §§ 3.1(a), 3.10, 3.125(a), 3.130, and 3.129.[461]

1. Housing facility for dog

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.1(a), when, during inspection, "APHIS found that respondents housed a dog (Bandit) in an enclosure that contained sheets of unused siding adjacent to the shelter structure."[462] Complainant provides the July 27, 2015 Inspection Report, CX 29, by Dr. Kirsten which does not specifically refer to a failure to meet standard 9 C.F.R. § 3.1(a) but does provide a photo, at 8, of "pieces of sheet steel laying on ground next to shelter for Lion, Chief, and dog, Bandit."

Aside from their general contentions, [463] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.1(a) require that "Housing facilities for dogs and cats must . . . be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering." The photographic evidence provided does not show whether the sheet metal is in the dog's enclosure and there is no supporting narrative in the Inspection Report, CX 29. However, Dr. Kirsten testified that "there were sheets of metal siding laying next to the

[461] Complaint at 20-21 ¶¶ 25a-g.

[462] Complainant's Post-Hearing Brief at 95 (citing CX 29).

[463] Respondents' Post-Hearing Brief at 19 (contending that "violations were based upon appearances and not proof of actual and potential risk to animals or visitors, and Complainant failed to substantiate these violations by a preponderance of the evidence in the requisite manner.") (citing *Tri-State Zoological Park of W. Md., Inc.*, 71 Agric. Dec. 915, 954 (U.S.D.A. 2012)).

shelter for the lion in the -- in the pen."[464] I reject Respondent's general contentions and agree with Complainant that sheets of metal siding in an enclosure are noncompliant with the standard as they present a risk of injury to the animals. Thus, I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.1(a).

2. Potable water for animals

Second, Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130, by failing to keep the water receptacle for a dog (Bandit) and a lion (Chief) clean and sanitized.[465] Dr. Kirsten testified that, during the inspection he observed that there was "green water in the enclosure for the lion, Chief, and dog, Bandit" which is corroborated by the Inspection Report and accompanying photos.[466]

Aside from Respondents' general contentions, [467] they do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

I reject Respondents' general contentions. The Standards do not require that inspectors test water and do not require inspectors to "establish the actual amount of content of any water source." The Standards, 9 C.F.R. §§ 3.10 and 3.130 require that potable water be provided and that "all water receptacles must be kept clean and sanitized" or "sanitary."

The record, especially the photo of the green water in the enclosure, CX 29 at 7, clearly demonstrates that that the water receptacle was not "kept clean and sanitized." I find Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.10 and 3.130.

3. Lion, tiger, and hyena enclosures

---

[464] Tr. Vol. 5, 1468:14-16. It has been established that the dog Bandit and the lion Chief cohabitate in an enclosure.

[465] Complainant's Post-Hearing Brief at 100 (citing CX 29).

[466] Tr. Vol. 5, 1468:20-21 (referencing CX 29 at 1, 7 (photo)).

[467] Respondents' Post-Hearing Brief at 19; *see supra* note 419.

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.125(a), by housing tigers and lions "in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals[;]"hyenas in enclosures with "broken wires protruding into the enclosure"; and a lion in an enclosure "that contained sheets of unused siding adjacent to the shelter structure." [468] Complainant also contends, *id.,* "[n]one of these enclosures have any angled top fencing (kick-in), or any additional means to ensure adequate containment."

Complainant provides the testimony of Dr. Kirsten who stated that, during the inspection, he observed a repeat violation "in that, there was still three pens, large feline pens, that were out of compliance with that section, Tiger Pen 4 and 5 and Lion Pen 1. Also[,] there were some broken wire ends protruding into the hyena enclosure. And there were sheets of metal siding laying next to the shelter for the lion in the -- in the pen."[469] Dr. Kirsten explained that "[t]he kick-in is…required as – in order to prevent escape. And especially on -- well in enclosures that are at least 12 feet high, and then we, you know, for the – we've asked persistently for a 3-foot kick-in on those enclosures."[470]

Aside from their general contentions,[471] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

The Standard, 9 C.F.R. § 3.125(a), requires that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." There is no requirement that there be proof an animal

---

[468] Complainant's Post-Hearing Brief at 106-7 (citing Complaint ¶ 25(c)-25(e)).

[469] Tr. Vol. 5, 1468:9-16 (referencing CX 29 at 1, 5 (photo of broken wire ends in hyena enclosure), 8 (sheet metal in lion enclosure)).

[470] Tr. Vol. 5, 1471:8-16. *See also* Tr. 1472:20, 1473-1475; CX 29 at 1.

[471] Respondents' Post-Hearing Brief at 18; see *supra* note 278. *See also supra* note 428.

has escaped an enclosure to show that a licensee has failed to meet the Standards.[472]

As previously discussed, *supra* pp. 85-87,[473] and *supra* pp. 117-120,[474] in this decision I do not reach the issue of whether the fence height, "kick-in" and "hot-wire" "performance standards" are enforceable requirements apart from what is required by the Regulations and Standards themselves.[475] But the record evidence, including ACI Houser's testimony, demonstrate by a preponderance of the evidence that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

Complainant's evidence of dangerous debris found in the animal enclosures, including Dr. Kirsten's testimony and photographs showing hanging wires in the hyena enclosures and sheet metal debris in the lion enclosure, shows that Respondents failed to maintain these facilities "in good repair." However, the record does not show that the lion and tiger enclosures were not constructed "in a manner that would contain those animals." Aside from citing the "performance standard," Dr. Kirsten does not testify, and Complainant provides no other expert testimony or evidence, as to why a "kick-in" is required or why the lion and tiger enclosure fencing could not contain the animals as constructed. Therefore, I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a), by failing to maintain the lion, and hyena enclosures in good repair; but Complainant did not show by a preponderance of the evidence that the lion and tiger enclosures were insufficient to contain the animals.

4. Diet for animals

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.129, by failing "to provide juvenile tigers a diet that was wholesome, palatable, and free from contamination and prepare with

---

[472] *See supra* n. 280 and accompanying text.

[473] In discussion regarding Complaint ¶¶ 22g-h.

[474] In discussion regarding Complaint ¶¶ 23d-g.

[475] *See supra* note 308.

consideration for the age, species, condition, size, and type of animals."[476] Dr. Kirsten testified that "there were four 10-week-old tiger cubs that were on a diet which was described to me as 100 percent formula, utilizing Fox Valley 32/40. They were no -- I was told they were not being offered any ground meat at the time" and he explained the diet he recommended to licensee.[477] In his Inspection Report, CX 29 at 1-2, Dr. Kirsten explains that "[b]y the time they [the baby tigers] are 10-12 weeks old they should be getting a diet very close to that of an adult in order to provide for added nutritive value."

Aside from Respondents' general contentions, [478] Respondents do not address this allegation specifically or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.129, require in relevant part that animals' food "shall be wholesome, palatable, and free from contamination and . . .shall be prepared with consideration for the age, species, condition, size, and type of the animal." I find that Complainants have shown by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.129.

g. Complaint Paragraphs 26a –l (October 8, 2015)

The Complaint alleges that "on or about October 8, 2015, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a) by failing to meet the Standards," including 9 C.F.R. §§ 3.1(a), 3.3(e)(1), 3.4(b)(2), 3.80(a)(2)(viii), 3,125(a), and 3.127(d).[479]

---

[476] Complaint at 21, ¶ 25g.

[477] Tr. Vol. 5, 1468:25-1469:16.

[478] Respondents' Post-Hearing Brief at 19 (contending "violations were based upon appearances and not proof of actual and potential risk to animals or visitors, and Complainant failed to substantiate these violations by a preponderance of the evidence in the requisite manner.") (citing *Tri-State Zoological Park of W. Md., Inc.*, 71 Agric. Dec. 915, 954 (U.S.D.A. 2012)). *See also* Respondents' Proposed Findings & Conclusions at 5 ¶ 24.

[479] Complaint at 21-22 ¶¶ 26a-l.

1. Housing facility for dog

Complainant contends that "APHIS found that respondents housed two dogs in an enclosure that contained a shelter in disrepair, with exposed nails and detached wood" in noncompliance with the Standards, 9 C.F.R. § 3.1(a).[480] Complainant provides the testimony of ACI Houser who stated that during the inspection she observed an enclosure for two dogs in which the shelter had "various broken planks of wood, more pulled apart on the roof and on the sides" and that "[n]ails were exposed."[481]

Aside from their general contentions, [482] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.1(a) require that "Housing facilities for dogs and cats must . . . must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering." Based on the Inspection Report and ACI Houser's testimony, as well as and the lack of evidence offered by Respondents to rebut Complainant's evidence, I find that the preponderance of evidence shows that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.1(a).

2. Moisture in dog enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1), by housing "two Terrier dogs in enclosures with surfaces that were not impervious to moisture."[483] ACI Houser testified

---

[480] Complainant's Post-Hearing Brief at 95 (citing Tr. Vol. 3, 707-714; CX 35). Noting that the Inspection Report includes the narrative of the green water in the dog Bandit and the lion Chief's enclosure under cite to violation of standard 9 C.F.R. § 3.130.

[481] Tr. Vol. 3, 707:7-22 (referencing CX 35 at 2, 9 (photo)). The photo does not show wood enclosure alleged to be in disrepair with exposed nails.

[482] Respondents' Post-Hearing Brief at 19; *see supra* note 463.

[483] Complainant's Post-Hearing Brief at 98 (citing Complaint ¶ 26(b); CX 35; Tr. Vol. 3, 707-714).

that the "two terrier dogs . . . had unsealed and chewed the wood on all sides of their kennel."[484]

I find the record insufficient to show that Respondents failed to meet the Standards, 9 C.F.R. § 3.3(e)(1). Aside from ACI Houser's brief testimony about the terriers' kennel, which does not fully explain why the chewed wood might cause the kennel to be permeable to moisture, the Inspection Report does not reference Standard 9 C.F.R. § 3.3(e)(1), and there is no photographic evidence showing whether the enclosure was impervious to moisture.

3. Outdoor facilities for dogs

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.4(b)(2), by housing "two dogs, a Great Dane and a Mastiff, in an enclosure that did not provide the dogs with adequate shelter from the sun."[485] ACI Houser testified that the enclosure housing the Great Dane and mastiff did not have any shade aside from a plastic container used as a dog house.[486]

Aside from their general contentions, [487] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standard, 9 C.F.R. § 3.4(b)(2), requires that "[s]helters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must . . . [p]rovide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow." I reject Respondents general contentions. Complainant provided testimonial, written, and photographic evidence in support of this allegation, all

---

[484] Tr. Vol. 3, 707:13-14 (referencing CX 35 at 2). I note that the Inspection Report, CX 35, does not recite a violation of 9 C.F.R. § 3.3(e)(1) and does not include any pictures of the terriers' kennel.

[485] Complainant's Post-Hearing Brief at 98 (citing CX 35; Tr. Vol. 3, 707-714).

[486] Tr. Vol. 3, 708:3-9 (referencing CX 35 at 2, 9 (photo)). I note that the photo is focused on the Great Dane and does not show the full enclosure.

[487] Respondents' Post-Hearing Brief at 19-20; *see supra* note 440.

unrebutted by Respondent. Therefore, I find that Complainant has shown by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.4(b)(2).

4. Convenient access to food and water for primates

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.80(a)(2)(viii) by housing "three ring-tailed lemurs in an enclosure that did not provide them with easy and convenient access to food and water." [488] ACI Houser testified that, during the inspection, she observed that the "[g]uillotine door for three ring-tailed lemurs was broken and did not allow for the lemurs to be able to get inside the shelter facility overnight" but, because the lemurs' food and water were on the inside, the lemurs "had been locked out without food and water or shelter outside all night long."[489]

Aside from general contentions, [490] Respondents do not specifically address or deny this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.80(a)(2)(viii), require that "[p]rimary enclosures must be constructed and maintained so that they . . . [p]rovide the nonhuman primates with easy and convenient access to clean food and water. I find that Complainant has shown by a preponderance of the record

---

[488] Complainant's Post-Hearing Brief at 101 (citing Complaint ¶ 26(d); Tr. Vol.3, 707-714; CX 35)

[489] Tr. Vol. 3, 713:15-714:7 (referencing CX 35 at 5). The Inspection Report does not contain any photographic evidence of the lemur enclosure.

[490] Respondents' Post-Hearing Brief at 19 (contending ""violations were based upon appearances and not proof of actual and potential risk to animals or visitors, and Complainant failed to substantiate these violations by a preponderance of the evidence in the requisite manner") (citing *Tri-State Zoological Park of W. Md., Inc.*, 71 Agric. Dec. 915, 954 (U.S.D.A. 2012)); *id.* at 21 (contending "deficiencies that were either corrected or were not timely allowed to be corrected simply cannot be used to support a license suspension or enforcement proceeding.") (citing *Hodgins v. U.S. Dep't of Agric.,* 238 F3d 421 (6th Cir 2000)).

evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.80(a)(2)(viii).

5. Tiger, lion, hyena, and cougar enclosures

Complainant contends that Respondents failed to meet the Standards, 9 C.F.R. § 3.125(a), by housing tigers and lions "in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals" and hyenas, a cougar, and multiple tigers in enclosures that were in disrepair.[491] ACI Houser testified that, during the inspection, she observed a repeat violation of the tiger and lion pens not having the correct fence height and having a "large amount of bone and debris litter in the enclosure," and a "hyena enclosure where the fencing had been pulled apart, so there were numerous wires there were protruding into the enclosure approximately six to nine inches of length" which were poking the hyena in the chest and neck.[492] ACI Houser also stated that the shelter for the cougar had "a roof and side wall that was broken – and needed to be repaired."[493]

Aside from their general contentions,[494] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

The Standard, 9 C.F.R. § 3.125(a), requires that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall

---

[491] Complainant's Post-Hearing Brief at 107-8 (citing Complaint ¶ 26(e)-26(k); Tr. Vol. 3, 707-714; CX 35).

[492] Tr. Vol. 3, 708:10-709:5 (referring to CX 35 at 3-4, 10 (photo of Pen #5, lion enclosure), 11(photo of Pen #6, tiger enclosure)), 710:1-9 (referring to CX 35 at 12 (photo of Pen #4, lion enclosure)), 710:20-711:6 (referring to CX 35 at 14 (photo of hyena enclosure)).

[493] Tr. Vol. 3, 709:6-9, 710:12-17 (referring to CX 35 at 13, 16 (photo of cougar enclosure with broken fence), 711:9-17 (referring to CX 35 at 14 (photo of cougar enclosure with debris)).

[494] Respondents' Post-Hearing Brief at 18; see *supra* note 278. *See also supra* note 428.

be maintained in good repair to protect the animals from injury and to contain the animals." There is no requirement that there be proof an animal has escaped an enclosure to show that a licensee has failed to meet the Standards.[495]

As previously discussed, *supra* pp. 85-87,[496] and *supra* pp. 117-120,[497] in this decision I do not reach the issue of whether the fence height, "kick-in" and "hot-wire" "performance standards" are enforceable requirements apart from what is required by the Regulations and Standards themselves.[498] In these circumstances, I evaluate the record, including ACI Houser's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

Complainant's evidence of dangerous debris found in the animal enclosures, including ACI Houser's testimony and photographs showing protruding wires in the hyena enclosure and bone debris and litter in the tiger enclosures, shows that Respondents failed to maintain the facilities "in good repair." However, the record does not show that the lion and tiger enclosures were not constructed "in a manner that would contain those animals." ACI Houser does not explain, and Complainant provides no other expert testimony or evidence, as to why the fences of the lion and tiger enclosures as constructed would not contain the animals. Therefore, I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a), by not maintaining the tiger and hyena enclosures in good repair; but I find that Complainant did not show by a preponderance of the evidence that the lion and tiger enclosures were insufficient to contain the animals.

6. Perimeter fences

Complainant contends that Respondents did not meet the Standards, 9

---

[495] *See supra* n. 280 and accompanying text.

[496] In discussion regarding Complaint ¶¶ 22g-h.

[497] In discussion regarding Complaint ¶¶ 23d-g.

[498] *See supra* note 308.

C.F.R. § 3.127(d), by housing animals in facilities with an inadequate perimeter fence that would sufficiently "protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence."[499] ACI Houser testified that she observed that the height of the fence did not meet height requirement set out in the Standards, 9 C.F.R. § 3.127(d), and that:

> a large section that two poles had been damaged; they had been bent approximately two feet off the ground, which allowed an angle of the fence posts in such a way that, you know, it -- it changed the height of the perimeter fence as well as the strength of it. And on the two poles, there's -- there were no fence clips connected to it, so the fence was just loose on it, resulting in a weak area in a that, you know, if an animal want [sic] to, they could either get in or out. This -- this stretched approximately 20 to 40 feet in length of – this area of disrepair.[500]

Complainant did not provide any photographs or other evidence of the structural instability of the fence at issue.

Aside from their general contentions,[501] Respondents do not address this allegation specifically or provide specific evidence to rebut the evidence offered by Complainant.

That Complainant did not present evidence of an actual animal escape is immaterial to whether Respondents violated the Standard.[502] Respondent's other general contentions are without merit. The Standard, 9 C.F.R. § 3.127(d), requires that outdoor housing facilities must be enclosed by a perimeter fence at least eight feet high for dangerous animals and at least six feet high for other animals (unless exempted in writing by the Administrator after a submitted request for exemption by the licensee,

---

[499] Complaint ¶ 26(l).

[500] Tr. Vol. 3, 712:20-713:11 (referencing CX 35 at 4). The Inspection Report, CX 35, does not include pictures of the perimeter fencing.

[501] Respondents' Post-Hearing Brief at 18; *see supra* note 278.

[502] Respondents' Proposed Findings & Conclusions at 5 ¶ 16. *See supra* note 280.

and the record reveal no such exemption here). The regulation Standards, *id.*, require that a perimeter fence "protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility." I find that Complainant showed by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(d).

h. Complaint Paragraphs 27a-i (January 20, 2016)

The Complaint alleges that "on or about January 20, 2016, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a) by failing to meet the Standards," including 9 C.F.R. §§ 3.1(a), (c)(1)(ii), 3.4(b), 3.125(a), and 3.127(b).[503]

1. Housing facilities for dogs

Complainant contends that Respondents housed a hybrid dog in an "enclosure that contained a shelter in disrepair, with exposed nails and detached wood"[504] in violation of 9 C.F.R. §§ 3.1(a), (c)(1)(ii). ACI Houser testified that this is a repeat offence, that there were "two nails protruding out that can come in contact as the dogs jump on and off of the enclosure," and that a board on top of the shelter within the enclosure was missing "[s]o that just allows the rain and snow to go directly into the housing."[505]

Aside from their general contentions, [506] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. §§ 3.1(a), (c)(1)(ii), require that housing for dogs "must be designed and constructed so that they are structurally sound[,] . . . kept in good repair, and they must protect the animals from

---

[503] Complaint at 23-24, ¶¶ 27a-i.

[504] Complainant's Post-Hearing Brief at 95 (citing CX 36; Tr. Vol. 3., 720-729).

[505] Tr. Vol 3, 721:2-10 (referencing CX 36 at 2-3, 17-18 (photos)).

[506] Respondents' Post-Hearing Brief at 19; *see supra* note 463.

injury, contain the animals securely, and restrict other animals from entering." The Standards, *id.*, also require that "[i]nterior and any surfaces that come in contact with dogs or cats must: . . . [b]e free of jagged edges or sharp points that might injure the animals."

I reject Respondents general contentions. Complainant provided testimonial, written, and photographic evidence in support of this allegation sufficient to establish a *prima facie* violation, and Respondent presented no evidence in response. Therefore, I find that Complainant has shown by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. §§ 3.1(a), (c)(1)(ii).

2. Outdoor facilities for dogs

Complainant contends that Respondents failed to the meet the Standards, 9 C.F.R. §§ 3.4 and 3.4(b), by housing "a hybrid dog in an enclosure that contained a shelter that did not protect the dog from the elements, and housed a dog (Bandit) in an enclosure that contained a shelter that did not contain adequate bedding to protect the dog from the cold."[507] ACI Houser testified that during the inspection "the ground was snow-covered, it was extremely cold, there was a three-sided shelter, and there was no bedding on the floor. So the – the dog only had – the dirt or snow to lay on."[508]

Aside from their general contentions, [509] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

The Standards, 9 C.F.R. § 3.4, require that "[o]utdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility" which "contain a roof, four sides, and a floor," provide adequate protection from the cold and heat, and contain "clean, dry, bedding material if the ambient temperature is below

[507] Complainant's Post-Hearing Brief at 98 (citing CX 36, Tr. Vol.3, 720-729).

[508] Tr. Vol. 3, 721:16-24 (referring to CX 36 at 3, 20 (photo), 28 (photo)).

[509] Respondents' Post-Hearing Brief at 19-20; *see supra* note 440.

50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower."

I reject Respondents' general contentions. Complainant provided testimonial, written, and photographic evidence of this allegation. Therefore, I find that Complainant has shown by a preponderance of the evidence that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.4.

3. Tiger, lion, hyena, and coyote enclosers

Complainant contends that Respondents failed to meet Standards, 9 C.F.R. § 3.125(a), by housing tigers and lions "in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals[;]"[510]hyenas in in an enclosure in disrepair; and a coyote in an enclosure with a shelter that was open to the elements. ACI Houser testified that the tiger and lion enclosures were less than twelve feet high, a repeat violation and that the fencing of one of the tiger enclosures "was pulled away from his shelter box creating a hole about one to two feet in diameter with broken wires poking into the enclosure that could come into contact with the animals."[511] ACI Houser also testified that there was a section of the hyena enclosure "where the fence has been pulled apart, resulting in multiple wires protruding into the enclosure."[512] ACI Houser did not specifically testify as to the coyote enclosure this specific allegation (Complaint at 23, para. 27f) was not addressed in Complainant's Post-Hearing Brief.

Aside from their general contentions,[513] Respondents do not address this allegation specifically or provide specific evidence to rebut Complainant's evidence offered.

---

[510] Complainant's Post-Hearing Brief at 108 (citing Complaint ¶ 27(d)-27(f); CX 36; Tr. Vol. 3, 720-729).

[511] Tr. Vol. 3, 722:13-723:5 (referencing CX 36 at 3-4, 21-27 (photos)).

[512] Tr. Vol. 3, 723:6-12, 16-25 (referencing CX 36 at 3-4, 19 (photo)).

[513] Respondents' Post-Hearing Brief at 18; *see supra* note 278. *See also supra* note 428.

The Standard, 9 C.F.R. § 3.125(a), requires that facilities "must be constructed of such material and strength as appropriate for the animals involved" and that "housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." There is no requirement that there be proof an animal has escaped an enclosure to show that a licensee has failed to meet the Standards.[514]

As previously discussed, *supra* pp. 85-87,[515] and *supra* pp. 117-120,[516] in this decision I do not reach the issue of whether the fence height, "kick-in" and "hot-wire" "performance standards" are enforceable requirements apart from what is required by the Regulations and Standards themselves.[517] In these circumstances, I evaluate the record, including ACI Houser's testimony, to determine if a preponderance of the evidence demonstrates that Respondents violated the Standard as written, 9 C.F.R. § 3.125(a).

Complainant's evidence of dangerous debris found in the hyena enclosure, including ACI Houser's testimony and photographs of the protruding wires, shows that Respondents failed to maintain the enclosure "in good repair." Further, the evidence showing the gaps in fencing and broken wires in the tiger enclosure, particularly ACI Houser's testimony, demonstrate that the tiger enclosure was not "maintained in good repair to protect the animals from injury and to contain the animals" in accordance with the Standard. However, the record does not show that the lion enclosure was not constructed "in a manner that would contain those animals." Complainant does not provide specific evidence, either in ACI Houser's testimony or other expert testimony, explaining why the lion enclosure as constructed would not contain the animal.

I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a), as regards

---

[514] *See supra* note 280 and accompanying text.

[515] In discussion regarding Complaint ¶¶ 22g-h.

[516] In discussion regarding Complaint ¶¶ 23d-g.

[517] *See supra* note 308.

hyena enclosure not maintained in good repair and the tiger enclosure that was in disrepair and not sufficiently constructed to maintain the animals; but I find that Complainant did not show by a preponderance of the evidence that the lion enclosure was insufficient to contain the animal. Further, I do not find the record sufficient to show that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.125(a), with regards to a coyote enclosure as Complainant did not provide evidence or testimony regarding this allegation.

4. Shelter from elements for animals

Complainant contends that Respondents failed to meet Standards, 9 C.F.R. § 3.127(b), by housing "a coyote in an enclosure containing a shelter that was open to the elements," housing "three wolves in an enclosure containing a single shelter that was not adequate to accommodate all three wolves," and housing a lion and tiger "in an enclosure that did not provide adequate shelter from the elements for both animals."[518] ACI Houser testified that the enclosure housing wolves "only had one medium to large-size igloo" which was "about big enough for one of those animals, so that means the other two animals are completely out in the open." [519] ACI Houser also observed that the lion and tiger enclosure did not have enough shelter to fit all animals simultaneously but did not fully explain why or how the animals did not have adequate shelter.[520] However, the Inspection Report, CX 36, does not include pictures of the shelter in the lion and tiger enclosure. ACI Houser did not testify as to the coyote enclosure, the coyote enclosure is not mentioned in the Inspection Report, CX 36, and Complainant did not address the coyote enclosure in its Post-Hearing Brief.

Aside from their general contentions, [521] Respondents do not specifically address this allegation or provide specific evidence to rebut Complainant's evidence.

---

[518] Complaint at 23 ¶¶ 27g-i.

[519] Tr. Vol. 3, 727:22-728:7 (referencing CX 36 at 4, 18 (photo)).

[520] Tr. Vol. 3, 728:8-16 (referencing CX 36 at 4).

[521] Respondents' Post-Hearing Brief at 19-20; *see supra* note 440.

The Standards, 9 C.F.R. § 3.127(b), require that appropriate natural or artificial shelter be provided for all animals housed outdoors to provide protection and prevent discomfort. I reject Respondents general contentions. Complainant provided testimonial, written, and photographic evidence of the allegations regarding the wolf enclosure. Therefore, I find that Complainants have shown by a preponderance of the evidence that Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(b), regarding the wolves' enclosure. However, regarding the lion, tiger, and coyote enclosures, I find the record insufficient to show that Respondents violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, 9 C.F.R. § 3.127(b), because Complainant did not provide sufficient evidence regarding these allegations to establish a *prima facie* violation.

X. Respondents' Other Contention: Bias

Respondents claim "it has been expressly found previously that APHIS is biased in general in favor of animal rights activists and against Class B animal dealers."[522] As support for this claim, Respondents contend that, when asked "if it had ever been noted in federal court that he and Dr. Gondentyre had been instructing APHIS inspectors to falsify inspection reports on certain targeted licensees" Dr. Gibbins "perjured his testimony by denying his involvement" because "it clearly states and was brought to light that Dr. Goldentyre was noted by a federal judge to have been purposely instructing inspectors to do just that."[523]

First, Respondent cites *Hodgins* in its contention that APHIS has been found "biased in general in favor of animal rights activists and against Class B animal dealers." However, the 6th Circuit Judge in *Hodgins* did not find bias. Rather, in *Hodgins* the 6th Circuit found that the ALJ erred in denying, and Judicial Officer erred in upholding the denial of,

---

[522] Respondents' Post-Hearing Brief at 29 (citing *Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421 (6th Cir 2000).

[523] *Id.* at 30 (citing "Caudill, Kalmanson, et. al, Docket 10-0416, Decision and Order as to Mitchell Kalmanson"; 'Terranova, et. al, 15-0058, 15-0059, 16-0037, 16-0038"; "AWA Docket No. 16-0124 and AWA DocketNo. [sic] 16-0125 Page: 201 line 22-Page: 202 line 8").

respondent's proposed evidence of bias and noted that such evidence would be relevant to the determination of inspectors' testimony and report credibility.[524] The Decision and Order in *Hodgins* was vacated and the case remanded to the agency for further proceedings.[525] Here, Respondents enter no specific evidence to show that the APHIS inspectors involved in this proceeding demonstrated any bias in conducting inspections, reporting, or testifying. Unlike the ALJ in *Hodgins* I have not denied Respondents the entry of any alleged evidence of bias. A vague claim of bias does not show that Respondents were targeted in any way and does not discredit the evidence presented by Complainant in support of the allegations.

Second, Respondents claim that Dr. Gibbens participated in a scheme with Dr. Godentyre to instruct "APHIS inspectors to falsify inspection reports on certain targeted licensees" and thus "perjured his testimony by denying his involvement" is unsubstantiated. Respondents do not cite any federal case to show that any such scheme existed, was alleged, or was tried. The citations Respondents presented (listing names as follows: *Kalmanson*, *Terranova*, and *Stark*) are vague, at best, and do not appear to support Respondents' contentions. As to the September 24, 2012 "Decision and Order as to Mitchell Kalmanson,"[526] there is no mention of either Dr. Gibbens or Dr. Goldentyre. In *Terranova,* USDA AWA Docket Nos. 15-0058, 15-0059, 16-0037, and 16-0038, the initial September 26, 2016 Decision and Order was appealed on November 29, 2016. Although not entirely relevant as the initial Decision and Order was appealed and, thus, not final, the September 26, 2016 Decision and Order in *Terranova*

---

[524] *Hodgins v. U.S. Dep't of Agric*., 2000 WL 1785733, *30-31, 238 F.3d 421 (6th Cir. 2000).

[525] *Id.* at 32. As Complainant notes in its Reply Brief at 49, after remand to the Department, the 6th Circuit affirmed the Judicial Officer's Decision and Order on remand and, in its affirmation of the Decision and Order on remand, the 6th Circuit does not make a determination of APHIS bias against animal rights activists or Class B licensees. *Hodgins v. US. Dep't of Agric*., 33 Fed. Appx 784 (6th Cir. 2002).

[526] *Caudill*, 71 Agric. Dec. 1007 (U.S.D.A. 2012). The undersigned assumes this is the case to which Respondents intend to cite. However, Respondents only included a simple italicized name without further citation, so it is not certain this is the case Respondents intended to cite.

mentioned neither Dr. Goldentyre nor Dr. Gibbens and did not find any scheme of selective enforcement or bias. Lastly, Respondents cite their own cases, AWA Docket Nos. 16-0124 and 16-0125, and provide page numbers to an unidentified document which I assume is meant to refer to the transcript of the instant hearing. Respondents citations are irrelevant to any bias claim and Respondents' claim that a scheme for selective enforcement was "noted by a federal judge" is unsubstantiated.

Further, Respondents' theory or contention that APHIS inspectors' reports are "biased against Respondents" because bias "from superiors within the USDA . . . passed down to their inspectors who, in fact, only do what they are told to do in order to maintain their employment" is equally unsubstantiated and without merit. A presumption of regularity supports the official acts of public officers.[527] Thus, in the absence of

[527] *Blackburn*, 76 Agric. Dec. 590, 597 n.17 (U.S.D.A. 2017) (Order Den. Pet. to Reconsider) (citing *Nat'l Archives & Records Admin, v. Favish*, 541 U.S. 157, 174 (2004) (holding, absent clear evidence to the contrary, there is a presumption of legitimacy accorded to the government's official conduct); *United States v. Chem. Found., Inc*., 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume public officers have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating, without a showing that the action of the Secretary of Agriculture was arbitrary, bis action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and, in the absence of clear evidence to the contrary, courts presume public officers have properly discharged their duties); *Greenville Packing Co*., 59 Agric. Dec. 194, 220-22 (U.S.D.A. 2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); Shepherd, 57 Agric. Dec. 242, 280-82 (U.S.D.A. 1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (U.S.D.A. 1997) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his

evidence to the contrary, I presume that APHIS inspectors' inspections and reports were completed according to the AWA and the Regulations promulgated thereunder and not to carry out biased targeted enforcement that "stem" from USDA superiors.

XI. Penalties

Complainant recommends a cease and desist order, revocation of Respondents' AWA license, joint and several civil penalties of not less than $339,000 for Respondents, and a civil penalty of $40,000 for Respondent Stark.

Respondents' argue that Complainant "demands monetary penalties . . . the factual record developed at trial does not possibly support" and "overreaches to assess penalties in a magnitude higher" than $30,000 and that the penalties requested by Complainant are "entirely incommensurate with the minor conduct at issue."[528] Respondents aver that they have not failed to comply with any part of the AWA, Regulations, or Standards and therefore "[n]o cease and desist order, license revocation, or civil penalty

---

actions are presumed to be valid); *Mil-Key Farm, Inc*., 54 Agric. Dec. 26, 55 (U.S.D.A. 1995) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *King Meat Co*., 40 Agric. Dec. 1468, 1494 (U.S.D.A. 1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*. No. CV 81-6485 (C D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (U.S.D.A. 1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, *reinstated nunc pro tunc*), *aff'd,* 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *Gold Bell-I&S Jersey Farms. Inc*., 37 Agric. Dec. 1336, 1361 (U.S.D.A. 1978) (rejecting the respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem*., 614 F.2d 770 (3d Cir. 1980).

[528] Respondents' Post-Hearing Brief at 31 (citing *Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435-62 (U.S.D.A. 1987)).

is therefore appropriate."[529]

Under the AWA, the appropriateness of the civil penalty should be determined "with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." [530] As discussed fully herein, I have found that Respondents violated the AWA and Regulations on many occasions. Further, I disagree with Respondents that their conduct was "minor." Conversely, based on the record and following analysis of the factors, including willfulness, size of business, gravity, history, and good faith, in my opinion the issuance of a cease and desist order and only civil penalties would not be sufficient to ensure Respondents' compliance with the AWA and Regulations. I also do not think only a minimal civil penalty and issuance of a cease and desist order would deter others from violating the AWA and Regulations to fulfill the remedial purpose of the AWA. Thus, I find that revocation of AWA license 32-C-0204, permanent disqualification from obtaining an AWA license, and issuance of a cease and desist order is necessary; and that Respondents should be jointly and severally assessed a civil penalty in the amount of $300,000 and Respondent Timothy Stark should be assessed a civil penalty in the amount of $40,000.

e. Willfulness

Under the AWA, the term "willful" means "action knowingly taken by one subject to the statutory provision in disregard of the action's legality. . . . Actions taken in reckless disregard of statutory provisions may also be

[529] *Id.* at 32.

[530] 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,* 331 U.S. 519, 528-29 (1947).

'willful.' "[531] The Court in *Hodgins* determined the "proper rule": [532]

> Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty.

The Judicial Officer has long held that a "willful act under the Administrative Procedure Act ("APA") (5 U.S.C. § 558(c)) 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."[533] It is also important to note that 'willfulness' determinations are not necessary for issuance of civil penalties or cease and desist orders. Only one finding of a willful violation is needed under 7 U.S.C. § 2149(a) to provide authority for the suspension

---

[531] *Hodgins v. U.S. Dep't of Agric*., 238 F.3d 421, 2000 WL 1785733, *9 (6th Cir. 2000) (table) (internal quotations omitted) (quoting *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999); citing *United States v. Illinois Cent. Ry*., 303 U.S. 239, 242-43 (1938) (one who 'intentionally disregards the statute or is plainly indifferent to its requirements' acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961) (one who 'acts with careless disregard of statutory requirements' acts willfully); JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action "was committed intentionally" or "was done in disregard of lawful requirements" and also noting that "gross neglect of a known duty will also constitute willfulness")).

[532] *Id.* at *10.

[533] *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. 2012) (citing *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*., 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009); *Bond*, 65 Agric. Dec. 92, 107 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978)).

or revocation of a license.[534]

Respondents contend, Post-Hearing Brief at 10, that "willfulness—a mandatory element to be proven—is one that must be addressed separately with respect to each specific violation" and that "Complainant utterly failed to do so at every turn" but that Respondents' evidence "demonstrated well that Respondents did not plan or commit any willful violation, nor intentionally perform [sic] any prohibited act without regard to motif or erroneous advice, nor act with *any* disregard of statutory requirements, much less by doing so in a reckless fashion." Respondents also contend, *id.* at 6-7, that they were never given a reasonable opportunity to correct violations because, although Respondents concede that they "had in fact been provided with copies of the regulations once per year and presumably given written copies of each inspection report," Respondents were "definitely *not* provided any such reasonable or realistic opportunity [to demonstrate compliance], especially in any form that would satisfy the core purposes of the Act."[535]

Complainant, in its Reply Brief at 7-8, states that the APA does not require notice and an opportunity to correct in cases where public health, interest, or safety requires otherwise and that this case is one that "implicates public health, public interest, and public safety."[536] Complainant contends, *id.*, that "the record is replete with evidence that APHIS repeatedly and specifically advised respondents of their noncompliance - through inspection reports, post inspection exit interviews, correspondence, and a 21-day suspension of respondent Stark's license in 2015."[537] Complainant states the "evidentiary record in this case . . . establishes that respondents repeatedly failed to correct the deficiencies documented by the APHIS inspectors."[538] Further, Complainant contends, *id.* at 14-15, that Respondents "are wrong on both

---

[534] *See Big Bear Farm, Inc*, 55 Agric. Dec. 107, 139 (U.S.D.A. 1996); *Horton*, 73 Agric. Dec. 77, 85 (U.S.D.A. 2014).

[535] Citing "Transcript at 148:2-28 in Testimony of Tim Stark on 10/04/18."

[536] Citing *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 140 (1996) (citing 5 U.S.C. § 558(c)).

[537] Citing CX 4, 6, 14, 18, 22, 23, 29, 30, 35, 36, 45-48.

[538] *Id.* at 9 (citing CX 4, 6, 14, 18, 22, 23, 29, 30, 35, 36; RX 14, 18-20).

the law and the facts" as there was no requirement to establish willfulness because 1) willfulness does not need to be established to assess civil penalties or to order a cease and desist; 2) willfulness does not need to be established because Respondents were provided both notice and opportunity to correct;[539] and 3) willfulness does not need to be established because this case concerns public health, public interest, and public safety.

Here, regarding each of the allegations, I have considered whether each violation concerned public health, interest, and/or safety. I've also considered whether each violation was a repeat (i.e. Respondents had notice and a chance to correct but failed to do so), the gravity of the violation, and whether Respondents knew or should have known that their action or inaction would lead to a violation based on their knowledge of the Regulations. I have also taken into consideration Respondent Stark's background in animal ownership and exhibition, that Respondent Stark held a Class B AWA license from 1999 until 2008, and has held a Class C exhibitors license since 2008 with full awareness, knowledge of, and access to the AWA and Regulations promulgated thereunder.[540]

f. Size of the business

I find that the Respondents' business is large based on the evidence of record as to the number of animals housed at the facility and the revenue conducted. [541]

g. Gravity of the violation

---

[539] Also noting, *Id.* at 11, that "the Judicial Officer has held that the regulations themselves provide adequate notice of the requirements, particularly with respect to handling" (citing *Zoocats, Inc*., 68 Agric. Dec. 1072, 1078 (U.S.D.A. 2009) (Order Den. Pet. for Recons.)).

[540] Tr. Vol. 7, 1901:2-1902:9.

[541] Complainant contends, and Respondents do not deny, that Respondents' business is large based on Respondent Stark's representations to APHIS between 2011 and 2015 that he held between forty-three and 124 animals and derived over $569,000 from animal exhibitions in 2014 alone. Complaint at ¶ 3. *See also* Complainant's Post-Hearing Brief at 128-29 (citing *Perry*, 2013 WL 8213618, at *8 (2013) (citing *Huchital*, 58 Agric. Dec. 763, 816-17 (1999) (finding the respondent, who held approximately 80 rabbits, operated a large business);

I find the gravity of many of the violations to be serious due to: 1) repeated failure and/or refusal to provide access to APHIS inspectors for the purpose of conducting inspections to determine compliance with the AWA and Regulations promulgated thereunder; 2) repeated interference with and verbal abuse of APHIS inspectors; 3) repeated failures to handle animals carefully, particularly repeated exposure of the public and animals to risks by failing to provide proper distance and barriers during exhibition particularly with small children and infants present; 4) repeated failures to provide attending veterinarian supervision and involvement; and 5) repeated failures to provide adequate veterinary care to animals that may have resulted in the deaths of many animals.[542]

h. Good faith and History of Previous Violations

I find that Respondents have a history of previous violations and a lack of good faith to comply with the AWA and Regulations promulgated thereunder. Although Respondents have never been subject to a previous adjudication finding that they violated the AWA, I have found numerous violations of the AWA and Regulations between January 2012 and January 2016[543] and such an "ongoing pattern of violations establishes a

---

Browning, 52 Agric. Dec. 129, 151 (1993) (finding that respondent, who held 75-80 animals, operated a moderately large business), *aff'd per curium*, 15 F.3d 1097 (11th Cir. 1994); CX 1, CX 36 at 9; Tr. Vol. 7, 1953-54; Respondent Wildlife in Need and Wildlife in Deed, Inc. 2014-17 Tax Returns, attached to Complainant's Proposed Order and Request to Take Official Notice).

[542] *See Mitchell*, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001) ("Interference with Animal and Plant Health Inspection Service officials' duties under the Animal Welfare Act and the failure to allow Animal and Plant Health Inspection Service officials access to facilities, animals, and records are extremely serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act."); *Yost*, 78 Agric. Dec. 23, 40 (U.S.D.A. 2019) ("The Secretary has found that violations based on an exhibitor's failure to handle dangerous animals with sufficient distance and/or barriers are serious, can result in harm to animals and people, and merit assessment of 'the maximum, applicable civil penalty for each handling violation.'") (citing *Mitchell*, 2010 WL 5295429, at *8 (U.S.D.A. 2010)).

[543] Also noting that Respondent Stark's AWA license was previously suspended in 2015 for a period of twenty-one (21) days, RX 9.

'history of previous violations' for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith."[544] Specifically, the record reflects that Respondent Stark has shown a lack of good faith by deliberately trying to circumvent the AWA regulations, including presenting forged documents and in his interference with APHIS inspectors, and by repeatedly misrepresenting the involvement of attending veterinarians in operations.

i. Penalty Amount

The amount of the civil penalty is subject to my discretion within the statutory limit at the time of violation and justified with a purpose of deterring future violations. The maximum civil penalty per violation in this case is $10,000.[545] Complainant states that the Complaint alleged Respondents committed not fewer than 339 willful violations of the AWA and Regulations and Complainant calculates that Respondent Stark is alleged to have committed not fewer than four willful violations of the AWA and Regulations.[546] Complainant asks that the undersigned not assess less than ten percent (10%) of the maximum penalties assessable under the AWA.[547] Complainant's reasoning is considered and consideration of other mitigation factors regarding gravity have been noted as to each allegation where appropriate. Based on the number of violations,[548] size of the business, the gravity of the violations, the history

---

[544] *Staples*, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014). I here acknowledge that Respondent Stark was convicted of violating the Endangered Species Act in 2008, *United States v. Timothy L. Stark*, Case No. 4:07CR00013~001 (S.D. Ind.), and is was respondent in a license termination proceeding, *Stark*, AW A Docket No. 15-0080, but it was found on the merits that Respondent Stark's AWA license should not be terminated in that case.

[545] 7 U.S.C. § 2149(b). *See also supra* note 24.

[546] Complainant's Post-Hearing Brief at 133.

[547] *Id.*

[548] Based on the findings herein, Complainant did not meet its burden of proof regarding at least twenty (20) alleged violations. It is unclear how Complainant counted each alleged violation, considering alleged violations that pertained to multiple animals. Thus, I have rounded down Complainant's calculated number of violations. Respondent Stark individually is found herein to have committed four willful violations of the AWA and Regulations.

of previous violations, and Respondents' lack of good faith, I find that Respondents should be jointly and severally assessed a civil penalty in the amount of $300,000.

The Complaint in paragraphs 7 (a) through (d) alleged that "respondent Stark willfully violated the Act and the Regulations, 9 C.F.R. § 2.4, by interfering with, and/or verbally abusing APHIS officials in the course of carrying out their duties . . ." The text of the Complaint does not allege that Respondent Wildlife in Need committed these particular violations, and Complainant on brief seeks penalties only against Respondent Stark for these violations. As Complainant states on brief: "Dr. Gibbens testified that the kind of behavior exhibited by respondent Timothy Stark impedes the ability of the Department to enforce the AWA." [549] I find the allegations of these Complaint paragraphs virtually undisputed in the record with no credible showing of any alleged good faith, and to state violations of great gravity. I agree with Dr. Gibbens'—who at the time of the Hearing was the National Director of APHIS Animal Care's Field Operations and previously an APHIS VMO, Field Supervisor, and Regional Director[550]—opinion that the subject actions by Respondent Stark interfere with the ability of APHIS to enforce the AWA. The ability to enforce the AWA is fundamental to the USDA program, and the maximum penalties are appropriate for such interference in the circumstances of this proceeding. I therefore find that Respondent Stark should be assessed a civil penalty in the amount of $40,000.

FINDINGS OF FACT

1. Timothy L. Stark (Stark) is an individual whose business address is 3320 Jack Teeple Road, Charlestown, Indiana 47111. At all times mentioned in the Complaint, Respondent Stark was an exhibitor as that term is defined in the AWA and the Regulations and held AWA license 32-C-0204 as an "individual." Respondent Stark, together with Wildlife In Need and Wildlife In Deed, Inc., operated a zoo at the Charlestown, Indiana address. Answer at ¶ 1.

---

[549] Complainant's Post-Hearing Brief at 32-33 (citing Tr. Vol. 8 at 2217:11-19).

[550] Tr. Vol. 8, 2196.

2. Respondent Wildlife In Need and Wildlife In Deed, Inc. (Wildlife, Inc.), is an Indiana corporation (1999081064) whose agent for service of process and president is Respondent Stark, 3320 Jack Teeple Road, Charlestown, Indiana 47111. At all times mentioned in the Complaint, Wildlife, Inc., was an exhibitor, as that term is defined in the AWA and the Regulations and together with Respondent Stark operated a zoo at the Charlestown, Indiana, address. Respondent Wildlife, Inc., is registered as a 501(c)(3) not-for-profit corporation and has never held any AWA license. Answer at ¶ 1; CX 2.

3. In 2011, respondent Stark represented to APHIS that he held 46 animals (5 nonhuman primates and 41 wild or exotic mammals); in 2012, he represented to APHIS that he held 43 animals (five non-human primates and 38 wild or exotic mammals); in 2013, he represented to APHIS that he held 75 animals (four dogs, two cats, and 69 wild or exotic mammals); in 2014, he represented to APHIS that he held 120 animals (one dog, two cats, and 117 wild or exotic mammals); in 2015, he represented to APHIS that he held 124 animals (one dog, one cat, 25 nonhuman primates and 97 wild or exotic mammals); in 2016, he represented to APHIS that he held 222 animals (two dogs, 36 non-human primates and 184 wild or exotic mammals); in 2017, he represented to APHIS that he held 252 animals (two dogs, 54 non-human primates and 196 wild or exotic mammals); and in 2018, he represented to APHIS that he held 293 animals (one dog, 64 non-human primates and 228 wild or exotic mammals). CX 1, 51.

4. On or about the following dates, Respondent Stark interfered with, and/or verbally abused APHIS officials in the course of carrying out their duties:

a. June 25, 2013. During a compliance inspection, Respondent Stark repeatedly used profanity, made derogatory comments about the Animal Care Inspector (ACI), and suggested that he could not understand what the ACI said because of his manner of speaking. CX 10, 11, 43; Tr. Vol. 2 at 433, 444, 512.

b. September 24, 2013. During a compliance inspection, Respondent Stark was argumentative, repeatedly used profanity, insisted several times that the APHIS inspectors needed to enter an enclosure (without

a shift cage or double-gate system) that housed multiple tigers, and over the objections of the inspectors, Respondent Stark opened the enclosure, left it unlocked, and entered the enclosure, leaving the inspectors inside the perimeter fence. CX 10, 12, 14, 28; Tr. Vol. 2 at 522, 524-527; Tr. Vol. 6 at 1412.

c. September 26, 2013. During a compliance inspection exit interview, Respondent Stark was argumentative with the APHIS inspectors, repeatedly used profanity, slammed his fist on the table several times, repeatedly called his attending veterinarian a "f**king lying bitch," and told the inspectors that he would go down and "f**king show her." CX 10, 12, 14, 28; Tr. Vol. 2 at 520-21, 531-33, 536, 540, 543, 545, 547.

d. January 20, 2016. When APHIS Veterinary Medical Officers (VMOs) arrived to conduct a compliance inspection, accompanied by two Indiana State Troopers, Respondent Stark was argumentative, repeatedly used profanity, and at one point told the inspectors and the troopers to get "the f**k off" of his property. Following the inspection, Respondent Stark called one of the VMOs a "geriatric old bastard," and told the other VMO that he was "sick and tired" of her "f**king opinions." CX 38, 29, 56, 57; Tr. Vol 1, 139, 144, 148; Tr. Vol. 3 at 729-732, 735-752; Tr. Vol. 5 at 1482-1485, 1487-1491; Tr. Vol. 8 at 2217.

5. On the following occasions, APHIS inspectors documented noncompliance with the Regulations governing attending veterinarians and adequate veterinary care:

a. October 30, 2012-December 1, 2012. Respondents failed to obtain any veterinary medical care for two juvenile leopards who, according to respondent Stark, were suffering from metabolic bone disease. CX 6, 9, 42, 43,49, 49a; Tr. Vol. 2 at 389-390; Tr. Vol. 5 at 1293; Tr. Vol. 7 at 1932-1938; 2041; Tr. Vol. 7 at 2043; Tr. Vol. 8 at 2095-2098, 2111.

b. June 25, 2013. Respondents failed to obtain adequate veterinary care for a juvenile leopard and failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services and adequate guidance to personnel involved in

the care and use of animals regarding euthanasia by using blunt force trauma to the head to "euthanize" a juvenile leopard. CX 6, 9, 41-43, 49, 49a; Tr. Vol. 2 at 389-392, 436-439, 556-558, 568-569, 571.

c. January 1, 2012. September 30, 2013. Respondents failed to employ an attending veterinarian to provide adequate veterinary care to Respondents' animals. CX 6, 8, 10, 12, 14, 43, 44; Tr. Vol. 2 at at 382-386, 393-394, 440- 441, 445-448, 453-459, 538-539.

d. June 25, 2013. Respondents failed to obtain adequate veterinary care for a Great Pyrenees dog with a bleeding lesion on his nose. CX 6, 8; Tr. Vol. 2 at 387-388, 394-98.

e. On or about August 21, 2013. Respondents failed to obtain adequate veterinary care for an ocelot that died, specifically, Respondents did not obtain any veterinary care for the ocelot, communicate with a veterinarian regarding the ocelot, or have a necropsy performed to determine the cause of the ocelot's death. CX 14; RX 29; Tr. Vol. 2 at 463.

f. On or about August 25, 2013. Respondents failed to obtain adequate veterinary care for a serval that died, and specifically, Respondents did not obtain any veterinary care for the serval, communicate with a veterinarian regarding the serval, or have a necropsy performed to determine the cause of the serval's death. CX 14; RX 29; Tr. Vol. 2 at 463.

g. August 25, 2013-September 3, 2013. Respondents failed to obtain adequate veterinary care for a male red kangaroo that died, and specifically, Respondents never obtained any veterinary care for the kangaroo and did not have a necropsy performed to determine the cause of the kangaroo's death. CX 14; RX 29; Tr. Vol. 2 at 461-463.

h. On or about August 25, 2013. Respondents failed to obtain adequate veterinary care for a coatimundi that died, and specifically, Respondents did not obtain any veterinary care for the coatimundi, communicate with a veterinarian regarding the coatimundi, or have a necropsy performed to determine the cause of the coatimundi's death. CX 14; RX 29; Tr. Vol. 2 at 463, 469-470.

i. September 24, 2013. Respondents failed to obtain adequate veterinary care for a Great Pyrenees dog with lesions and scabs on his nose. CX 12, 14; RX 29; Tr. Vol. 2 at 463-465.

j. September 24, 2013. Respondents failed to obtain adequate veterinary care for a tiger with abnormally worn, broken and discolored canine teeth, and visible weight loss, and for which Respondents admitted they had never obtained veterinary care. CX 12, 14, 54; RX 29; Tr. Vol. 2 at 465-467.

k. October 8, 2015. Respondents failed to obtain adequate veterinary care for a Great Dane dog that was observed to have crusted material and a thick green mucus exuding from both eyes. CX 35; Tr. Vol. 3 at 705-706.

l. October 8, 2015. Respondents failed to obtain adequate veterinary care for a thin Fennec fox that was observed to be lethargic and reluctant to ambulate, had a dull coat, scabby material sluffing off from inside its left ear, and a green discharge from both eyes. CX 35; Tr. Vol. 3 at 706-707.

m. On or about January 20, 2016. Respondents failed to obtain adequate veterinary care for a red kangaroo that respondents knew was ill; the kangaroo died sometime between October 8, 2015, and the date of the inspection, without having received any veterinary care, and respondents did not have a necropsy performed to determine the cause of the kangaroo's death. CX 36, 38, 39; RX 30, 57; Tr. Vol. 3 at 717-718.

6. On or about September 24, 2013, Respondents failed to identify dogs as required. CX 14; RX 43, 44; Tr. Vol. 2 at 470-471.

7. On or about December 1, 2012, through June 24, 2013, Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the date of disposal of two juvenile leopards acquired by respondents on or about October 31, 2012, and specifically, Respondents had records showing that they had acquired two juvenile leopards on October 31, 2012 and Respondents had no records of the disposition of

either leopard, no records of any diagnosis of metabolic bone disease made by any veterinarian, and no records of any veterinary medical treatment given to either leopard for metabolic bone disease, or for any other condition. CX 6 ,9, 43, 49, 49a; Tr. Vol. 5 at 1282-1283, 1277-1287, 1289, 2041-2043.

8. On or about June 25, 2013, Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the acquisition of forty-three animals that were observed by the APHIS inspectors at Respondents' facility during the June 25, 2013, inspection, as follows: there were no acquisition records for one baboon; one black-capped capuchin; one white-handed gibbon; two Patagonian cavies; one guinea pig; one groundhog; three hybrid dogs; ten ocelots; four servals; one African crested porcupine; one armadillo; three bobcats; three foxes; one hedgehog; two kinkajou; seven tigers; and one caracal. CX 6, 13; Tr. Vol. 2 at 399-402; Tr. Vol. 5 at 1295-1296.

9. On or about June 25, 2013, Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the disposition of six animals, as follows: there were no disposition records for two lemurs; one kangaroo; one tayra; and two leopards. CX 6, 13; Tr. Vol. 2 at 399-402; Tr. Vol. 5 at 1295-1296.

10. On or about September 24, 2013. Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the acquisition and disposition of dogs, as required. CX 14; Tr. Vol. 2 at 471-472.

11. On or about September 24, 2013, Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the acquisition of four animals that were observed by the APHIS inspectors at respondents' facility during the September 24, 2013 inspection, as follows: there were no acquisition records for one coatimundi; one guinea pigs; and two domestic pigs. CX 14.

12. On or about September 24, 2013, Respondents failed to make, keep, and maintain records or forms that fully and correctly disclose the disposition of three domestic pigs. CX 14.

13. On or about May 14, 2013 and May 23, 2013, APHIS inspector Dr. Juan Arango attempted to conduct a compliance inspection at respondents' facility, but no one was available to provide access or to accompany him. CX 45-47; Tr. Vol. 5 at 1266, 1271-1272; Tr. Vol. 4 at 1478-1479; Tr. Vol. 6 at 1907-1908.

14. On or about June 25, 2013, respondents failed to provide APHIS officials with access to conduct AWA inspections of their records, and specifically, Respondents produced a written program of veterinary care dated January 17, 2013, on which the name of the veterinarian and the veterinarian's signature were forged and written without the veterinarian's consent (the veterinarian named testified he ceased to serve as respondents' attending veterinarian several years earlier). CX 6 ,9, 43-44; RX 73; Tr. Vol. 3 at 970-972; Tr. Vol. 4 at 977.

15. On or about the following dates, APHIS inspectors documented noncompliance with the Regulations governing the handling of animals:

a. December 1, 2012. Respondents failed to handle a juvenile leopard as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, by using blunt force trauma to the head to "euthanize" the juvenile leopard. CX 6, 9 ,43; Tr. Vol. 2 at 390-392; Tr. Vol. 7 at 1937-1938.

b. January 10, 2014. Respondents failed to handle juvenile tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." CX 17,1 7a-f; Tr. Vol. 2 at 288-298, 301.

c. January 10, 2014. Respondents failed to handle juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited the tigers without any distance or barriers between the animals and the public and a member of the public was injured by one of the tigers. CX 17,1 7a-f; Tr. Vol. 2 at 288-298, 301.

d. January 10, 2014. Respondents exposed juvenile tigers to rough or excessive public handling. CX 17,1 7a-f; Tr. Vol. 2 at 288-298, 301.

e. January 14, 2014. Respondents failed to handle a juvenile tiger and

a juvenile kangaroo as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." CX 15-16; Tr. Vol. 1 at 170-199; Tr. Vol. 2 at 321-359.

f. January 14, 2014. Respondents failed to handle juvenile tigers and a juvenile kangaroo, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited the tigers and the kangaroo without any distance or barriers between the animals and the public. CX 15-16; Tr. Vol. 1 at 170-199; Tr. Vol. 2 at 321-359.

g. January 14, 2014. Respondents exposed juvenile tigers to rough or excessive public handling. CX 15-16; Tr. Vol. 1 at 170-199; Tr. Vol. 2 at 321-359.

h. January 15, 2014. Respondents failed to handle three juvenile tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." CX 18, 19, 19a, 20; Tr. Vol. 1 at 238-271.

i. January 15, 2014. Respondents failed to handle three juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited the tigers without any distance or barriers between the animals and the public, and, two members of the public were injured by tigers. CX 18, 19, 19a, 20; Tr. Vol. 1 at 238-271; Tr. Vol. 3 at 694.

j. January 15, 2014. Respondents exposed three juvenile tigers to rough or excessive public handling. CX 18, 19, 19a, 20; Tr. Vol. 1 at 238-271.

k. August 19, 2014. Respondents failed to handle two juvenile tigers, a coatimundi, nonhuman primates, and a lemur as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort. CX 23-27, 53; Tr. Vol. 1 at 169; Tr. Vol. 3 at 903, 916- 917, 922-923, 926-929; Tr. Vol. 4 at 1141, 1146, 1150-1151, 1155-1158.

l. August 19, 2014. Respondents failed to handle two juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited the tigers without any distance or barriers between the animals and the public, and three members of the public were scratched or bitten by the tigers. CX 23-27, 53; Tr. Vol. 1 at 169; Tr. Vol. 3 at 903, 916- 917, 922-923, 926-929; Tr. Vol. 4 at 1141, 1146, 1150-1151, 1155-1158.

m. August 19, 2014. Respondents failed to handle five nonhuman primates (two lemurs, a macaque, a capuchin, and a vervet), a kangaroo, and a coatimundi, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited these animals without any distance or barriers between the animals and the public, and, inter alia, Respondent Stark was observed to swing a capuchin monkey around by its tail, to swing a macaque by a belt around its hips, and to swing a nonhuman primate around by a belt, and then to toss the primate onto the lap of one of respondents' customers. CX 23-27, 53; Tr. Vol. 1 at 169; Tr. Vol. 3 at 903, 916- 917, 922-923, 926-929; Tr. Vol. 4 at 1141, 1146, 1150-1151, 1155-1158.

n. August 19, 2014. Respondents exposed two juvenile tigers to rough or excessive public handling. CX 23-27, 53; Tr. Vol. 1 at 169; Tr. Vol. 3 at 903, 916- 917, 922-923, 926-929; Tr. Vol. 4 at 1141, 1146, 1150-1151, 1155-1158.

o. September 13, 2015. Respondents failed to handle four juvenile tigers and one juvenile capuchin monkey as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger playtime" exhibit. CX 30-33; Tr. Vol. 4 at 1037, 1059, 1129; Tr. Vol. 8 at 2094- 2095, 2108.

p. September 13, 2015. Respondents failed to handle four juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, and specifically, exhibited the tigers to groups of approximately thirty people, without any distance or barriers between the tigers and the public, and multiple persons were scratched and/or bitten, and the juvenile tigers were repeatedly hit with riding crops. CX 30-33; Tr. Vol. 4 at 1038-1039, 1052, 1054-1055, 1125-1127, Tr. Vol. 8 at 2091-2093, 2105-2107, 2160-2162, 2165.

q. September 13, 2015. Respondents failed to handle one juvenile capuchin monkey, during exhibition, with minimal risk of harm to the animal and the public, and specifically, exhibited the capuchin to groups of approximately thirty people, without any distance or barriers between the nonhuman primate and the public, exposing both the animal and the public to harm. CX 30-33.

r. September 13, 2015. Respondents exhibited four juvenile tigers in successive "playtime" and photo sessions without providing them an adequate rest period. CX 30-33; Tr. Vol. 4 at 1036, 1045, 1050-1052, 1056-1058; Tr. Vol. 8 at 2104.

s. September 13, 2015. Respondents exposed multiple young or immature animals to rough or excessive public handling. CX 30-33; Tr. Vol. 4 at 1042.

t. September 13, 2015. Respondents exhibited four juvenile tigers and a juvenile capuchin monkey for periods of time and under conditions that were inconsistent with the animals' good health and well-being. CX 30-33.

16. On or about June 25, 2013, APHIS inspectors documented noncompliance with the Standards, as follows:

a. Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement to promote the psychological well-being of nonhuman primates, in accordance with currently accepted professional standards, and made available to APHIS upon request. CX 6; Tr. Vol. 2 at 404.

b. Respondents housed seven tigers and one lion in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. CX 6.

c. Respondents housed multiple tigers in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect the tigers from injury, function as a secondary containment system, and prevent the animals from physical contact

with persons or other animals outside the fence. CX 6; Tr. Vol. 2 at 423-428.

d. Respondents fed large carnivores a diet not prepared with consideration for the age, species, condition, size, and type of animals. CX 6; Tr. Vol. 2, 428-429.

17. On or about September 24, 2013, APHIS inspectors documented noncompliance with the Standards, as follows:

a. Respondents failed to store supplies of food for dogs in facilities that adequately protect the supplies of food from deterioration, molding, or contamination by vermin. CX 14; Tr. Vol. 2 at 473-475.

b. Respondents housed three hybrid dogs in enclosures with surfaces that were not impervious to moisture. CX 14; Tr. Vol. 2 at 476-477.

c. Respondents failed to develop, document, and follow an appropriate plan for exercise for dogs, as required. CX 14; Tr. Vol. 2 at 487.

d. Respondents failed to clean and sanitize food receptacles for three hybrid dogs as required. CX 14; Tr. Vol. 2 at 491-493.

e. Respondents failed to sanitize used primary enclosures for three hybrid dogs as required. CX 14; Tr. Vol. 2 at 495-496.

f. Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement to promote the psychological well-being of nonhuman primates, in accordance with currently accepted professional standards, and made available to APHIS upon request. CX 14; Tr. Vol. 2 at 494; Tr. Vol. 4 at 1816, 1823, 2005-2006.

g. Respondents housed seven tigers and one lion in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. CX 14; Tr. Vol. 2 at 497.

h. Respondents housed four tigers in an enclosure with a resting platform placed close to the side of the enclosure such that it could

provide a means for the tigers to escape. CX 14; Tr. Vol. 2 at 497-498.

i. Respondents failed to store supplies of food in facilities that adequately protect the supplies of food from deterioration, molding, or contamination by vermin. CX 14; Tr. Vol. 2 at 499-502.

j. Respondents housed multiple tigers in facilities that were not enclosed by a perimeter fence to protect the tigers from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence, and specifically, there was a 3-to-6-inch gap between one of the gates and the fence. CX 14; Tr. Vol. 2 at 507-508.

k. Respondents housed a lion, two tigers, one leopard, and four bears in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. CX 14.

l. Respondents failed to provide animals a diet that was wholesome, palatable, and free from contamination and prepared with consideration for the age, species, condition, size, and type of animals. CX 14; Tr. Vol. 2 at 513.

m. Respondents failed to provide potable water to bears. CX 14; Tr. Vol. 2 at 513-518.

n. Respondents failed to provide potable water to the tigers housed in pens 1, 2, 4, 5. CX 14; Tr. Vol. 2 at 513-518.

o. Respondents failed to provide potable water to a lion. CX 14; Tr. Vol. 2 at 513-518.

p. Respondents failed to employ a sufficient number of adequately trained employees. CX 14; Tr. Vol. 2 at 518-520.

18. On or about May 6, 2014, an APHIS inspector documented noncompliance with the Standards, as follows:

a. Respondents housed three dogs in enclosures with surfaces that were not impervious to moisture. CX 22; Tr. Vol. 2 at 661-665.

b. Respondents failed to provide potable water to a dog. CX 22.

c. Respondents failed to clean and sanitize two enclosures housing five hybrid dogs as required. CX 22; Tr. Vol. 3 at 667.

d. Respondents housed four bears in an enclosure with a wooden walkway that was in disrepair, and there were broken pieces of wood with exposed nails inside the bear enclosure. CX 22; Tr. Vol. 3 at 671-672.

e. Respondents housed a tiger in an enclosure with a wooden spool that had collapsed, leaving broken pieces of wood and exposed nails. CX 22.

f. Respondents housed a tiger in an enclosure that contained logs with exposed nails. CX 22.

g. Respondents housed twelve animals (eight foxes, one cougar, and three porcupines) in enclosures that did not provide them with adequate shade. CX 22; Tr. Vol. 3 at 675-676.

h. Respondents failed to provide potable water to multiple tigers, four bears, one cougar, and one lion. CX 22.

19. On or about August 20, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed three dogs in enclosures with surfaces that were not impervious to moisture. CX 23.

b. Respondents failed to provide potable water to a dog. CX 23.

c. Respondents failed to clean and sanitize two enclosures housing five hybrid dogs as required. CX 23; Tr. Vol. 3 at 688.

d. Respondents housed four bears in an enclosure with a wooden walkway that was in disrepair, and there were broken pieces of wood with exposed nails inside the bear enclosure. CX 23; Tr. Vol. 3 at 688-689.

e. Respondents failed to provide potable water to multiple tigers, four bears, two cougars, and one lion. CX 23.

20. On or about July 27, 2015, an APHIS inspector documented noncompliance with the Standards, as follows:

a. Respondents housed a dog in an enclosure that contained sheets of unused siding adjacent to the shelter structure. CX 29.

b. Respondents failed to keep a dog's water receptacle clean and sanitized. CX 29.

c. Respondents housed two hyenas in an enclosure that had broken wires protruding into the enclosure and accessible to the hyenas. CX 29; Tr. Vol. 5 at 1468.

d. Respondents housed a lion in an enclosure that contained sheets of unused siding adjacent to the shelter structure. CX 29; Tr. Vol. 5 at 1468.

e. Respondents failed to keep a lion's water receptacle clean and sanitized. CX 29.

f. Respondents failed to provide juvenile tigers a wholesome and palatable diet, free from contamination and prepared with consideration for the age, species, condition, size, and type of animals. CX 29; Tr. Vol. 5 at 1468-1469, 1476.

21. On or about October 8, 2015, APHIS inspectors documented noncompliance with the Standards, as follows:

a. Respondents housed two dogs in an enclosure that contained a shelter in disrepair, with exposed nails and detached wood. CX 35.

b. Respondents housed two dogs in an enclosure that did not provide the dogs with adequate shelter from the sun. CX 35; Tr. Vol. 3 at 707-714.

c. Respondents housed three ring-tailed lemurs in an enclosure that did not provide them with easy and convenient access to food and water. CX 35; Tr. Vol. 3 at 707-714.

d. Respondents housed a tiger in an enclosure containing a platform that was in disrepair, with numerous protruding nails accessible to the tiger. CX 35.

e. Respondents housed four tigers in an enclosure containing a shelter that was in disrepair, with portions of tin detached from the wall. CX 35.

f. Respondents housed two hyenas in an enclosure in disrepair, with sections of detached fencing exposing wires that protruded into the enclosure. CX 35.

g. Respondents housed a cougar in an enclosure containing a shelter in disrepair and open to the elements. CX 35.

h. Respondents housed multiple tigers in enclosures that contained excessive amounts of food waste. CX 35.

i. Respondents housed a cougar in an enclosure that contained a buildup of feces. CX 35.

j. Respondents housed animals in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. CX 35; Tr. Vol. 3 at 707-714.

22. On or about January 20, 2016, APHIS inspectors documented noncompliance with the Standards, as follows:

a. Respondents housed a hybrid dog in an enclosure that contained a shelter in disrepair, with exposed nails and detached wood. CX 36; Tr. Vol. 3 at 720-729.

b. Respondents housed a hybrid dog in an enclosure that contained a shelter that did not protect the dog from the elements. CX 36; Tr. Vol. 3 at 720-729.

c. Respondents housed a dog in an enclosure that contained a shelter that did not contain adequate bedding to protect the dog from the cold. CX 36; Tr. Vol. 3 at 720-729.

d. Respondents housed three tigers in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. CX 36; RX 14, 18-20, 30, 56-57; Tr. Vol. 6 at 1532, 1544; Tr. Vol. 7 at 1921-1922; Tr. Vol. 8 at 2200; 2201.

e. Respondents housed two hyenas in an enclosure that was in disrepair, with sections of detached fencing exposing wires that protruded into the enclosure. CX 36; Tr. Vol. 3 at 720-729.

f. Respondents housed three wolves in an enclosure containing a single shelter that was not adequate to accommodate all three wolves. CX 36; Tr. Vol. 3 at 720-729.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. On June 25, 2013, September 24, 2013, September 26, 2013, and January 20, 2016, Respondent Stark willfully violated the AWA and Regulations by interfering with, and verbally abusing APHIS officials in the course of carrying out their duties. 9 C.F.R. § 2.4.

3. On or about the following dates, Respondents willfully violated the Regulations governing attending veterinarian and adequate veterinary care (9 C.F.R. § 2.40), by failing to provide adequate veterinary care to

the following animals and/or failing to establish programs of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, equipment and services, and/or the use of appropriate methods to prevent, control, and treat diseases and injuries, and/or daily observation of animals, and a mechanism of direct and frequent communication in order to convey timely and accurate information about animals to the attending veterinarian, and/or adequate guidance to personnel involved in animal care:

a. Between October 30, 2012, and approximately December 1, 2012. Respondents failed to obtain any veterinary medical care for two juvenile leopards. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).

b. June 25, 2013. Respondents failed to obtain adequate veterinary care for a juvenile leopard and failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services and adequate guidance to personnel involved in the care and use of animals regarding euthanasia. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(4).

c. January 1, 2012, through September 30, 2013. Respondents failed to employ an attending veterinarian to provide adequate veterinary care to Respondents' animals. 9 C.F.R. §§ 2.40(a), 2.40(a)(1).

d. June 25, 2013. Respondents failed to obtain adequate veterinary care for a Great Pyrenees dog with a bleeding lesion on his nose. 9 C.F.R. §§ 2.40(a) and 2.40(b)(3).

e. On or about August 21, 2013. Respondents failed to obtain adequate veterinary care for an ocelot that died. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

f. On or about August 25, 2013. Respondents failed to obtain adequate veterinary care for a serval that died. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

g. August 25, 2013, through September 3, 2013. Respondents failed to obtain adequate veterinary care for a male red kangaroo

that died on September 3, 2013. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

h. On or about August 25, 2013. Respondents failed to obtain adequate veterinary care for a coatimundi that died. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

i. September 24, 2013. Respondents failed to obtain adequate veterinary care for a Great Pyrenees dog. 9 C.F.R. § 2.40(a).

j. September 24, 2013. Respondents failed to obtain adequate veterinary care for a tiger. 9 C.F.R. §§ 2.40(a).

k. October 8, 2015. Respondents failed to obtain adequate veterinary care for a Great Dane dog. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).

l. October 8, 2015. Respondents failed to obtain adequate veterinary care for a Fennec fox. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).

m. On or about January 20, 2016. Respondents failed to obtain adequate veterinary care for a red kangaroo that died sometime between October 8, 2015. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

4. On or about September 24, 2013. Respondents violated the Regulations by failing to identify dogs as required. 9 C.F.R. § 2.50(c).

5. On or about December 1, 2012, through June 24, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the date of disposal of two juvenile leopards acquired by Respondents on or about October 31, 2012. 9 C.F.R. § 2.75(b).

6. On or about June 25, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition of forty-three animals that were observed by the APHIS inspector at respondents' facility during the June 25, 2013. 9 C.F.R. § 2.75(b).

7. On or about June 25, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the disposition of six animals. 9 C.F.R. § 2.75(b).

8. On or about September 24, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition and disposition of dogs. 9 C.F.R. § 2.75(a)(2).

9. On or about September 24, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the acquisition of four animals. 9 C.F.R. § 2.75(b)(1).

10. On or about September 24, 2013. Respondents willfully violated the Regulations by failing to make, keep, and maintain records or forms that fully and correctly disclose the disposition of three domestic pigs. 9 C.F.R. § 2.75(b)(1).

11. On May 14, 2013 and May 23, 2013. Respondents willfully violated the Regulations governing access for inspections. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126.

12. On or about June 25, 2013, respondents failed to provide APHIS officials with access to conduct AWA inspections of their records, in willful violation of the Regulations producing an illegitimate written program of veterinary care with forged signature dated January 17, 2013. 9 C.F.R. § 2.126(a)(2).

13. On or about the following dates, Respondents willfully violated the Regulations governing the handling animals:

a. December 1, 2012. Respondents failed to handle a juvenile leopard as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort by using blunt force trauma to the head to "euthanize" the juvenile leopard. 9 C.F.R. § 2.131(b)(1).

b. January 10, 2014. Respondents failed to handle juvenile tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." 9 C.F.R. § 2.131(b)(1).

c. January 10, 2014. Respondents failed to handle juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public, by exhibiting the tigers without any distance or barriers between the animals and the public resulting in injury to a member of the public. 9 C.F.R. § 2.131(c)(1).

d. January 10, 2014. Respondents exposed juvenile tigers to rough or excessive public handling. 9 C.F.R. § 2.131(c)(3).

e. January 14, 2014. Respondents failed to handle a juvenile tiger and a juvenile kangaroo as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." 9 C.F.R. § 2.131(b)(1).

f. January 14, 2014. Respondents failed to handle juvenile tigers and a juvenile kangaroo, during exhibition, with minimal risk of harm to the animals and the public by exhibiting the tigers and the kangaroo without any distance or barriers between the animals and the public. 9 C.F.R. § 2.131(c)(1).

g. January 14, 2014. Respondents exposed juvenile tigers and a juvenile kangaroo to rough or excessive public handling. 9 C.F.R. § 2.131(c)(3).

h. January 15, 2014. Respondents failed to handle three juvenile tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger baby playtime." 9 C.F.R. § 2.131(b)(1).

i. January 15, 2014. Respondents failed to handle three juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public by exhibiting the tigers without any distance or

barriers between the animals and the public, resulting in injuries to two members of the public. 9 C.F.R. § 2.131(c)(1).

j. January 15, 2014. Respondents exposed three juvenile tigers to rough or excessive public handling. 9 C.F.R. § 2.131(c)(3).

k. August 19, 2014. Respondents failed to handle two juvenile tigers, a coatimundi, nonhuman primates, and a lemur as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort. 9 C.F.R. § 2.131(b)(1).

l. August 19, 2014. Respondents failed to handle two juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public by exhibiting the tigers without any distance or barriers between the animals and the public, resulting in injury to three members of the public. 9 C.F.R. § 2.131(c)(1).

m. August 19, 2014. Respondents failed to handle five nonhuman primates (two lemurs, a macaque, a capuchin, and a vervet), a kangaroo, and a coatimundi, during exhibition, with minimal risk of harm to the animals and the public. 9 C.F.R. § 2.131(c)(1).

n. August 19, 2014. Respondents exposed two juvenile tigers to rough or excessive public handling. 9 C.F.R. § 2.131(c)(3).

o. September 13, 2015. Respondents failed to handle four juvenile tigers and one juvenile capuchin monkey as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, during a "tiger playtime" exhibit. 9 C.F.R. § 2.131(b)(1).

p. September 13, 2015. Respondents failed to handle four juvenile tigers, during exhibition, with minimal risk of harm to the animals and the public. 9 C.F.R. § 2.131(c)(1).

q. September 13, 2015. Respondents failed to handle one juvenile capuchin monkey, during exhibition, with minimal risk of harm to the animal and the public. 9 C.F.R. § 2.131(c)(1).

r. September 13, 2015. Respondents exhibited four juvenile tigers in successive "playtime" and photo sessions without providing them an adequate rest period. 9 C.F.R. § 2.131(c)(3).

s. September 13, 2015. Respondents exposed multiple young or immature animals to rough or excessive public handling. 9 C.F.R. § 2.131(c)(3).

t. September 13, 2015. Respondents exhibited four juvenile tigers and a juvenile capuchin monkey for periods of time and under conditions that were inconsistent with the animals' good health and well-being. 9 C.F.R. § 2.131(d)(1).

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

a. Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement to promote the psychological well-being of nonhuman primates, in accordance with currently accepted professional standards, and made available to APHIS upon request. 9 C.F.R. § 3.81.

b. Respondents housed seven tigers and one lion in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. 9 C.F.R. § 3.125(a).

c. Respondents housed multiple tigers in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect the tigers from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. 9 C.F.R. § 3.127(d).

d. Respondents fed large carnivores a diet that was not prepared with consideration for the age, species, condition, size, and type of animals. 9 C.F.R. § 3.129(a).

15. On or about September 24, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to store supplies of food for dogs in facilities that adequately protect the supplies of food from deterioration, molding, or contamination by vermin. 9 C.F.R. § 3.1(e).

b. Respondents housed three hybrid dogs in enclosures with surfaces that were not impervious to moisture. 9 C.F.R. § 3.3(e)(1).

c. Respondents failed to develop, document, and follow an appropriate plan for exercise for dogs, as required. 9 C.F.R. § 3.8.

d. Respondents failed to clean and sanitize food receptacles for three hybrid dogs as required. 9 C.F.R. § 3.9.

e. Respondents failed to sanitize used primary enclosures for three hybrid dogs as required. 9 C.F.R. § 3.11(b)(2).

f. Respondents failed to develop, document, and follow an appropriate plan for environmental enhancement to promote the psychological well-being of nonhuman primates, in accordance with currently accepted professional standards, and made available to APHIS upon request. 9 C.F.R. § 3.81.

g. Respondents housed seven tigers and one lion in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. 9 C.F.R. § 3.125(a).

h. Respondents housed four tigers in an enclosure with a resting platform placed close to the side of the enclosure such that it could provide a means for the tigers to escape. 9 C.F.R. § 3.125(a).

i. Respondents failed to store supplies of food in facilities that adequately protect the supplies of food from deterioration, molding, or contamination by vermin. 9 C.F.R. § 3.125(c).

j. Respondents housed multiple tigers in facilities that were not enclosed by a perimeter fence to protect the tigers from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. 9 C.F.R. § 3.127(d).

k. Respondents housed a lion, two tigers, one leopard, and four bears in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. 9 C.F.R. § 3.127(d).

l. Respondents failed to provide animals a diet that was wholesome, palatable, and free from contamination and prepared with consideration for the age, species, condition, size, and type of animals. 9 C.F.R. § 3.129.

m. Respondents failed to provide potable water to bears. 9 C.F.R. § 3.130.

n. Respondents failed to provide potable water to the tigers housed in pens 1, 2, 4, 5. 9 C.F.R. § 3.130.

o. Respondents failed to provide potable water to a lion. 9 C.F.R. § 3.130.

p. Respondents failed to employ a sufficient number of adequately trained employees. 9 C.F.R. § 3.132.

16.On or about May 6, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed three dogs in enclosures with surfaces that were not impervious to moisture. 9 C.F.R. § 3.3(e)(1).

b. Respondents failed to provide potable water to a dog. 9 C.F.R. §

3.10.

c. Respondents failed to clean and sanitize two enclosures housing five hybrid dogs as required. 9 C.F.R. § 3.11(b)(2).

d. Respondents housed four bears in an enclosure with a wooden walkway that was in disrepair, and there were broken pieces of wood with exposed nails inside the bear enclosure. 9 C.F.R. § 3.125(a).

e. Respondents housed a tiger in an enclosure with a wooden spool that had collapsed, leaving broken pieces of wood and exposed nails. 9 C.F.R. § 3.125(a).

f. Respondents housed a tiger in an enclosure that contained logs with exposed nails. 9 C.F.R. § 3.125(a).

g. Respondents housed twelve animals in enclosures that did not provide them with adequate shade. 9 C.F.R. § 3.127(a).

h. Respondents failed to provide potable water to multiple tigers, four bears, one cougar, and one lion. 9 C.F.R. § 3.130.

17.On or about August 20, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed three dogs in enclosures with surfaces that were not impervious to moisture. 9 C.F.R. § 3.3(e)(1).

b. Respondents failed to provide potable water to a dog. 9 C.F.R. § 3.10.

c. Respondents failed to clean and sanitize two enclosures housing five hybrid dogs as required. 9 C.F.R. § 3.11(b)(2).

d. Respondents housed four bears in an enclosure with a wooden walkway that was in disrepair, and there were broken pieces of wood with exposed nails inside the bear enclosure. 9 C.F.R. §

3.125(a).

e. Respondents failed to provide potable water to multiple tigers, four bears, two cougars, and one lion. 9 C.F.R. § 3.130.

18. On or about July 27, 2015, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed a dog in an enclosure that contained sheets of unused siding adjacent to the shelter structure. 9 C.F.R. § 3.1(a).

b. Respondents failed to keep the water receptacle for a dog clean and sanitized. 9 C.F.R. § 3.10.

c. Respondents housed two hyenas in an enclosure that had broken wires protruding into the enclosure and accessible to the hyenas. 9 C.F.R. § 3.125(a).

d. Respondents housed a lion in an enclosure that contained sheets of unused siding adjacent to the shelter structure. 9 C.F.R. § 3.125(a).

e. Respondents failed to keep the water receptacle for a lion clean and sanitized. 9 C.F.R. § 3.130.

f. Respondents failed to provide juvenile tigers a diet that was wholesome, palatable, and free from contamination and prepared with consideration for the age, species, condition, size, and type of animals. 9 C.F.R. § 3.129.

19. On or about October 8, 2015, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed two dogs in an enclosure that contained a shelter in disrepair, with exposed nails and detached wood. 9 C.F.R. § 3.1(a).

b. Respondents housed two dogs in an enclosure that did not

provide the dogs with adequate shelter from the sun. 9 C.F.R. § 3.4(b)(2).

c. Respondents housed three ring-tailed lemurs in an enclosure that did not provide them with easy and convenient access to food and water. 9 C.F.R. § 3.80(a)(2)(viii).

d. Respondents housed a tiger in an enclosure containing a platform that was in disrepair, with numerous protruding nails accessible to the tiger. 9 C.F.R. § 3.125(a).

e. Respondents housed four tigers in an enclosure containing a shelter that was in disrepair, with portions of tin detached from the wall. 9 C.F.R. § 3.125(a).

f. Respondents housed two hyenas in an enclosure that was in disrepair, with sections of detached fencing exposing wires that protruded into the enclosure. 9 C.F.R. § 3.125(a).

g. Respondents housed a cougar in an enclosure containing a shelter that was in disrepair and open to the elements. 9 C.F.R. § 3.125(a).

h. Respondents housed multiple tigers in enclosures that contained excessive amounts of food waste. 9 C.F.R. § 3.125(a).

i. Respondents housed a cougar in an enclosure that contained a buildup of feces. 9 C.F.R. § 3.125(a).

j. Respondents housed animals in facilities that were not enclosed by a perimeter fence of sufficient height and structural strength to protect these animals from injury, function as a secondary containment system, and prevent the animals from physical contact with persons or other animals outside the fence. 9 C.F.R. § 3.127(d).

20. On or about January 20, 2016, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents housed a hybrid dog in an enclosure that contained a shelter in disrepair, with exposed nails and detached wood. 9 C.F.R. §§ 3.1(a), 3.1(c)(1)(ii).

b. Respondents housed a hybrid dog in an enclosure that contained a shelter that did not protect the dog from the elements. 9 C.F.R. § 3.4(b).

c. Respondents housed a dog in an enclosure that contained a shelter that did not contain adequate bedding to protect the dog from the cold. 9 C.F.R. § 3.4(b)(4).

d. Respondents housed three tigers in enclosures that were not constructed of such material and strength as appropriate for those species, and in a manner that would contain those animals. 9 C.F.R. § 3.125(a).

e. Respondents housed two hyenas in an enclosure that was in disrepair, with sections of detached fencing exposing wires that protruded into the enclosure. 9 C.F.R. § 3.125(a).

f. Respondents housed three wolves in an enclosure containing a single shelter that was not adequate to accommodate all three wolves. 9 C.F.R. § 3.127(b).

ORDER

By reasons of the Findings of Fact above, the Respondents have violated the AWA and, therefore, the following Order is issued:

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the AWA and the regulations and standards issued thereunder.

2. AWA license number 32-C-0204 is hereby revoked.

3. Respondents Timothy L. Stark and Wildlife In Need and Wildlife In Deed, Inc., are jointly and severally assessed a civil penalty of

$300,000 for their violations herein. The civil penalty shall be made by check made payable to "The Treasurer of the United States," must include the Docket Nos. 16-0124 and 16-0125, and shall be remitted either by U.S. Mail addressed to:

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

or by overnight delivery addressed to:

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

4. Respondent Timothy L. Stark is assessed a civil penalty of $40,000 for his violations herein, payable as set forth in paragraph 3 above.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

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

___

In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC., a Florida corporation, d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Decision and Order on Remand.
Filed Feb. 7, 2020.

AWA.

Ciarra A. Toomey, Esq., for APHIS.
Ellis L. Bennett, Esq., for Respondent.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER ON REMAND

INTRODUCTION AND BACKGROUND

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq*.) ("AWA"), and the Regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq*.) ("Regulations"). This matter initiated with a Complaint filed on July 17, 2015, by Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS").[1] The Complaint alleged Respondent Stearns Zoological Rescue & Rehab Center, Inc., a Florida corporation doing business as Dade City Wild Things ("Respondent" or "Respondent Stearns"), willfully violated the AWA and Regulations. Respondent timely filed an Answer on August 5, 2015.

An in-person Hearing was held June 27 through June 30, 2016 in Tampa, Florida. On February 15, 2017, then-Chief Administrative Law Judge Bobbie J. McCartney[2] ("Chief ALJ") issued a Decision and Order in the instant proceeding. On April 7, 2017, Respondent filed an appeal petition, and on April 27, 2017 Complainant filed a response and cross appeal thereto. On May 1, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) ("*Lucia*"), pending in the United States Supreme Court at that time, in which the Solicitor General took the position that administrative law judges ("ALJs") of the Securities and Exchange Commission are inferior officers under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

On December 27, 2017, then-USDA Judicial Officer, William G.

[1] While I recognize the Administrator is a person, herein I use the pronoun "it" when referring to Complainant.

[2] Chief Administrative Law Judge Bobbie J. McCartney retired from her position as Chief Administrative Law Judge effective January 19, 2018 but was appointed to the position of Judicial Officer by USDA Secretary Perdue on October 28, 2018, documented on November 16, 2018.

Jenson,[3] addressed the Appointments Clause issue and remanded this proceeding to the Chief ALJ. On January 10, 2018, this proceeding was reassigned to the undersigned for further action in accordance with the Remand Order. On May 4, 2018, I issued a Stay Order, suspending "[a]ll substantive activities . . . pending the issuance of a Supreme Court opinion in *Lucia v. SEC*, No. 17-130, or July 2, 2018, whichever comes first." Stay Order at 4. The Supreme Court issued its decision in *Lucia* on June 21, 2018.

I issued an Order Lifting Stay and Setting Filing Deadline on March 21, 2019, which provided that the February 15, 2017 initial Decision and Order was vacated, absent a specific waiver by the parties to a new hearing and a new decision by a new presiding judge, and providing the parties an opportunity to file proposals for the conduct of further proceedings consistent with the guidelines set forth therein. In response, Respondent filed a Proposal Regarding Further Proceedings on May 29, 2019 and Complainant filed a Response to the March 21, 2019 Order on May 30, 2019.

As explained below, the February 15, 2017 Decision and Order is vacated and I find that Respondent is entitled to a new proceeding on the existing record up to, but excluding, the vacated Decision and Order, and a new disposition. However, I also find that Respondent is neither entitled to a new in-person hearing and entirely new record, nor is dismissal of the Complaint and case warranted. Aside from Respondent's request for new hearing under *Lucia*, Respondent neither identifies any particular challenges to prior rulings by then-Chief Judge McCartney nor any basis for the broad contention that all her rulings were improper. Thus, no rulings aside from those that were contained in the now vacated Decision and Order are overturned. Respondent's requests to supplement the record with new evidence is likewise denied for failure to be specific as to the evidence Respondent seeks to add to the record and for failure to demonstrate good cause to add additional evidence to the record. Neither party requested to submit new briefs to be considered during my *de novo* review of the record. Thus, I did not order that new briefs be submitted for review and considered the existing briefs.

---

[3] Judicial Officer William G. Jenson retired from federal service effective August 31, 2018.

Based on a *de novo* review of the record up to, but excluding, the vacated February 15, 2017 Decision and Order, I find that the Complainant failed to show by a preponderance of the evidence that Respondent violated the following AWA regulations on the following occasions:

1. On July 27, 2011, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(c)(l), by failing to handle a macaque during public exhibition with minimal risk of harm to the animal and the public, and with sufficient distance and/or barriers between the animal and the public.

2. On October 10, 2012, and October 13, 2012, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(c)(1).On September 30, 2011, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. §§ 2.131 (c)(3), 2.131(d)(1); and on October 13, 2012, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(d)(1).Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.100(a), on the following dates by failing

3. to meet the minimum Standards promulgated under the AWA (9 C.F.R. Part 3), as follows:

    a. September 6, 2012. (Loose electric wire inside lion enclosure.)

    b. May l, 2013. (No method to rapidly eliminate excess water from tiger enclosures.)

Further, I find that the record shows by a preponderance of the evidence that Respondent willfully violated the following AWA regulations on the specified occasions:

1. On November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog as required. 9 C.F.R. § 2.50(c).

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

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

3. On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.13l(b)(l), by failing to handle tigers as carefully as possible in a manner that would not cause behavioral stress, physical harm, or unnecessary discomfort.

4. On October 10, 2012, and October 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131 (b)(2)(i), by using physical abuse to handle or work young tigers.

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

6. On October 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(3), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being.

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

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

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

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

THE HEARING PROCESS ON REMAND UNDER *LUCIA*

In *Lucia*, the Supreme Court held that Administrative Law Judges ("ALJs") are Officers of the United States within the meaning of Article II of the United States Constitution and are subject to the Appointments Clause.[4] The Court also held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, appropriate relief is a new hearing before a different, properly appointed official. [5]

In a ceremony on July 24, 2017, almost a year before the Supreme Court's opinion in *Lucia*, the Secretary of the United States Department of Agriculture, Sonny Perdue, personally ratified the prior appointments of USDA's ALJs and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that action.

The USDA Judicial Officer McCartney held in her February 19, 2019 "Order Remanding to the Chief Judge for Further Proceedings" in *Trimble*, Docket No. 15-0097, that as a result of the Secretary's actions to ratify the appointments of USDA ALJs, as of July 24, 2017, USDA ALJs were duly appointed by a "head of the department" as required by Article II and the Supreme Court's ruling in *Lucia*.[6] Furthermore, Secretary Perdue appointed me, Channing D. Strother, USDA Chief ALJ on October 17, 2018.

As stated, under *Lucia*, where a timely challenge to the "validity of the appointment of an officer who adjudicates his case" is made, the remedy for a respondent is the opportunity to seek a new hearing and a new decision by a new presiding judge.[7] Appointments Clause challenges may

---

[4] *Lucia v. SEC*, 138 S. Ct. 2044, 2051-55 (2018).

[5] *See id.* at 2055 (citing *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)).

[6] *Trimble*, 78 Agric. Dec. 145, 147 (U.S.D.A. 2019) (Order Remanding to Chief Judge for Further Proceedings) (affirming USDA ALJ authority as of July 24, 2017).

[7] *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 182-83 (internal quotations omitted)).

also be waived.[8] Here, a full hearing on the record was held from June 27 through 30, 2016 in Tampa, Florida, and an Decision and Order was entered on February 15, 2017. The Hearing was presided over, and the Decision and Order entered by, then-Chief ALJ McCartney prior to the Secretary's July 24, 2017 ratification of ALJ appointments. Therefore, a remedy of a new hearing and new disposition by a new presiding ALJ is warranted in this case under *Lucia*.

The USDA Judicial Officer has provided guidance on the procedure for new hearing granted under *Lucia* as follows:[9]

> The Supreme Court did not specify the type of hearing required to remedy an Appointments clause violation, thereby leaving it to judges' discretion to determine how to comply with its ruling and how to conduct new hearings. . . .
>
> Testimony taken at USDA hearings is taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence

---

[8] *See, e.g.*, *Finberg*, PACA-APP Docket No. 14-0167 (U.S.D.A. Feb. 7, 2019) (Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168 and 14-0169 and Remand Order Regarding Docket 14-0167), *available at* https://oalj.oha.usda.gov/sites/default/files/14-0167%20%20JO%20PROCEDURAL%20STATUS_Redacted.pdf (last visited Aug. 12, 2019) (where three respondents waived the raising of Appointments Clause challenges and forfeited a new hearing, while one respondent raised such challenge and was granted a remand for new hearing in accordance with *Lucia*). *See also, e.g.*, *DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

[9] *Trimble*, 78 Agric. Dec. at 2-3.

> as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any new evidence not previously submitted in the prior proceeding.
>
> [T]his process addresses any argument that [the Judge's] prior opinions, orders, and rulings may have been tainted from the Appointments Clause violation by removing any influence of [the Judge] on the record. Doing so does not in any way undermine the integrity of the record regarding the raw evidence produced and testimony taken at the hearing.

Thus, in the March 21, 2019 Order Lifting Stay and Setting Filing Deadline ("March 21, 2019 Order") I provided the parties with the opportunity to waive or accept a new hearing and a new decision by a new presiding judge pursuant to *Lucia* and *Trimble*; and instructed the parties, at 6, that, should a new hearing be held,

> absent a showing of good cause, the parties may rely on the existing record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as a part of that written record. The parties will be provided an opportunity to show good cause why any specific previous substantive or procedural ALJ action or ruling should be revisited and/or to show good cause why the written record should be supplemented with any new testimony or other evidence not previously submitted in this proceeding during the hearing held June 27 through June 30, 2016.

The parties were invited to file "proposals for the conduct of further proceedings consistent with the guidelines set forth" and were instructed that proposals "must include the identification of any specific previous substantive or procedural ALJ action being challenged, other than the vacated February 15, 2017 Decision and Order, supported by good cause, and the relief the party is requesting[;]" and "must include any request to supplement the existing record with any new testimony or other evidence

not previously submitted in this proceeding during the June 27 through June 30, 2016 hearing *supported by a showing of good cause*" (emphasis added).

Party Proposals for Procedures on Remand

Respondent filed a "Proposal Regarding Further Proceedings" ("Proposal") on May 29, 2019. In the Proposal at 1, Respondent "demands that the February 15, 2017 Decision and Order issued by Judge McCartney be vacated, and further demands dismissal of the Complaint. In the event the Complaint is not dismissed in its entirety, Respondent demands a new hearing upon an entirely new record conducted by a new presiding judge in accordance with *Lucia v. SEC*, 138 S. Ct. 2044 (2018)."

Respondent asks, at 1, that "in the event the Complaint is not dismissed under Lucia . . . Respondent is entitled to a new hearing at which new evidence and testimony must be allowed." Respondent broadly states at 1-2 that "Judge McCartney made significant rulings that fundamentally impacted and tainted those proceedings, including, but not limited to issues related to the presentation of evidence. In addition, the proceedings under Judge McCartney were fundamentally flawed from the outset in derogation of Respondent's rights, and Judge McCartney should have dismissed the Complaint." Respondent neither cites any authority nor provides any specific reasoning as to why Respondent "must" be afforded an opportunity to submit new evidence and testimony or why the Complaint should have been dismissed, nor does Respondent reference specific rulings by Judge McCartney that Respondent contends "fundamentally impacted and tainted those proceedings."

In the Proposal at 3, Respondent also asks to incorporate by reference its May 2, 2018 Statement of Position. Respondent requests a full new hearing and new record but asks, if that is not allowed, that new evidence be considered including evidence submitted with the Statement of Position. *Id.* Respondent also asks to "take additional evidence and present additional testimony, including that of the Respondent through its employees and representatives, including but not limited to Kathy Steams. Respondent additionally would like to present expert testimony, including that of Don James Woodman, DVM, who submitted an affidavit on May 2, 2018 in conjunction with Respondent's Statement of Position which

should also be considered." *Id.*

Complainant APHIS submitted its "Response to March 21, 2019 Order" ("Response") on May 30, 2019. Complainant states at 2-3: "It has been, and remains, the complainant's position with respect to how to proceed continues to be that this matter be decided on the written record" and that "respondent has not shown good cause to revisit substantive or procedural actions or rulings by then-Chief Judge McCartney, or to supplement the existing record with evidence that was introduced or could have been introduced at the four-day hearing of this matter."

As the Judicial Officer pointed out in *Trimble*, the Supreme Court in *Lucia* did not specify the matter in which a "new hearing" must be conducted to remedy an Appointments Clause issue.[10] Under the Judicial Officer precedent in *Trimble* and *Finberg*, a hearing on the record is sufficient and Respondent's demand for an entirely new hearing with a new record is not merited.[11]

Further, Respondent's demand that the Complaint be dismissed is without merit. Although it is well settled that constitutional issues can and should be raised during administrative proceedings, the mere raising of such constitutional issues, whether addressed or not by the ALJ, are not justification on their own for dismissal of a case.[12] As the previous JO,

---

[10] *See supra* note 6.

[11] *See Trimble supra* note 6; *Finberg supra* note 8.

[12] *See Horne v. Dep't of Agric.*, 569 U.S. 513, 528 (2013) (stating "[a]llowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails."); *Lesser*, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993) (stating "Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ."); *but see Lesser*,52 Agric. Dec. at 167-68 (citing *Robinson v. United States*, 718 F.2d 336, 337-38 (10th Cir. 1983) ("no agency ruling on a constitutional challenge could have resulted in a dismissal of the action.")); *Gallo Cattle Co., Inc.*, 57 Agric. Dec. 357 (U.S.D.A. 1998) ("It would be inappropriate for me to rule on the constitutionality of bloc voting, since '[n]o administrative

William Jenson, held, the raising of a constitutional issue should not inhibit the processing of a case.[13] Respondents cite no authority and provide no reason for the proposition that an otherwise proper complaint must be dismissed.

Last, Respondent demands that I permit new evidence into the record. In particular, Respondent requests to submit new evidence and testimony from "including but not limited to Kathy Stearns" and new "expert testimony including that of Don James Woodman, DVM." Aside from the fact that Respondent had a full opportunity to directly examine both Ms. Stearns and Dr. Woodman during the hearing, Respondent failed to state the nature of the proposed new evidence and testimony to be adduced and to show that such evidence is not merely cumulative, or to otherwise attempt to make a just cause showing for its addition to the record.[14] As

---

tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer.' *Buckeye Indus., Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979)") (other citations omitted); *Berosini*, 54 Agric. Dec. 886 (U.S.D.A. 1995) ("Respondent [argues] that USDA lacks the jurisdiction to regulate Respondent's activities. In the first place, it would be inappropriate for me to rule on the constitutionality of the Act. . . .") (citing *Buckeye Indus., Inc*., 587 F.2d at 235, and *Orchard*, 47 Agric. Dec. 378, 379 (U.S.D.A. 1988)); and *Horne*, 67 Agric. Dec. 1244, 1253 (U.S.D.A. 2008) ("Mr. Horne and partners are challenging the constitutionality of the Raisin Order . . . I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture . . . Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional . . . .") (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.")).

[13] *Beasley*, 76 Agric. Dec. 454, 458 (U.S.D.A 2017) ("Ms. Haselden cannot avoid or enjoin this administrative proceeding by raising constitutional issues.") (citing *Beho v. SEC*, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244-45 (1980) (refusing to enjoin an allegedly unlawful administrative proceeding where the court of appeals would be able to review alleged unlawfulness after the agency proceeding had concluded); *Jarkesy v. SEC*, 803 F.3d 9, 27 (D.C. Cir. 2015) (refusing to enjoin proceedings before an administrative law judge based on an Appointments Clause challenge)).

[14] *See* 7 C.F.R. § 1.146(a)(2).

the Judicial Officer points out in *Splish Splash II* "merely stating a desire to present evidence . . . without more, is insufficient grounds."[15]

RULING AND PROCEDURE FOR NEW HEARING ON REMAND

The Decision and Order issued by Judge McCartney on February 15, 2017 is vacated and the parties are granted a new hearing on the record by a new presiding judge. No weight will be given to the vacated February 15, 2017 Decision and Order and no factual finding or legal conclusion determined by then-Chief ALJ McCartney during the instant proceeding has been treated as presumptively correct. In fact, the undersigned has not read the vacated February 15, 2017 Decision and Order and it is not referred to in this Decision for any substantive purpose.

The new hearing will be conducted on the existing Record up to but not including the vacated February 15, 2017 Decision and Order. Respondent's requests to submit new evidence and testimony, including testimony from Kathy Stearns, Dr. Woodman, and to submit Respondents May 2, 2018 Statement of Position as new evidence, are denied. As discussed above, Respondent was provided the opportunity to make a showing of good cause to present specific new evidence and Respondent failed to make such a showing.

SUMMARY OF RECORD

As noted, no factual finding nor legal conclusions determined by then-Chief ALJ McCartney during the instant proceeding has been treated as presumptively correct or have otherwise been utilized for any substantive purpose. I have neither reviewed nor taken into account the analysis or findings in the vacated February 15, 2017 Decision and Order. Orders and rulings of an administrative nature[16] are hereby deemed non-substantive

---

[15] *Splish Splash II, LLC*, 78 Agric. Dec. 46, 53 (U.S.D.A. 2019).

[16] The following orders and rulings have been determined non-substantive for *de novo* review of the Record: December 4, 2015 Order to "File by January 27 (Wed) 2016" issued by ALJ Jill S. Clifton, ordering the parties to file joint or separate motions identifying preferences for hearing dates, locations, and format; January 29, 2016 Disclosure Deadlines & Other Instructions issued by ALJ Jill S. Clifton;

for the purposes of my *de novo* review of the Record. The Record contains of the following substantive pleadings, filings, and orders[17]:

- July 17, 2015 Complaint
- August 5, 2015 Answer
- March 21, 2016 Complainant's Witness and Exhibit List
- May 18, 2016 Respondent's List of Witnesses and Exhibits
- June 16, 2016 Complainant's Application for Subpoena
- June 21, 2016 Joint Stipulations as to Facts, Witnesses, and Exhibits
- Hearing Transcripts:[18]
  - June 27, 2016
  - June 28, 2016
  - June 29, 2016
  - June 30, 2016
- August 5, 2016 Complainant's Proposed Corrections to Transcript of Oral Hearing
- August 18, 2016 Order Adopting Transcript Corrections
- October 14, 2016 Respondent's Post-Hearing Brief

January 29, 2016 "2016 June 7-10 Hearing Notice" issued by ALJ Jill S. Clifton; March 3, 2016 Order reassigning Docket No. 15-0146 to then-Chief ALJ Bobbie J. McCartney; April 14, 2016 Order reassigning Docket No. 15-0146 to ALJ Jill S. Clifton issued by then-Chief ALJ Bobbie J. McCartney; April 25, 2016 "2016 June 27-July 1 Amended Hearing Notice"; May 26, 2016 Order reassigning Docket No. 15-0146 to then-Chief ALJ Bobbie J. McCartney; June 7, 2016 Notice of Hearing issued by then-Chief ALJ Bobbie J. McCartney; and October 6, 2016 Order Granting Request to Modify Briefing Schedule.

[17] The following pleadings and filings have been deemed non-substantive for purposes of *de novo* review of the record: Respondent's November 20, 2015 Motion for Case Management Conference; Respondent's January 28, 2016 Response to Case Management Order; Complainant's January 29, 2016 Response to Scheduling Order; Complainant's April 21, 2016 Notice of Appearance (Samuel Jockel); Respondent's October 4, 2016 Agreed Motion for Time Extension; Complainant's October 4, 2016 Request to Modify Briefing Schedule; Complainant's December 21, 2016 Notice of Withdrawal of Attorney (Colleen Carroll); and Respondent's December 28, 2016 Notice of change of Address.

[18] Noting that the Hearing Transcripts are named by date of transcription and each date starts with "page 1" as opposed to being consecutively numbered. Thus, hereinafter the transcripts will be referred to by date: *i.e.*, June 27, 2016 will be referred to as "Tr. 6/27" *et. seq.*

- October 14, 2016 Complainant's Proposed Finding of Fact, Conclusions of Law, Order, and Brief in Support Thereof

The following exhibits were admitted:

By stipulation:[19]	
CX 1-Licenses and renewal forms CX 2-Corporate records CX 3-APHIS form 7060 Warning Notice, 5/31/12; and inspection reports CX 13-Declaration of Dennis Trainum CX 14-Inspection Report, 7/27/11 CX 15-Inspection Report, 1/26/12 CX 16-Inspection Report and photographs, 9/6/12 CX 17-Inspection Report and photographs, 5/1/13 CX 18-Inspection Report, 9/9/13 CX 19-Inspection Report and photographs, 11 /21/13	RX 1-Amended and original inspection report, 1/7/2010 RX 2-Inspection Report, 1/9/13 RX 3-Inspection Report, 3/12/14 RX 4-Inspection Report, 5/15/14 RX 5-Inspection Report, 9/18/14 RX 8-Appeal letter for Sept. 14, 2011 Inspection Report RX 9-Letter from USDA to Kathy Stearns re video, dated Jan. 5, 2012 RX 10-Express mail receipt and U.S. Postal Service tracking confirmation Jan. 31, 2012 RX 11-USDA response to appeal of Sept. 14, 2011 inspection report RX 17-Email from Dr. Gaj to Kathy Stearns re investigation, dated May 3, 2012 RX 18-Interview with Jayanti Seiler, Lenscratch.com, Jan. 11, 2016 RX 20-E-mails between Dr. Woodman and Megan Adams re male leopard Cleo
During the June 27-30, 2016 Hearing:[20]	
CX 4-Video of segment of "Good Morning America 10/10/12" (Tr. 6/28 91:8-9) CX 5-Video of segment of "Fox and Friends" 10/18/12 (Tr. 6/28 91:8-9) CX 6-Declaration of Laurie Gage (Tr. 6/28 227:18-19) CX 7-Letter from Jayanti Seiler to APHIS (Tr. 6/27 166:16-9) CX 8-Affidavit of Jayanti Seiler, and photographs (Tr. 6/27 50:5-6, 166:16-9) CX 9-Letter from Barbara Keefe to APHIS (Tr. 6/28 85:14-15) CX 10-Affidavit of Barbara Keefe (Tr. 6/28 85:14-15)	RX 7- Video of Sept. 14, 2011 inspection (Tr. 6/30 117:5-6) RX 13- April 11, 2013 letter from Dr. Woodman re tiger behavior (Tr. 6/29 54:20-21) RX 14- Tiger cub protocol (Tr. 6/29 70:6-7) RX 15- Adult tiger protocol (Tr. 6/29 82:21-22) RX 16- Swimming protocol (Tr. 6/29 96:20-21) RX 22- Video of tiger swimming at Dade City Wild Things (Tr. 6/30 154:22-155:1) RX 25- Recordings of baby tiger sounds (Tr. 6/30 154:22-155:1) RX 27- USDA letter to Kathy Steams dated 2/24/12 regarding review of previous denial

CX 11-Photographs provided by respondent to Barbara Keefe (Tr. 6/28 55:8-9) CX 12-Photographs provided by Barbara Keefe to APHIS (Tr. 6/28 49:19-20) CX 20-Letter from Jayanti Seiler and Jim Pivonka 9/11/13, pages 1-3 (Tr. 6/27 164:12-165:1, 165:18-19; 6/28 6:8-9) CX 21-Incident Report 7/30/11 (Tr. 6/28 122:11-12). CX 22-Felids dates of birth and death – Page 1 only, Redacted (Tr. 6/30 266:10-11, 267:13-14) CX 26-Attachment A to the Subpoena for the custodian of records (Tr. 6/30 269:8-9)	of appeal; still denied (Tr. 6/30 127:8-9) RX 28- CD of photos from business hard drive (Tr. 6/29 207:10-11) RX 30-Overview sheet, screenshots of photo access system, Spreadsheet chart of all tiger and gator swim events (Tr. 6/30 169:21-22)

A party may move for reconsideration of this decision in the event a party is aware of a factual error or factual omission that was not considered but is a part of the record.

JURISDICTION AND BURDEN OF PROOF

The AWA was promulgated to insure the humane care and treatment of animals intended for research facilities, exhibition, or as pets.[21] Congress provided for enforcement of the AWA by the Secretary of Agriculture, USDA.[22] Regulations promulgated under the AWA are in the

[19] Accepted into the record due to stipulation, *see* Tr. 6/27 at 10:22-11:2.

[20] The court reporting company did not provide a table of contents for exhibits admitted into evidence. For ease of reference, each exhibit admitted during the Hearing includes reference to the transcript. For further information, CX 23 (Entries of tigers), CX 24 (Entries of tigers), and CX 25 (video of cubs playing) were denied admission to the Record, *see* Tr. 6/30 251:5-22. Respondent chose not to offer RX 6 (*see* Tr. 6/30 226: 6-15), RX 12 (*see* 6/30 226: 16-19), RX 19 (*see* 6/30 226:20-22), RX 21 (*see* 6/30 227:1-2), RX 23 (*see* 6/30 227:3-5), RX 23 (*see* 6/30 227:6-7), and RX 29 (*see* Tr. 6/30 173:2-7) into the Record. There is no RX 26 (*see* Respondent's List of Witnesses and Exhibits, referring to "all exhibits listed by Complainant" as RX 26).

[21] 7 U.S.C. § 2131.

[22] 7 U.S.C. §§ 2131-59.

Code of Federal Regulations, part 9, sections 1.1 through 3.142. The burden of proof is on Complainant, APHIS.[23] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[24] such as this one, is the preponderance of the evidence.[25]

RELEVANT STATUTORY AND REGULATORY AUTHORITY

The Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et. seq*. was promulgated 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." 7 U.S.C. § 2131(1). To this purpose, the AWA provides that:

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

7 U.S.C. § 2146(a).

The regulations promulgated under the AWA and relevant to this case, provide:

> (a) Each dealer, exhibitor, intermediate handler, or carrier shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;
> (2) To examine records required to be kept by the Act and the regulations in this part;
> (3) To make copies of the records;
> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary

[23] 5 U.S.C. § 556(d).

[24] 5 U.S.C. §§ 551 *et seq*.

[25] *See Herman & Maclean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

> 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.

9 C.F.R. § 2.126(a).

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

9 C.F.R. § 2.131(b)(1).

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

9 C.F.R. § 2. 131(b)(2)(i).

> During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.13l(c)(l).

> Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or wellbeing.

9 C.F.R. § 2.13 l(c)(3).

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

9 C.F.R. § 2.131(d)(l).

A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats 3; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

9 C.F.R. § 2.50(b).

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

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

> section, or
>
> (2) By identifying each dog or cat with:
>
> (i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;
>
> (ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and
>
> (iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

9 C.F.R. § 2.50(c).

The Regulations define "handling" as:

> petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal.

9 C.F.R. § 1.1.

Section 2.100(a) of the Regulations provides:

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

9 C.F.R. § 2.100(a).

The Regulations provide the following standards, relevant to this case:

> Drainage. A suitable method shall be provided to rapidly

> eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(c).

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

9 C.F.R. § 3.125(a).

The AWA provides for the following civil penalties if a violation of the statute is found in section 2149(b):

> **(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**
>
> **Any dealer**, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, **that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $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**. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to

> the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the **size of the business of the person involved**, the **gravity of the violation**, the **person's good faith**, and the **history of previous violations**. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 2149(b) (emphasis added).[26]

DISCUSSION

The Complaint, filed July 17, 2015, alleges that Respondent willfully violated the AWA and the regulations issued thereunder on multiple occasions between on or about July 27, 2011 through on or about November 21, 2013. In the Answer, filed August 5, 2015, Respondent admits to the jurisdictional allegations but denies all alleged violations. Respondent raises no other affirmative defenses in the Answer.

[26] The civil penalty for a violation of the AWA is a maximum of $11,390, for violations taking place between December 5, 2017 and March 14, 2018; and a maximum of $10,000 for violations taking place between May 7, 2010 and December 4, 2017. 7 C.F.R. § 3.91(b)(2)(ii).

Under the Administrative Procedure Act, ("APA"), 5 U.S.C. § 558(c), for a license to be withdrawn, suspended, annulled, or revoked, the license holder must be given notice in writing of facts or conduct that warrant such action and an opportunity to demonstrate or achieve compliance "except in cases of willfulness or those in which public health, interest, or safety requires otherwise." Willfulness determinations are not necessary for issuance of civil penalties or cease and desist orders and only one finding of a willful violation is needed under 7 U.S.C. § 2149(a) which authorizes the suspension or revocation of a license.[27]

The Judicial Officer has long held that a "willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) 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."[28] Under the AWA, the term "willful" means "action knowingly taken by one subject to the statutory provision in disregard of the action's legality. . . . Actions taken in reckless disregard of statutory provisions may also be 'willful'" (internal quotations omitted).[29] The Court in *Hodgins* determined that:

---

[27] *See Big Bear Farm, Inc*, 55 Agric. Dec. 107, 139 (U.S.D.A. 1996); *Horton*, 73 Agric. Dec. 77, 85 (U.S.D.A. 2014).

[28] *Terranova Enters., Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. July 19, 2012) (citing *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*., 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009); *Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978)).

[29] *Hodgins v. U.S. Dep't of Agric*., 238 F.3d 421, 2000 WL 1785733, *9 (6th Cir. 2000) (table) (quoting *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999); citing *United States v. Illinois Cent. Ry*., 303 U.S. 239, 242-43 (1938) (one who 'intentionally disregards the statute or is plainly indifferent to its requirements' acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961) (one who 'acts with careless disregard of statutory requirements' acts willfully); JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action "was committed intentionally" or "was done in disregard of lawful requirements"

> [the] proper rule . . . is this: Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty.[30]

Here, regarding each of the allegations, I take into account that Respondent has been in business for about sixteen years and the Executive Director and co-founder, Ms. Kathy Stearns, stated that she "speak[s] a lot on references to USDA and OSHA regulations."[31] Thus, I conclude Respondent is well informed regarding the AWA and related regulations. Based on the evidence, Respondent was provided with Inspection Reports (and a chance to demonstrate or achieve compliance) for about eleven of the twenty-four alleged violations.[32] The other alleged violations arose out of complaints regarding the handling of animals during encounters with the public, which complaints arguably fall under public interest and public safety.

I. Identification of Animals

The Complaint, at 3, para. 6, alleges that "[o]n November 21, 2013, respondent willfully violated the Regulations by failing to identify a dog, as required. 9 C.F.R. § 2.50(c),"[33] In its Brief at 6, Complainant characterizes this allegation as "[t]he complaint alleges that on November 21, 2013, Steams Zoo willfully violated the Regulations by failing to identify a dog *used for exhibition*" (emphasis added).

---

and also noting that "gross neglect of a known duty will also constitute willfulness")).

[30] *Hodgins*, *supra* note 531, at *10.

[31] Tr. 6/30, 5:16-19, 10:21-22. *See also* Tr. 6/30, 11:2-3 ("a lot of the industry will call me about how to be in compliance and do things.")

[32] *See e.g.* CX 3, 14, 15, 16, 17, 18, 19, 21.

[33] Complaint at 3 ¶ 6.

In support of this allegation, Complainant presented the testimony of Dr. Luis Navarro, an APHIS Animal Care veterinarian medical officer ("VMO").[34] He testified that the main issued he observed was that "the dog didn't have any identification, and by regulation they should have an identification tag with the USDA if it's going to be used for any purpose that is a regulated activity."[35] He testified that during his inspection of Respondent's facility an identification could not be found on the dog's collar or on the door of the enclosure.[36] Dr. Navarro testified that Ms. Stearns told him at the time of the inspection that the dog was used for interactive sessions.[37] The November 21, 2013 Inspection Report, signed by both Dr. Navarro and Ms. Stearns, corroborates Dr. Luis Navarro's testimony (CX 19 at 1) and includes photographs (CX 19 at 4) taken by Dr. Navarro on the day of the inspection with the description "Dog with collar but no id tag. 'Boots.'"

Complainant contends that although Ms. Stearns testified that she later corrected the alleged violation by placing identifying information in the dog's "cage,"[38] "correction of a violation does [*sic*] [not] eliminate the fact that it occurred."[39] Complainant's Brief at 7.

Ms. Stearns testified during the hearing that she "is not in the business of showing dogs," the dog observed without identification in CX 19 is her son's dog, and the dog "is not an exhibit" because he "is in an area where

---

[34] Tr. 6/28, 132:4-134:6.

[35] Tr. 6/28, 133; 4-11.

[36] Tr. 6/28, 133:14-18.

[37] Tr. 6/28, 133:19-134:2.

[38] Tr. 6/30, 219:8-11.

[39] Citing *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 754, 759, (U.S.D.A. 2013) (citing *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *Bond*, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *Drogosch*, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); *Parr*, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); *Huchital*, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); *Stephens*, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999)).

the public can never see him."[40] She testified that the pen the dog was in was in a place not viewable by the public. She testified that the dog had been there for previous inspections and that previous inspectors understood that the dog was not exhibited. Ms. Stearns further testified that the dog was in a pen because it "is just not a good dog" and if let out unsupervised would kill her chickens and turkeys. Respondent contends that "[r]equiring Kathy Stearns to identify 'Boots' her son's pet dog, as one of the Respondent's exhibited animals shows just how petty APHIS can be."[41]

The Regulations, 9 C.F.R. § 2.50(c), state "[a] class 'C' exhibitor shall identify *all live dogs* and cats *under his or her control or on his or her premises*, whether held, purchased, or otherwise acquired" (emphasis added). The Regulations do not include an exception for pet animals on the premises not used for exhibition.[42] Complainant is correct in that the Department's policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. . . . While

---

[40] Tr 6/30 219:7-219:21. *But see* Complainant's Brief at 7 n.1 (contending that Mrs. Stearns never appealed Dr. Navarro's inspection report or otherwise communicated that the report was incorrect because the dog was a pet).

[41] Respondent's Brief at 4 (citing "Tr. 4, 21"). Noting that the citation is unclear and, if understood to mean Tr. 6/30, 21, there is no discussion of or reference to this allegation at that cite.

[42] *See Lawson*, 57 Agric. Dec. 980, 1011 (U.S.D.A.1998) ("Complainant contends that John Curtis' dogs -- his personal pets -- were regulated animals even though not exhibited because they were on the same premises as animals to be exhibited. . . . [N]either the [Animal Welfare] Act nor the Regulations [and Standards] prohibit APHIS in these circumstances from . . . [regulating] personal pets . . . on an exhibitor's premises. . . . [Footnote omitted. Considerable] weight is . . . given to . . . APHIS' . . . interpretation of the Regulations [issued under] the statute [APHIS] enforces. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 84[2-45] (1984). Therefore, since Respondents did not maintain records on John [Curtis'] pets, or provide tags . . . or . . . an exercise program, [Respondents] violated [sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and] sections 2.50 and 2.75 of the [Regulations (9 C.F.R. §§ 2.50, .75)"); *Wahl*, 56 Agric. Dec. 396, 406 (U.S.D.A. 1997) ("The animals in question are, therefore, subject to regulation under this broad definition, either if Respondents ever intended to exhibit them, or if they were to remain pets.").

corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.[43]

I find that Complaint did not prove by a preponderance of the evidence that Boots the dog was exhibited. Ms. Stearns' testimony under oath at hearing, subject to cross-examination, that Boots was not exhibited, with the supporting reasons that the dog was in a pen because it was not safe unsupervised around her chickens and turkeys is sufficient to counterbalance the evidence presented by the Complainant that Ms. Stearns said at the time of the inspection that Boots had been exhibited, which is the only evidence of record that Boots was exhibited.

The record in this case is extensive, but there is no testimony by any witness that the dog was seen being exhibited. There are no photographs or video of the dog being exhibited. The issue as framed by Complainant is whether or not the dog in question was identified, not whether Ms. Stearns misspoke, for whatever reason, in telling the investigator the dog was exhibited. I find Ms. Stearns' testimony at hearing to be credible and compelling, and to overcome on a substantive basis Complainant's evidence that she said something else that was contradictory to the investigator.

However, I also find that the Regulations do not require a dog be exhibited in order to come within the identification requirements of 9 C.F.R. § 2.50(c). Therefore, any issue of whether or not Boots was exhibited, is not relevant to determine that the regulation was violated. Under the express language of the regulation, exhibition of a dog on the premises is not an element of a violation of the regulation. The record is undisputed that Boots was on the premises and was unidentified. That Ms. Stearns' testimony is sufficient to prove that the dog was not exhibited does not obviate the uncontested evidence that the dog was on the premises and unidentified, thus that a violation took place. I find that because the record is uncontested that the dog Boots was on the Respondent's premises and was not identified within the meaning of the regulation, that failure to

[43] *Hodgins*, 56 Agric. Dec. 1242, 1275-76 (quoting *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 142 (U.S.D.A. 1997)).

identify the dog Boots violated 9 C.F.R. § 2.50(c).

As noted, Respondent on brief contends "[r]equiring Kathy Stearns to identify 'Boots' her son's pet dog, as one of the Respondent's exhibited animals shows just how petty APHIS can be."[44] Respondent also states: "It is no wonder that Kathy Stearns insists on being present for every inspection."[45] It is unclear what Respondent is contending. The record is devoid of any evidence that anyone required Ms. Stearns to tell the USDA inspector that Boots was an exhibited animal if Boots was not an exhibited animal. I find no basis for any contention that an inspector's asking whether a dog on the premises is being exhibited to be "petty." As noted, the tagging and record book requirements of 9 C.F.R. § 2.50(c) apply to any dog on the licensee's premises. In this case the dog was locked in a pen on the premises. Respondent contended that the dog was kept in a pen that was not viewable by the public. Respondent did not contend the pen was not in the general area where exhibited animals were kept. For instance, it was not at Ms. Stearns' residence. Respondent makes no contention that the dog was not "on the premises" within the meaning of the regulation. Respondent does not contend that the tagging and record book procedures are unduly burdensome. Ms. Stearns was able to correct the violation promptly. Apparently, Respondent's contention is that the regulation requirement is petty. I find nothing in these circumstances as to APHIS enforcement of its regulations or its inspectors' actions to be "petty."

Complaint demonstrated by a preponderance of the evidence that "[o]n November 21, 2013, respondent willfully violated the Regulations by failing to identify a dog, as required. 9 C.F.R. § 2.50(c)."[46]

II. Inspections

The Complaint, at 3, para. 7, alleges that on or about January 26, 2012, and on or about September 9, 2013, Respondent willfully violated the AWA, 7 U.S.C. § 2146(a), and Regulations, 9 C.F.R.§ 2.126(a), by failing

---

[44] Respondent's Brief at 4 (citing "Tr. 4, 21"). *See supra* note 41.

[45] *Id.*

[46] Complaint at 3 ¶ 6.

to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours. As support for this allegation, Dr. Navarro testified that on January 26, 2012 he waited for an hour and made multiple attempts, by phone and by going into the tour store and main office, to get in contact with a responsible adult that could give access to the premises for an AWA inspection.[47] Dr. Navarro's signed January 26, 2012 Inspection Report (CX 15) is consistent with his testimony.[48]

Dr. Robert Brandes testified that on September 9, 2013 "he rang the bell at the facility, and called Ms. Stearns, who told him that the facility was closed on Monday and she was busy."[49] Dr. Brandes' testimony is consistent with his signed September 9, 2013 Inspection Report (CX 18).[50]

Complainant contends that "the failure of an exhibitor either to be available to provide access for inspection or to designate a responsible person to do so constitutes *a willful violation* of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a)."[51] Complainant further contends that, although Ms. Stearns testified that she understood that "the rule is during your business hours, meaning my [i.e. Stearns] operation [hours]"[52] that there "is no rule applicable to the AWA that 'business hours' means only those times when a facility is open to the public."[53] Further, Complainant contends that there

---

[47] Tr. 6/28, 122:22-124:12.

[48] The January 26, 2012 Incident Report states "Sent by regular mail and certified mail," dated Jan-26-2012, with USPS mail tracking number "7011 2000 0002 4403 3207" but is not signed by a recipient.

[49] Complainant's Brief at 9 (citing Tr. 6/28, 164:12-20).

[50] The September 9, 2013 Incident Report states "Sent by first class mail," dated Sep-10-2013 but is not signed by a recipient.

[51] *Id.* (citing *Perry and Perry's Wilderness Ranch & Zoo, Inc*., 71 Agric. Dec. 876, 880 (U.S.D.A. 2012); *Perry*, 72 Agric. Dec. 635, 643 (U.S.D.A. 2013)) (emphasis added).

[52] Tr. 6/30 215:20-216:3. *See also* Tr. 6/30 215:2-14.

[53] Complainant's Brief at 10 (quoting 9 C.F.R. § 1.1 ("*Business hours* means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday,

is no exception to "the regulation requiring exhibitors to allow APHIS officials access to conduct inspections during business hours."[54]

Respondent, in its Brief at 5, contends that although on January 26, 2012, Ms. Stearns admitted that she was not available to participate in an inspection due to a doctor's appointment (citing Tr. 6/30 at 184),[55] because the inspectors "never reached Stearns . . . Complainant cannot say that she [Ms. Stearns] denied them [APHIS inspectors] access." Respondent also contends that "[t]he agency well knows that Respondent is a public facility that is closed on Monday's and so there was no violation" on September 9, 2013.[56] Respondent also contends that Ms. Stearns "always cooperates with inspectors" and notes she testified that she has "even left the hair salon in the middle of a dye treatment to attend an inspection."[57]

During the Hearing Ms. Stearns testified that she is "always" the only person that handles inspections because it is her name on "the application" and "Florida permits," she is "responsible for everything," and she wants "to make sure that everything is taken care of . . . [s]o if there is something wrong . . . [she can] know it and fix it [and] [i]f there isn't, [she] know[s] how to appeal."[58]

The AWA, 7 U.S.C. § 2146(a), provides that the:

> Secretary shall make such investigations or inspections as he deems necessary to determine whether any … exhibitor . . . has violated or is violating any provision of this chapter or any regulation or standard issued

---

except for legal Federal holiday, each week of the year, during which inspections by APHJS may be made."); citing *Perry*, 71 Agric. Dec. at 880).

[54] Citing 9 C.F.R. § 2.126(a); quoting *Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A 2013) ("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.").

[55] *See* Tr. 6/30, 183:18-184:3.

[56] Respondent's Brief at 5 (citing CX 18; Tr. 6/30, 215-16; 9 C.F.R. § 2.126(a)).

[57] *Id. See also* Tr. 6/30 at 185:21-186:3.

[58] Tr. 6/30, 184:4-185:2.

> 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.

The Regulations, 9 C.F.R. § 2.126(a), require that each exhibitor

> allow APHIS officials: . . . [t]o 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 . . . [t]o document, by the taking of photographs and other means, conditions and areas of noncompliance.

The Regulations define "business hours" as "a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal Holidays, each week of the year, during which inspections by APHIS may be made."[59]

It is well recognized that the "requirement that exhibitors allow APHIS officials access to and inspection of facilities, property, records, and animals, during business hours, which as provided in 9 C.F.R. § 2.126(a), is unqualified and contains no exemption."[60] AWA license holders must have "some employee or agent . . . available at each facility . . . to give full and ready access to it and its records, for any unannounced APHIS inspection."[61] Neither a doctor's appointment nor a licensee's desire to be the sole responsible adult to facilitate APHIS inspections, can excuse a licensee from compliance with the AWA and regulations. [62] The

---

[59] 9 C.F.R. § 1.1.

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

[61] *Berosini*, 54 Agric. Dec. 886 (U.S.D.A. 1995) (quoting *S.S. Farms Linn County, Inc*., 50 Agric. Dec. 476, 492 (U.S.D.A. 1991) [*aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)]).

[62] *See Greenly*, 72 Agric. Dec. at 617, where the Judicial Officer determined that, even though the Respondent was ill and had to leave for a doctor's appointment during an attempted inspection, and even though the APHIS inspector agreed to return on another day, the Respondent was found to have violated the AWA and

regulations define business hours to include "Monday through Friday."[63] Thus, even though Respondent's business is not open to the public on Mondays, Respondent was still required by the Regulations to provide access during "reasonable" business hours on Mondays. Further, despite a previous inspection report citing the failure to provide access for inspection on January 26, 2017 in violation of 9 C.F.R.§ 2.126(a), Respondent again refused APHIS officials' entry for inspection on Monday, September 9, 2013, when Ms. Stearns stated that the business was closed and she "was busy." Therefore, I find that Respondent willfully violated the AWA, 7 U.S.C. § 2146(a), and regulations, 9 C.F.R.§ 2.126(a), because the evidentiary record shows without dispute that Respondent failed to have a responsible person available to provide access to APHIS officials and thereby denied access to such officials to inspect its facilities, animals and records during normal business hours on January 26, 2012, and on September 9, 2013.

III. Handling of Animals

The Complaint alleges, that on multiple occasions Respondent willfully violated the following regulations: 9 C.F.R. § 2.131(b)(1), by failing to handle animals as carefully as possible in a manner that did not cause behavioral stress, physical harm, or unnecessary discomfort;[64] 9 C.F.R. § 2.13l(b)(2)(i), by using physical abuse to handle or work animals;[65] 9 C.F.R. § 2.13l(c)(l), by failing to handle animals during public exhibition with minimal risk of harm to the animals and the public, and with sufficient distance and/or barriers between the animals and the public;[66] and 9 C.F.R. §§ 2.131(c)(3) and 2.131(d)(1), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and by exhibiting young tigers for periods of time and/or under conditions

---

regulations because "[n]othing 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)."

[63] 9 C.F.R. § 1.1.

[64] Complaint 3-4 ¶ 8.

[65] Complaint at 4 ¶ 9.

[66] Complaint at 4 ¶ 10.

inconsistent with their good health and well-being.[67]

Respondent generally contends that the handling allegations involve a "strong disagreement [between Respondent and Complainant] over whether or not people should swim with young tigers" but that "[i]t is undisputed . . . that the practice is not prohibited, and the evidence showed that the swimming tiger program is beneficial to both tigers and people."[68] Respondent states the tiger swim program was developed to "acclimate captive bred tigers to the presence of humans and to build a greater bond with the public in the animal world" as a part of its tiger training program.[69] Respondent avers that all tiger protocols were developed with the assistance of qualified veterinarians, that various limits and rules are instilled during tiger swim sessions for the well-being of the tigers, and that a care regimen is in place to account for the tigers' needs.[70]

The violations alleged by Complainant involve the handling of animals by an AWA licensee required to abide by the requirements of the AWA, and Regulations promulgated thereunder, on the specific occasions of alleged violations. The AWA and Regulations do not expressly prohibit the exhibition of tiger cubs, nor do they expressly prohibit all direct public contact with tiger cubs. But the AWA charges the Secretary with promulgating "standards to govern the humane care, treatment and transportation of animals by . . . exhibitors," 7 U.S.C. § 2143 (a)(1), and the Secretary has promulgated such standards through regulations that govern the handling of such animals which each AWA licensee required to meet as further analyzed below. *See* 9 C.F.R. part 2.131.

a) Handling of Animals: July 27, 2011

The Complaint alleges, at 4, para. 10a, that on or about July 27, 2011, Respondent exhibited a macaque with insufficient distance and/or barriers between the macaque and the public in willful violation of 9 C.F.R. § 2.13l(c)(l). In support of this allegation, Complainant offered the

[67] Complaint at 5 ¶ 11.

[68] Respondent's Brief at 1 (citing Tr. 6/28, 144).

[69] *Id.* at 2 (citing Tr. 6/29, 19).

[70] *Id.* (citing Tr. 6/30, 24-27, 37, 39-40).

testimony of Dr. Navarro[71] that he received a handwritten Incident Report dated July 21, 2011,[72] stating that a monkey "attacked" a customer's arm during an encounter, hosted by Ms. Stearns, and that the monkey "kept slapping" the customer's face and "repeatedly bit [the customer's] arm" which "did break the skin" but that "Kathy [Stearns] did nothing." *Id.* Complainant contends that "[p]ermitting the public to have direct contact with animals without sufficient distance and/or barriers in a manner that risks harm (including injury or disease) to the animal or the public contravenes the handling Regulations" and "[h]ere, Stearns Zoo permitted a member of the public to have direct contact - without any distance or barrier—with a non-human primate (a macaque), resulting in apparent injury."[73]

Respondent contends that Dr. Navarro "did nothing to investigate or verify the facts in his report and instead relied on the hearsay statement of an unidentified health official who reported the bite complaint of an unidentified customer."[74] Respondent contends this allegation was investigated by the Florida Wildlife Commission ("FWC") and "[n]othing came of it" because Ms. Stearns, who was present during the encounter, provided FWC with pictures of the session and maintained that the monkey never bit the customer.[75]

Dr. Navarro testified that he received the hand-written Incident Report, CX 21, via email, along with an email from the Florida Health Department representative regarding a person seeking medical treatment for a monkey

---

[71] Tr. 6/28, 119:12-120:1.

[72] CX 21.

[73] Complainant's Brief at 12 (citing *Palazzo*, 69 Agric. Dec. 173, 194 (U.S.D.A. 2010)).

[74] Respondent's Brief at 13 (citing CX 14; CX 21; *Hansen*, 57 Agric. Dec. 1072 (U.S.D.A. 1998) ("the probative value of a report depends on the extent to which the inspector documents the facts supporting [the inspector's] findings."); Tr. 6/28, 147-48).

[75] Respondent's Brief at 14 (citing Tr. 6/30, 174-75, 176-77, 181, 183). Respondent claims that Stearns believed that she appealed the July 27, 2011 Inspection Report but did not keep the paperwork. *Id.*

bite.[76] I find the hand-written Incident Report, along with Dr. Navarro's testimony about how the hand written complaint was received,[77] an insufficient basis on which to determine there has been a violation as alleged by Complainant.

At hearing, Respondent objected to the admission of CX 21 as hearsay but presiding Judge McCartney overruled that objection and admitted that exhibit into evidence. I find that this ruling was correct. The courts have consistently held that reliable and probative hearsay evidence is admissible in cases under the Administrative Procedure Act as long as that evidence is not "irrelevant, immaterial, or unduly repetitious."[78] The

---

[76] Tr. 6/28 at 119:17-120:1. At the bottom of the hand-written Incident Report some writing is scratched out, which could possibly be a signature, but Dr. Navarro testified that he was not sure if it was a signature and that he did not scratch out the writing but recalls receiving the document that way. Tr. 6/28 at 118:22-119:9. The email submitting the Incident Report was not submitted to the record.

[77] *See* Tr. 6/28 at 147:12-14.

[78] *See Hansen*, 58 Agric. Dec. 369, 384-86 (U.S.D.A. 1999) (citing 5 U.S.C. § 556(d); 7 C.F.R. § 1.141(h)(1)(iv); *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible per se); *Crawford v. U.S. Dep't of Agric*., 50 F.3d 46, 49 (D.C. Cir. 1995) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric*., 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Hodgins*, 56 Agric. Dec. 1242, 1355 (U.S.D.A. 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Den. Pet. for Recons.); *Gray*, 55 Agric. Dec. 853, 868 (U.S.D.A. 1996) (Decision as to Glen Edward Cole); *Thomas*, 55 Agric. Dec. 800, 821 (U.S.D.A. 1996); *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 136 (U.S.D.A. 1996); *Fobber*, 55 Agric. Dec. 60, 69 (U.S.D.A. 1996); *Marion*, 53 Agric. Dec. 1437, 1463 (U.S.D.A. 1994)) (additional citations omitted).

record supports that a complaint was filed with the Florida Health Department, which deemed it credible enough to merit an investigation by the FWC. However, a ruling that particular hearsay evidence may be admitted into the record, is not determinative of the weight that evidence will be given as to specific issues. Nor is it a determination of as to what that evidence may or may not be relevant. Ms. Stearns testified that she did not recall being informed of someone being bitten during exhibition of a macaque on July 21, 2011, and that she would have known if someone had been bitten as she was the handler.[79]

The person allegedly injured by the macaque did not testify at the hearing, there is no signed document allegedly submitted by that person, and neither the Incident Report, CX 21, nor any other document on the record identifies the author of the Incident Report. The only evidence of record is a handwritten Incident Report submitted by a Florida official, with the signature or other writing crossed out, alleging that a person was injured by a macaque exhibited by Respondent.[80] Respondent is also correct that the record indicates that Dr. Navarro "did nothing to investigate or verify the facts in his report and instead relied on the hearsay statement of an unidentified health official who reported the bite complaint of an unidentified customer." Neither the customer nor the Florida health official testified at hearing. Thus, neither was subject to cross-examination. There is nothing in the record to indicate whether either would have been available to testify at hearing.

In USDA practice, the fact that an inspector has noted a violation on an inspection report, by itself, is not substantive evidence of the violation.[81] Likewise, the fact that USDA has brought a formal complaint against a respondent for an alleged violation is not deemed evidence that the Respondent actually committed the alleged violation. It would be illogical

---

[79] Tr. 6/30, 173-19, 177:6-7.

[80] CX 21. Noting also that the Incident Report, CX 21, names "Kathy Sterns" but does not identify the Respondent directly.

[81] *Big Bear Farm, Inc*., 55 Agric. Dec. 107, 134 (U.S.D.A. 1996) ("The fact that an inspector noted a violation in a report is not substantive evidence of the violation, and all findings based upon such documents without testimony subject to cross examination should be dismissed.").

to treat an unsigned handwritten Incident Report as standalone evidence of a violation. Exhibit CX 21 is evidence that some sort of complaint was made to Florida officials. Standing by itself, which it does, it is not probative of and entitled to no weight as to whether Respondent "exhibit[ed] a macaque with insufficient distance and/or barriers between the macaque and the public." Therefore, I find that Complainant has failed in its burden of bringing forth reliable record evidence that Respondent willfully violated 9 C.F.R. § 2.13l(c)(l) by exhibiting a macaque with insufficient distance and/or barriers between the macaque and the public.

b) Handling of Animals: September 30, 2011

The Complaint alleges that on or about September 30, 2011, Respondent willfully violated 9 C.F.R. §§ 2.13l(c)(l), 2.131(b)(1), 2.131(c)(3), and 2.131(d)(1), when Respondent: exhibited young tigers with no distance and/or barriers between the animals and the public;[82] kept a young tiger in a pool despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool;[83] and exposed young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and exhibited young tigers for periods of time and/or under conditions inconsistent with their good health and well-being.[84]

In support of these allegations, Complainant provides the testimony of Ms. Barbara Keefe,[85] a lay person, as well as a letter from Ms. Keefe[86] and Ms. Keefe's Affidavit[87] that are consistent with her testimony and describe in detail her experience attending the tiger swim session. In her letter, CX 9, Ms. Keefe states that "[i]n September 2011, [she] flew from Illinois to Tampa to swim with these tigers" but when she arrived "[t]here

[82] Complaint at 4 ¶ 10b.

[83] Complaint at 3 ¶ 8a.

[84] Complaint at 5 ¶ 11.

[85] Tr. 6/28, 10-64.

[86] CX 9.

[87] CX 10.

were several other people sitting in the waiting area."[88] Ms. Keefe noted that, when she arrived at the facility where the cubs would be, they were in "a holding cage far too small for them . . . looking anxious" and once the five customers got in to the pool with one of the tigers, "the poor cub 'performed' for [the group] for the next 20 minutes [and] [i]t was apparent he was tired, irritated and plain sick of swimming."[89] Ms. Keefe testified that during her visit but before the swim she was allowed to feed and handle the cubs, but that she did not sanitize her hands at any point before or after handling the cubs nor did she observe any other person (handlers, trainers, or customers) sanitizing their hands before or after handling the cubs.[90]

Complainant contends there "was insufficient distance and/or barriers between the general viewing public and Raijah and Rori to minimize the risk of harm to the animal and to the public by providing sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of them and the public."[91] Complainant also contends that, for the age and size of the tigers, and as indicated by the sounds and attempts to exit the pool as observed by Ms. Keefe, the handling of the tigers was not careful and expeditious, and the period of the swim sessions was not "under conditions consistent with the tigers' good health and well-

[88] CX 9 at 1.

[89] *Id.* at 1-2. In her letter, at 1-2, Ms. Keefe noted that the cub made multiple attempts to exit the pool but was placed back in the pool. Ms. Keefe also wrote that, although she did not know how many times the cubs had "performed," another group arrived after her group to swim with the cubs. *See also* CX 10 at 2 ("This poor cub was extremely exhausted and kept trying to get out of the pool. I know when cubs are happy they make this happy chuffing sound, but this cub made a groaning sound like it was just exasperated."); Tr. 6/28, 28:4-8 ("The one cat was making sounds of exasperation. He was like (making sound) every time he was picked up by the neck and put back in the water, and they would lift him, and he was just exasperated.")

[90] Tr. 6/28 31:20-32:9. *See* CX 12 at 3-16, and CX 10 at 1-2. *See also* Tr. 6/29, 19:13-19.

[91] Complainant's Brief at 15 (citing *Zoocats, Inc*., 68 Agric. Dec. 737 (U.S.D.A. 2009)).

being" as required by the regulations.[92]

Respondent contends that Complainant errs in relying on Ms. Keefe's complaint and testimony because Ms. Keefe "made her complaint a year after her visit, at the prodding of Carol Baskin, a competitor of Respondent who is aligned with animal rights groups."[93] Respondent also contends that "[t]o the extent [Ms. Keefe] provided factual testimony, it should carry very little weight due to her obvious bias, the passage of time, and contemporaneous photographs that contradict her assertions."[94] As an example, Respondent stated that in the "many pictures taken of Keefe's swim show that she enjoyed herself [footnote omitted] and that the tiger was not in any undue distress."[95]

On Brief, at 7, Respondent cites the testimony of Ms. Stearns, who "was the trainer that day," and testified that she "did not hear Keefe say anything negative."[96] Respondent also noted, Brief at 7, that Ms. Stearns' testimony "contradicted Keefe's testimony when she arrived she saw some people leaving"[97] and that the records Respondent prepared indicated that tiger swims rarely if ever occurred more than once per day.[98]

I reject Respondent's contentions that Ms. Keefe's testimony as the principle witness for the alleged violations on September 30, 2011 should be disregarded for lack of credibility. First, Respondent contends that Ms.

---

[92] *See id.* at 17-18 (citing *Mitchell*, 60 Agric. Dec. 1991 (U.S.D.A. 2001); *Perry*, *supra* note 51; *Zoocats, Inc*., 68 Agric. Dec. 737 (U.S.D.A. 2009); *The Int'l Siberian Tiger Found.*, 61 Agric. Dec. 53, 90 (U.S.D.A. 2002)).

[93] Respondent's Brief at 5-6 (citing Tr. 6/30, 62). *See* Tr. 6/30, 62:7-17 and noting that the line of questioning regarding Carole Baskin and Big Cat Rescue was objected to and the objection sustained, Tr. 6/30 62:18-63:20.

[94] Respondent's Brief at 6. Respondent notes that Ms. Keefe's tiger swim "encounter" was on September 30, 2011 and she wrote the complaint on October 15, 2012.

[95] Respondents Brief at 6 (citing CX 11 and CX 12).

[96] Citing Tr. 6/30, 53. *See* Tr. 6/30, 53:17-54:3.

[97] Citing Tr. 6/30, 56. *See* Tr. 6/30, 55:17-57:6.

[98] Citing RX 30. *See* Tr. 6/30, 57:7-22.

Keefe's testimony should be disregarded due to "obvious bias."[99] In particular, Respondent states that Ms. Keefe did not write her complaint letter until "after she saw posts on Facebook from Big Cat Rescue and spoke with Ms. Baskin."[100] During the hearing, Respondent, in questioning Ms. Keefe about her motivation for filing the complaint with USDA, asked Ms. Keefe if she "was Facebook friends with Carole Baskin,"[101] if Ms. Keefe "read things that her organization or she [Carol Baskin] had posted on Facebook,"[102] if Ms. Keefe had "spoke on the phone" with Ms. Baskin,[103] and if Ms. Baskin "encouraged" Ms. Keefe "to make a complaint about Dade City Wild Things."[104]

Ms. Keefe testified that she was "Facebook friends" with Big Cat Rescue's Facebook page[105] and communicated with Ms. Baskin through Facebook messages about her concerns with the September 30, 2011 tiger swim,[106] stating "I don't recall if I've ever spoken to Carole on the phone."[107] When Respondent pointedly asked Ms. Keefe if Ms. Baskin encouraged her to write a complaint to USDA,[108] Ms. Keefe replied:

> She didn't encourage me. She said, "If you want to do something, I can give you the avenues on what you can do." She didn't prompt me to do it. She just said, "I will tell you," you know, "you can contact this organization if you want to file a complaint." And I -- and that was the—

---

[99] Respondent's Brief at 6.

[100] *Id.*

[101] Tr. 6/28 at 69:9-10.

[102] Tr. 6/28 at 69:13-14.

[103] Tr. 6/28 at 70:8.

[104] Tr. 6/28 at 70:13-15.

[105] Tr. 6/28 at 69:3-4, 11-12.

[106] Tr. 6/28 at 70:1-4, 12.

[107] Tr. 6/28 at 70:9-10.

[108] Tr. 6/28 at 70:14-15.

> that's how I got the information to the USDA.[109]

Respondent went on to question Ms. Keefe about why she stated in her Affidavit: "I didn't think one person could make a difference, but Carole encouraged me and provided me with the information in the event that I wanted to do something about it."[110] To which Ms. Keefe replied:

> She said, "It doesn't matter that you're just one person. If you feel you want to do this, then here's the information. Go ahead and do it." It's not like I contacted her every day and was like, "Oh, now what do I do?" She gave me the information that I needed, and I took it upon myself to contact these people.[111]

Respondent also asked Ms. Keefe if Ms. Baskin told her about "the issues that she had with Dade City Wild things?" To which Ms. Keefe replied "[t]hat wasn't part of our conversation. As I stated, I reached out to her to give me guidance on where I could go if I, in fact, wanted to file a complaint."[112] Respondent's suggestion that Ms. Keefe's complaint was motivated by a Respondent's third-party competitor is unsupported and thus unproven. Ms. Keefe's credibility is not discredited merely because she was given information about how to file a complaint by a group she reached out to on Facebook.

Second, Respondent contends that Ms. Keefe's testimony should be disregarded due to the passage of time. Respondent points out that "when Keefe returned home, she told her friends that it was a great experience and she was happy that she did it" and that "her only explanation for waiting so long was that she was 'still on a high about going.'"[113]

Third, Respondent contends that that Ms. Keefe's testimony

---

[109] Tr. 6/28 at 70:16-71:1.

[110] *See* CX 10 at 2.

[111] Tr. 6/28 at 71:9-15.

[112] Tr. 6/28 at 71:16-22.

[113] Respondent's Brief at 6 (citing Tr. 6/28, 65; CX 10).

contradicts itself. Respondent points out that Ms. Keefe "was unhappy that the tiger was on a leash" and "contrary to her stated concern for the tiger's well-being, she would have liked the activity to last longer."[114]

I agree that Ms. Keefe's complaint about her participation in the tiger swim was delayed. But I do not agree with Respondent that Ms. Keefe's testimony is contradictory, at least in any way that would undermine her testimony as to what she observed.[115] It is entirely logical that the witness could have concerns about the treatment of the tiger cubs, yet enjoy the overall experience, and be disappointed at the time that the tiger swim included other people, did not last longer, and did not allow more direct contact with the tiger cub.[116] Moreover, both parties had the opportunity to examine and cross-examine Ms. Keefe about her recollections to their desired extent. The fact that Ms. Keefe apparently had mixed feelings, and even evolving feelings about her experiences, does not discredit her factual observations.

Respondent also contends that "Complainant presented no evidence supporting the allegations that merely exhibiting the cubs in a pool in close proximity to people amounted to a violation" and that Complainant witness, Dr. Gregory Gaj, testified regarding his observation of a swim event that, as to the first tiger, "I did not feel that there was enough of a problem to - - to say that it was dangerous for the public at that point" [117] and, as to the second tiger Dr. Gaj observed, although Dr. Gaj felt the tiger was not comfortable in the water and was being made to swim, the tiger "did not appear to be big enough, strong enough, or dangerous to the public; and so, I did not consider that an issue."[118] Respondent further contends that Complainant offered no evidence that the tigers were exposed to rough or excessive handling.[119] However, it is unclear whether Dr. Gaj observed the same or a separate swim event than the one about

---

[114] Respondent's Brief at 6 (citing Tr. 6/28, 73-74, 80).

[115] *See* Tr. 6/28, 74:4-8

[116] *See* Tr. 6/28, 72:20-73:1, 73:10-15, 74:2-4, 74:9-14.

[117] Respondent's Brief at 14 (citing Tr. 6/28, 175). *See* Tr. 6/28 at 175:2-7.

[118] *See* Respondents Brief at 14-15; Tr. 6/28 176:17-177:9, 177:18-178:1.

[119] Respondent's Brief at 16.

which Ms. Keefe testified.[120]

At issue is whether Respondent willfully violated the Regulations[121] on September 30, 2011. I find the Record demonstrates Respondent willfully violated 9 C.F.R. § 2.131(c)(1) on September 30, 2011 by allowing unlimited direct contact between the public and tiger cubs during the tiger swim event.[122] Although Ms. Keefe testified that the tiger cubs were accompanied by trainers and restrained on a leash,[123] indicating that the contact between the public and the tiger cubs was controlled, Ms. Keefe also testified that she and the other members of the public were not directed to sanitize their hands before or after interacting with the cubs[124] in direct contradiction of Respondent's own Handling Protocol.[125] Failing to ensure that the handlers and members of the public sanitized their hands before interacting with the tiger cubs was a failure to handle the tigers with "minimal risk of harm to the animal and to the public." Further, because of Respondent's background and experience with the Regulations, and because it is clear Respondent knows the importance of hygiene to for the public, handlers, and animals as clearly outline in Respondent's Handling Protocol, such violation shows, at minimum, a careless disregard for the regulatory requirements.

Based on the record, I find that Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by keeping a young tiger in the pool despite the tiger cub's

---

[120] Dr. Gaj testified that he attended a tiger swim event to observe as an inspector with Dr. Navarro in September 2011 but did not specify the date on which he attended nor the session he attended. Tr. 6/28, 173:9-12.

[121] 9 C.F.R. §§ 2.13l(c)(l), 2.131(b)(1), 2.131(c)(3), 2.131(d)(1).

[122] *See* CX 12. *See also Zoocats, Inc*., 68 Agric. Dec. 737, 745-46 (U.S.D.A. 2009) (where Respondents violated the regulations by allowing children to pose with a small tiger for photographs).

[123] Tr. 6/28 at 19:12-16, 21:22-22:1, 26:8-9.

[124] Tr. 6/28 31:20-32:9.

[125] *See* RX 14 ("2) hand sanitizes before and after contact"). *See also* Tr. 6/29, 66:12-19 (Dr. Woodman, witness for Respondent, testified that handling humans should "implement common sense sanitary" for the safety of the human and the animal); Tr. 6/29, 19:13-19 (Mr. Stearns stating that Respondent "always" has guests sanitize their hands before and after encounters).

discomfort and irritation. Ms. Keefe testified that one of the tiger cubs started "making sounds" every time he was placed back in the water, that the cub tried repeatedly to get out of the pool, and that the cub was obviously irritated – so much so that Ms. Stearns had the tiger cub sent back to its cage at some point during the swim event.[126] This testimony, of course, cuts both ways, in that it indicates the tiger cub was stressed and protesting, but that at some point it was as a result was given a rest away from the activities. However, I find that there is a preponderance of the evidence that that the cubs' treatment was not expeditious and careful and, based on Ms. Keefe's testimony, led to behavioral stress and unnecessary discomfort before it was removed from the pool.

As to this particular day, I find that the record does not demonstrate by a preponderance of the evidence that Respondent violated 9 C.F.R. §§ 2.131(c)(3), and 2.131(d)(1) by exposing the tiger cubs to rough or excessive handling and/or exhibiting the tiger cubs for periods of time that would be detrimental to their health or well-being. As noted, Ms. Keefe testified that she assumed an earlier group interacted and swam with the tiger cubs because she saw a group returning to the gift shop on the buses and also because the tiger cub did not seem interested in drinking from the bottle.[127] However, Ms. Stearns testified that she only recalls the one swim encounter that day and that Ms. Keefe could have witnessed a group coming from a swim encounter with another type of animal or Ms. Keefe could have had arrived very early if there was a swim encounter much earlier that day.[128] Ms. Keefe testified that in total, she estimated that she spent about twenty or twenty-five minutes with the tiger cub during her encounter.[129] Complainant failed to prove by a preponderance of evidence that the tiger cubs were exhibited for an amount of time that would be detrimental to their health or well-being.

c) Handling of Animals: October 10, 2012

The Complaint alleges that on or about October 10, 2012, Respondent

---

[126] Tr. 6/28 at 28:4-18.

[127] Tr. 6/28 at 15:3-4, 21:2-7.

[128] *See* Tr. 6/30 at 56-57.

[129] Tr. 6/28 at 22:3-4, 30:14-15.

willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.13l(b)(2)(i), and 2.13l(c)(l), when: Respondent allowed a reporter from The American Broadcasting Company's ("ABC") "Good Morning America" to handle a young tiger ("Tony") in a manner that caused the tiger to become visibly stressed, as exhibited by the tiger's repeated attempts to leave the pool, and the reporter repeatedly pulled the tiger back into the pool;[130] during exhibition, Respondent's employees or agents lowered a young tiger into a pool by the tiger's tail, pulled the tiger's tail to restrain it while it was in the pool, and pulled the young tiger out of the pool by the tiger's right front leg;[131] and Respondent exhibited a young (approximately 6 week old)[132] tiger ("Tarzan") and a juvenile tiger to a member of the public in a swimming pool with no distance and/or barriers between the animals and the public.[133]

On Brief, at 19, Complainant states that "[i]t is well settled that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both section 2.l31(c)(1) and 2.13l(b)(l)."[134] In support of the contention that Respondent violated 9 C.F.R. §§ 2.131(b)(1), and 2.13l(c)(l), Complainant provided video footage of segment of ABC's "Good Morning America" where the reporter is allowed to directly handle two tigers in a pool.[135] In the video clip, the smaller cub Tony, repeatedly attempts to get away from the reporter and makes multiple growling or "crying out" sounds when pulled back and handled by the reporter.[136] The voice of a female reporter states that the male reporter in the pool is "trying to chase the tiger cub who doesn't look like he wants to be in the pool with that unhappy growl." *Id.*

---

[130] Complaint at 3 ¶ 8b.

[131] Complaint at 4 ¶ 9a.

[132] Complainant's expert witness Gage estimated this cub to be at least 5 months old and about 60 lbs. Tr. 6/28, 211:12; CX 6 ¶ 3.

[133] Complaint at 4 ¶ 10c.

[134] Citing *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec 128, 138 (U.S.D.A. 2013); *Williams*, 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

[135] CX 4.

[136] CX 4 at 0:24-0:57.

Complainant offered the testimony of Dr. Laurie Gage, a highly qualified and experienced large felid expert,[137] who stated that APHIS Animal Care considers news reporters to be members of the public, and, based on her observation of the video, she was concerned because the tiger cub clearly does not desire to be in the water and the reporter is not trained to handle these types of animals.[138] Dr. Gage stated in her Affidavit that the "younger tiger was vocalizing (screaming and yowling) in a manner that suggested it was uncomfortable with the situation and wanted to get out of the water."[139] Dr. Gage further testified that, in observing the video,[140] of greater concern to her was a larger tiger on a leash, seen behind the reporter handling the tiger cub, that in her opinion should not be near the public because it is "too big and too strong, too fast" and "could cause damage not only to his handler, but to a member of the public."[141]

In support of the contention that Respondent violated 9 C.F.R. § 2.13l(b)(2)(i), Complainant points out that later in the video, when the ABC reporter is joined in the pool by a larger tiger cub Tarzan,[142] in the background the smaller tiger cub can be seen trying to get out of the water, is pulled out of the water by unknown handler by its leg, and then placed/dropped back in the pool by the handler.[143] Dr. Gage states in her Declaration, at 1 para. 3, that "the attendants/handlers in both videos grossly understate the actual weight of the juvenile tigers being used. Even the ABC anchors could recognize that 'Tarzan' the tiger was 'much larger than 30 pounds'. I would estimate that animal to be at least 5 months old and likely over 60 pounds."

Respondent, Brief at 7-8, contends that the ABC reporter "had extensive experience with animals in zoo settings; he was very seasoned

---

[137] Tr. 6/28, 187-92.

[138] Tr. 6/28, 202:12-203:2. *See also* CX 6 at 1.

[139] CX 6 at 1.

[140] CX 4 at 0:36-0:44.

[141] Tr. 6/28, 204:13-18.

[142] CX 4 at 2:47.

[143] CX 4 at 2:47. *See also* Complainant's Brief at 19.

and brought his own wet suit."[144] Respondent contends that, contrary to Dr. Gage's assessment of the tiger's behavior, Ms. Stearns' observed that "the tiger was not under any distress and just wanted to play," that "the tiger actually wanted to continue swimming," and that the "tiger's noises indicated excitement."[145] Respondent avers that an "upset tiger would make more of a roar sound,"[146] but that the vocalization seen in the video is normal for Tony because he is a "talking tiger," a "chatterbox and very outgoing."[147] In support of the swim program in general, Respondent offered the testimony of Dr. Don Woodman,[148] contending that "cubs need to be handled . . . allowed to explore their environment, cubs need to be allowed to socialize to be normal animals when they're young."[149]

Respondent also states that "[i]t is undisputed that Respondent's employees are trained to hold the base of a tiger's tail to provide balance and support while the tiger learns to swim"[150] and that Dr. Gage testified "I don't really see that as a being a big issue."[151] Respondent contends that Dr. Gage "did not specify which videos or pictures depicted pulling the animal by the tail" and that Mr. Stearns testified that he did not and would not pull on a tiger's tail.[152]

Respondent contends that Dr. Gage's "personal" opinion that tiger swim sessions are a "bad idea" is contrary to current USDA guidance that "the public could safely handle animals between eight and twelve weeks

---

[144] Citing Tr. 6/30, 136-137. *See* Tr. 6/30, 137: 4-21.

[145] Citing Tr. 6/30, 134-35, 134, 142-43.

[146] Citing RX 25 (video of two cubs scuffling and growling); Tr. 6/30, 148-49.

[147] Respondent's Brief at 8 (citing Tr. 6/30, 142-43).

[148] Respondent's veterinarian of record for about four or five years at the time of Hearing, *see* Tr. 6/29 at 41:14-19.

[149] Tr. 6/29 at 79:20-80:3. *See also* RX 15 at 1.

[150] Brief at 12 (citing RX 22; Tr. 6/30, 151).

[151] Citing Tr. 6/28, 278.

[152] Respondent's Brief at 12 (citing Tr. 6/29, 28). Also citing Tr. 6/28, 199 (Randy Stearns testified that trainers "usually tell [customers] not to touch the animals while they're swimming").

old" and that Dr. Gage testified that animals between twelve and sixteen weeks could be handled by the public if smaller and well-behaved.[153] Respondent points out that the Florida Fish and Wildlife Conservation Commission limits public contact with tigers exceeding forty pounds, but the USDA's standard is that the tiger must be under control of the attendant.[154] Respondent contends that Dr. Gage, in her Declaration (CX 6), incorrectly assessed the age and weight of the larger tiger, Tarzan, who Stearns testified was about four months old, about 36 to 38 pounds, and fully under control by Mr. Stearns during the filming of the Good Morning America segment.[155]

Complainant's video and expert testimony evidence on the subject allegations are quite comprehensive and compelling.

I find that on or about October 10, 2012, Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1) and 2.13l(b)(2)(i). Based on the record, and specifically the video of the "Good Morning America" segment (CX 4), the tiger cub Tony became visibly agitated and, whether the cub was vocalizing because it did not want to be in the water or because it was being restrained by the reporter, the behavior exhibited showed that the tiger cub was stressed and or agitated by the situation. In fact, RX 22 (a video of a tiger cub swimming with its trainer while being supported by its tail) shows the tiger cub swimming and making "chuffing" sounds, which sound very different from Tony the tiger cub's vocalizations in CX 4 (the ABC "Good Morning America" segment), which sound like growls or crying out. It is also clear from the video (CX 4 at 2:47) that the trainer handling the smaller tiger cub in the background (apparently Tony the tiger) unquestionably improperly lowered the tiger into the water by its tail, pulled the tiger cub out by its front leg, and immediately placed the cub back in the water even though the video clearly shows the cub was attempting to get out of the water. I reject Respondent's contention that the handler was properly holding the tiger's tail to offer support as the

[153] Respondent's Brief at 15 (citing Tr. 6/28, 198, 238).

[154] Respondent's Brief at 15 (citing Tr. 6/28, 109).

[155] *See* Respondent's Brief at 15-16 (citing Tr. 6/30, 130, 155, 215, 218-19). *But see* CX 4 at 2:57 (where the reporter states that "Tarzan" is "about thirty pounds").

handler was not in the water with the tiger.[156] The video evidence is clear cut on these points. I find that Respondent's contentions contrary to this video evidence are inconsistent with this record evidence and, thus, not credible.

I find that the record is not sufficient to show that Respondent willfully violated 9 C.F.R. § 2.13l(c)(l) by allowing the "juvenile" tiger Tarzan to be exhibited to the reporter, a member of the public. Dr. Gage estimated that Tarzan was over five months old and over sixty pounds in weight in the video,[157] but Complainant offers no other evidence of Tarzan's size or age at the time of the filming for the "Good Morning America" segment, and Mrs. Stearns testified that Tarzan weighed only 36 to 38 lbs.[158] It creates a difficult evidentiary issue to have a felid expert of Dr. Gage's caliber and experience opine that a tiger weighs more than sixty pounds, while a licensee testifies that tiger weighs less than forty pounds. I find nothing substantial in the record to contradict either witness and nothing to undermine the credibility of the testimony of either witness. The burden of proof resides with Complainant. I find that the actual weight of Tarzan is not established by a preponderance of the evidence. Further, during the video Mr. Stearns has the tiger on a leash, remains with the tiger, Mr. Stearns appears to have full control over the tiger, and the tiger appears to be calm. I find that the preponderance of the evidence does not demonstrate that Respondent willfully violated 9 C.F.R. § 2.13l(c)(l) as to the tiger Tarzan.

d) Handling of Animals: October 13, 2012

The Complaint alleges that on or about October 13, 2012, Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.13l(b)(2)(i), 2.13l(c)(l), 2.131(c)(3), and 2.131(d)(1) when: Respondent kept a young tiger Tony

---

[156] Again noting the difference of the handling in RX 22, where the handler is with the tiger in the water and is supporting the tiger's tail from the bottom. In CX 4, the handler is holding the tiger's tail as she lowers it into the pool.

[157] CX 6 at ¶ 3.

[158] Tr. 6/30, 143:16-19. For what it is worth, Tarzan looks to be over 40 lbs to me, too, but I cannot claim any expertise in judging the weights of tigers, so my impression of this tiger's weight is not evidence and is not probative.

in a pool despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool;[159] during exhibition, Respondent's principal, Randy Steams, handled or worked a young tiger Tony by pulling the tiger's tail, and holding the tiger aloft by the tiger's neck;[160] when Respondent exhibited a young tiger Tony with no distance and/or barriers between the animal and the public; and when Respondent exposed young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and exhibited young tigers for periods of time and/or under conditions inconsistent with their good health and well-being.

As support for these contentions, Complainant offers the testimony of and contemporaneous photographs taken by Jayanti Seiler, a layperson, who participated in a "tiger swim" session on October 13, 2012. In her Affidavit, Ms. Seiler stated that "when [Tony] tried to get away the trainer often yanked him back by the tail . . . the tiger resisted while being constantly forced over and over to sit near us and he continually made sounds of distress."[161] Ms. Seiler testified that "[Tony] was pulled in the water by his tail to return him back to the line . . . Tony definitely was resisting and wanting to get out of the pool. He reached for the edge many times and lurched up trying to get out. He was pulled back in by his tail . . . He was making signs . . . he was calling out."[162] Ms. Seiler also testified that the "tiger swim" session lasted for about fifteen to twenty minutes and each of the about five guests had an opportunity to swim from one side of the about twenty-foot pool to the other and back about two to three times, and "during this entire time in the pool, didn't have any time to sit, rest, get out of the pool, take a break."[163] Complainant also notes that, after the swim, "Ms. Seiler observed that Tony was 'shivering violently and was

---

[159] Complaint at 3 ¶ 8c.

[160] Complaint at 4 ¶ 9b.

[161] CX 8 at 1. *See also* CX 8 at 7 (a photograph of Randy Stearns, the trainer during the October 13, 2012 "tiger swim" session, holding the tiger by its tail).

[162] Tr. 6/27, 39:1-9. *See also* CX 9 at 9 (a photograph showing Tony trying to exit the pool).

[163] Tr. 6/27, 41:2-19.

dangled by the neck to pose for more pictures.'"[164]

Respondent contends, Brief at 9, that the complaints and testimony of Ms. Seiler should be disregarded as not probative because her "statements regarding abuse and the propriety of the activity are her own personal opinion based largely on information she received in an e-mail after the activity." Respondent contends that Ms. Seiler's observations and opinions should carry little weight because she "is a photographer and has no significant experience or education in animals or animal training."[165] Respondent points out that the pictures of Ms. Seiler from the tiger swim event show Ms. Seiler enjoying herself and that the "tiger shown in the pictures obviously was not in distress."[166] Respondent also offers the testimony of Mr. Stearns who was present during Ms. Seiler's encounter and stated during the hearing that he has not witnessed the type of behavior from Tony the tiger that Ms. Seiler described and he recalls that "everything went smoothly and Seiler made no negative comments."[167]

Respondent contends that Mr. Stearns explained that in each picture where his hand is seen near the tiger's tail, he is simply providing additional support to the tiger.[168] Further, allegations that Respondent held the tiger during the encounter from the neck were taken from Ms. Seiler's affidavit "which she corrected during the hearing to reflect that the tiger was being held by the scruff of the neck and not strangled,"[169] and which Dr. Gage testified "is a common practice" as "tigers will relax when held by the scruff, as the mother would do."[170]

Respondent contends that Complainant presented no evidence showing that Tony the tiger presented a danger to the public nor that USDA prohibits contact with tiger cubs the age that Tony was during the

---

[164] Brief at 24 (citing CX 8 at 2).

[165] *Id.* (citing Tr. 6/27, 97).

[166] Respondent's Brief at 9 (citing CX 8; RX 28; Tr. 6/27, 108).

[167] *Id.* at 10 (citing Tr. 6/29, 25, 204, 208, 76).

[168] *Id.* at 13 (citing Tr. 6/29, 29, 33-4).

[169] *Id.* (citing Tr. 6/27, 85).

[170] *Id.* at 12 (citing Tr. 6/28, 218, 267).

encounter.[171] Respondent further contends that Complainant offered no evidence that the tigers were exposed to rough or excessive handling.[172]

I find Ms. Seiler's testimony and Affidavit to be probative of her direct observations during her encounter with Tony the tiger. A witness does not "have to significant experience or education in animals or animal training" in order to competently testify as to direct observations that a tiger was being pulled by its tail, was being forced back into a pool while it was vocalizing in an agitated manner and trying to get out of the water, and was being forced to stay in one place despite its vocalized protests. However, I give no weight to her personal opinions or conjectures about what the tiger cub Tony might have been subjected to before or after Ms. Seiler's encounter. I do not find that Ms. Seiler's apparent enjoyment of her interaction with the tiger to undermine her testimony or render it inconsistent as to what she observed. It is not inconsistent for a witness to have enjoyed an interaction with a tiger cub, but to have qualms about the treatment of that cub, either at the time or upon reflection later.

I further find that the record does not support by a preponderance of the evidence that holding the tiger cub by the scruff of the neck in the circumstances described, such as size, weight, and age of the tiger, was a violation of the regulations.

Based on the record, I find that on or about October 13, 2012 Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.13l(b)(2)(i), and 2.131(c)(3), and by keeping a tiger cub, Tony, in a pool despite the tiger's discomfort, as exhibited by the tiger's vocalizing and attempts to exit the pool; by allowing Mr. Steams to roughly handle Tony the tiger by pulling the tiger's tail and forcing the tiger to stay in one spot despite its efforts to avoid being touched or petted; and by exhibiting the young tiger for a period of time inconsistent with its good health and well-being. Ms. Seiler testified that as soon Tony the tiger was placed on the ground with her and other members of the public, he tried to move away and "he hissed, he growled, he shrieked, and made a lot of various different noises when his

[171] *Id.* at 16.

[172] *Id.*

tail was pulled to bring him back to the spot."[173]

Ms. Seiler testified that "Tony definitely was resisting and wanting to get out of the pool,"[174] that he was shrieking, hissing when he was out of the water, and "making sounds like you could say crying"[175]; and "there wasn't anywhere for Tony to rest" during the swim encounter which consisted of about five to seven people allowed to take turns swimming across the pool.[176] Ms. Seiler also testified that the swim encounter alone lasted about fifteen to twenty minutes and the entire encounter was supposed to be thirty minutes but "may have run over a little bit"[177] and that after the swim encounter the customers were posed for additional pictures with Tony who was "dripping wet, and he wasn't dried off, and he have [sic] shivering violently, and he continued to shiver the entire time."[178]

I find the record is insufficient to show that Respondent willfully violated 9 C.F.R. §§ 2.13l(c)(l) and 2.131(d)(1). Ms. Seiler testified that "everything seems [sic] very structured . . . only limited time"[179] and the photos of the encounter (CX 8, 4-9; RX 28) show that Mr. Stearns, the handler, was present at all times and in control of the tiger. However, it is unclear whether a leash was used throughout the encounter as Ms. Seiler testified that the tiger was brought out on a leash,[180] but one cannot be seen in the photographs. Complainant offers no other evidence that additional barriers or distance were needed to assure the safety of the public or the tiger cub.

---

[173] Tr. 6/27 at 36:6-9, 37:10-13. *See also* CX 8 at 7 (photo of Mr. Stearns restraining the tiger by its tail.

[174] Tr. 6/27 at 39:4-5; *see also* CX 8 at 9 (photo of Tony trying to exit the pool and being restrained by the tail.

[175] Tr. 6.28 at 40:5-13.

[176] Tr. 6/27 at 38:12-22, 41:8-13.

[177] Tr. 6/27, 41:15-16, 54:8-11.

[178] Tr. 6/27 at 59:9-15.

[179] Tr. 6/27 37:16-17.

[180] Tr. 6/27 at 35:18-19.

e) Handling of Animals: October 18, 2012

The Complaint alleges that on or about October 18, 2012, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) when, during a simulated "swim encounter" staged in New York and presented on the show "Fox and Friends", Respondent kept a young tiger ("Tony") in a pool despite the tiger's obvious discomfort, as exhibited by the tiger's repeated, consistent attempts to exit the pool.[181] In support of this allegation, Complainant provides the video footage of the presentation[182] and the affidavit of Dr. Gage who observed based on the video that "the animal did not appear to enjoy being in the water . . . it made numerous and consistent attempts to exit the water but was held in the pool by its handler holding the leash."[183] Respondent, Brief at 11, states that at the time of the filming of Tony the tiger in New York for "Fox and Friends," which took place one week after the filming of the "Good Morning America" segment, Tony was ten weeks and weighed about 22 pounds.[184] Respondent contends that during the filming "[c]ontrary to Respondent's request, a kiddie pool had been provided" and the "tiger made noises indicating that he was excited by the cameras, and the flimsiness of the pool was a problem for him" but "after this swim, Tony was perfectly healthy."[185]

Based on the record, and particularly the video of the "Fox and Friends" segment (CX 5), I find that on or about October 18, 2012, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by allowing the

---

[181] Complaint at 4 ¶ 8d.

[182] CX 5.

[183] CX 6 at 2. *See also* Complainant's Brief, 24 (citing *Int'l Siberian Tiger Found.*, 61 Agric. Dec. 53, 92 (U.S.D.A. 2002)).

[184] Citing Tr. 6/30, 140. *But see* CX 5 at 1:20 (where Mr. Stearns tells the reporter that Tony "is about 15 pounds right now"); Tr. 6/30, 140:11-141:4 (stating that Mr. Stearns was aware of Tony's weight at the time of filming as a "health certificate" was provided about two days before filming).

[185] Respondent's Brief at 11 (citing Tr. 6/30 139, 140, 227, 228, 141-42). *But see* Respondent's Brief at 11 noting "Dr. Gage noted that the tiger was not making any noises"; CX 5 (during the video no sounds are heard from the tiger until the very end).

exhibition of Tony in New York for a "Fox and Friends" segment despite the tiger cubs' exhibited discomfort in the water and the tiger's excitement/stress due to the cameras, crowd, and possibly other overstimulation. Mr. Stearns testified that he was not provided the type of pool he requested and that the cameras and camera men were too close to Tony[186] but did not explain why he allowed the exhibition to continue in the less than satisfactory circumstances.

IV. Housing of Animals

The Complaint, para. 12, alleges that on multiple occasions, Respondent willfully violated the Regulations, 9 C.F.R.§ 2.100(a), by failing to meet the minimum Standards promulgated in the Regulations under the AWA (9 C.F.R. Part 3) ("Standards").

a) Housing of Animals: May 1, 2013

The Complaint alleges that on or about May 1, 2013, there was not a method to rapidly eliminate excess water from tiger enclosures, which had an accumulation of mud and water in violation of Standard 9 C.F.R.§ 3.127(c)[187] and that Respondent's enclosure for two baboons had a support pole that had detached from the side and front of the enclosure in violation of Standard 9 C.F.R. § 3.75(a).[188] In his May 1, 2013 Inspection Report, Dr. Luis Navarro, APHIS Veterinary Medical Officer, observed that:
[the] enclosure housing the 2 male babbon [sic] had a detached welded pole on the side and front panel area of the enclosure in which the primates are exhibited . . . [i]n order to protect the animals from injury, contain the animals securely, and restrict other animals from entering, housing facilities for nonhuman primates must be kept in good repair."[189]

Dr. Navarro testified that the baboon enclosure had detached poles because the primates "jump on this fence, and they push it towards the

[186] Respondent's Brief at 11 (citing Tr. 6/30 139, 140, 227, 228, 141-42).

[187] Complaint ¶ 12a.

[188] *Id.* ¶ 12c.

[189] CX 17 at 1. *See also* CX 17, 6-7 (photos of baboon enclosure).

outside" and "that's a danger for the animals to escape."[190]

Respondent contends that the allegation regarding the detached pole in the baboon enclosure "reflects a difference of opinion, not a violation."[191] Respondent avers that the baboon has been playing with the pole as an "enrichment item" to "startle visitors" and the pole did not provide structural support, but that Respondent attached the pole to the commercial pole at the insistence of Dr. Navarro.[192]

Regarding the second allegation, Dr. Navarro in his Inspection Report observed "[a] few of the Tiger enclosure[s] had water and mud accumulation due to rainy weather during the night. The owner recognized the problem and started working on it by putting new substrate on the ground inside the enclosure."[193] Dr. Navarro testified that "there's bacteria on the ground that tigers can be soaked with mud. It can create infections of the skin. If they drink muddy water, they can get intestinal problems."[194] Complainant contends that, even though Respondent claims to have corrected the drainage issue, subsequent correction cannot obviate violations.[195]

Respondent contends that on the date of the inspection there had been an unusual amount of rain and "severe flooding" that halted Respondent's

---

[190] Tr. 6/28 at 128:15-129:12.

[191] Respondents Brief at 17.

[192] Respondent's Brief at 17 (citing Tr. 6/30, 210-14).

[193] CX 17 at 1. See also CX 17, 2-5 (photographs of two muddy tiger enclosures).

[194] Tr. 6/28 at 131:13-131:19.

[195] Complainant's Brief at 26 (citing *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *Bond*, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *Drogosch*, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); *Parr*, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); *Huchital*, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); *Stephens*, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).

efforts to cement the enclosures.[196] Respondent states that additional dirt was added to the enclosures to speed the drying, and within a few hours it was completely dry and Respondent proceeded to cement the enclosure.[197] Therefore, Respondent contends that "there was either no violation based on Respondent's testimony that the excess water was eliminated, or else the violation was de minimus and resulted from an unusual amount of rain while Respondent was in the process of correcting it."[198]

I find that on or about May 1, 2013, Respondent willfully violated Standard 9 C.F.R. § 3.75(a) by failing to keep an enclosure for two baboons in good repair that had a detached support pole. I reject Respondent's contention that the detached poles served merely as "enrichment items." It is clear from the photographs (CX 17 at 6-7) that the detached poles were intended to provide structural support for the front and side panels of the enclosure.

I find that the record is insufficient to show by a preponderance of the evidence that on or about May 1, 2013, Respondent violated Standard 9 C.F.R.§ 3.127(c). Ms. Stearns testified that Respondent was in the process of cementing the floors of the enclosures and was delayed due to heavy rains.[199] Ms. Stearns also testified that Respondent's method to deal with excess water in these tiger enclosures until they could be cemented was to "add quite a bit more dirt to it and build it up," which work Respondent has already begun before the inspection, and that the enclosures dried out within a few hours.[200] First, I note that the Regulations do not mention, set apart, define, or exclude a "de minimus violation" as Respondent suggests. However, although I agree with Complainant that subsequent correction cannot obviate an AWA violation, the regulation at issue only requires that Respondent has provided a suitable method to rapidly eliminate excess water. The preponderance of the evidence is that Respondent was in the process of applying a method to reduce the drainage problem (cementing

---

[196] Respondent's Brief at 16.

[197] Respondent's Brief at 16 (citing Tr. 6/30, 204, 208).

[198] *Id.*

[199] Tr. 6/30 at 206:14-19.

[200] Tr. 6/30 at 205:12-13, 206:11-13, 208:20-209:2, 204:15-20.

the enclosure flooring) and, in the meantime, was actively utilizing a method to rapidly eliminate excess water (by placing dirt on top of the mud to hasten the drying process).[201]

b) Housing of Animals: September 6, 2012

The Complaint alleges that on or about September 6, 2012, there was a loose electric wire hanging inside the lion enclosure in violation of 9 C.F.R.§ 3.125(a).[202] In the September 6, 2012 Inspection Report, Dr. Navarro observed that "[t]he electric wire inside the lion enclosure was hanging lose due to a tree limb that fell and hit the horizontal holding wire clamp . . it was corrected while I was conducting the inspection."[203] Dr. Navarro testified that the wire was "hanging down, so it was too close to the chain-link; and if an animal decided to climb over it, it could walk over it because it didn't have enough separation from the chain-link fence."[204]

Respondent contends that "there either was no violation because the loose wire did not affect the integrity of the enclosure, or the violation was de minimus and corrected within minutes of it being pointed out."[205] Respondent states that the fallen wire was due to a storm, was twelve feet off the ground, was not required, and the electricity was still working despite the fallen wire. Respondent also claims that the wire was fixed when pointed out by Dr. Navarro.[206]

I find the record is not sufficient to show that on or about September 6,

---

[201] *See White*, 73 Agric. Dec. 114, 130 (U.S.D.A. 2014) ("It is axiomatic that inspections of outdoor facilities conducted on rainy days will often reveal pools of water; however, the issue is whether the exhibitor has provided a suitable method to rapidly eliminate excess water.")

[202] Complaint ¶ 12b.

[203] CX 16 at 1. *See also* CX 16, 3-4 (photographs of bent "wire clamp and electric wire touching the wire mesh fence" and "electrical wire hanging inside the lion enclosure").

[204] Tr. 6/28 at 126:14-18.

[205] Respondent's Brief at 17.

[206] Respondent's Brief at 17 (citing Tr. 6/29, 198-202; CX 16).

2012, Respondent violated Standard 9 C.F.R.§ 3.125(a) due to a loose electric wire hanging inside the lion enclosure. The regulation requires that the

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

9 C.F.R.§ 3.125(a). Complainant failed to prove by a preponderance of evidence that the hanging wire would either weaken the structural soundness of the enclosure, or that it could potentially cause injury. Dr. Navarro testified that he did not know if the wire could serve its purpose as it was because he did not know if there was electricity running through it.[207] Complainant did not allege, nor did Dr. Navarro indicate during his testimony, if the hanging wire, which was fixed during the inspection, could potentially injure the animals. Therefore, Complainant did not show by a preponderance of the evidence that the fallen clamp and wire in the tiger enclosure amounted to a violation of 9 C.F.R.§ 3.125(a).

c) Housing of Animals: November 21, 2013

The Complaint alleges that on or about November 21, 2013, Respondent's enclosure for a pig contained a rusted jagged pipe/pole in violation of Standard 9 C.F.R.§ 3.125(a)[208] and Respondent failed to provide tigers with adequate shelter from inclement weather in violation of Standard 9 C.F.R.§ 3.127(b).[209]

In support of these allegations, Complainant provides Dr. Navarro's testimony, corroborated by his November 21, 2013 Inspection Report and photographs.[210] Dr. Navarro testified that he "observed a rusted pipe" and

---

[207] Tr. 6/28 at 127:3-15.

[208] Complaint ¶ 12d.

[209] *Id.* ¶ 12e.

[210] *See* CX 19 1-2, 5 (photograph of rusted pole in pig enclosure), 6-7 (photographs of shelter for two tigers).

"the jagged edges, along with the rust, if he [the pig] uses his snout, like some pigs do, he could cut his snout on the jagged edges."[211] Dr. Navarro also testified that, regarding the tiger enclosures, "this particular enclosure had a small shelter in there, and it was not high or tall enough for the animals to get in there in case there was rain and they wanted to get shelter from the elements."[212]

Respondent contends that the rusted pole in the pig enclosure was replaced immediately and "[t]here was no evidence that the pole cause an animal any harm, and so any violation would be de minimus."[213] Respondent also avers that the tiger shelters had been in place for sixteen years and were not found non-compliant until the November 21, 2013 inspection.[214] Respondent states that the inspectors "were satisfied" when Respondent added a tarp to cover the enclosure.[215]

I find that on or about November 21, 2013, Respondent willfully violated Standard 9 C.F.R.§ 3.125(a) by failing to maintain housing facilities for a pig in good repair to protect the animal from injury where a rusted jagged pole/pipe was found in the enclosure. As earlier mentioned, subsequent correction does not obviate a violation.[216] Also as mentioned,

---

[211] Tr. 6/28 134:13-16, 135:9-12.

[212] Tr. 6/28 135:22-136:4. *See also* Tr. 6/28 136:13-137:13.

[213] Respondent's Brief at 17 (citing Tr. 6/30, 220).

[214] Respondent's Brief at 17 (citing Tr. 6/30, 221).

[215] Respondent's Brief at 17 (citing Tr. 6/30, 221-22).

[216] *See White*, 73 Agric. Dec. 114, 155 (U.S.D.A 2014) ("The correction of a violation of the Animal Welfare Act or the Regulations is to be encouraged and may be taken into account when determining the sanction to be imposed for the violation. However, 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.") (citing *Greenly*, 72 Agric. Dec. 603, 623, (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection), appeal docketed, No. 13-2882 (8th Cir. Aug. 23, 2013); *Tri-State Zoological Park of W. Md., Inc*., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A.

the Regulations do not provide for a "de minimus" violation exception as Respondent suggests, and I would not consider this violation de minimus. Here, the regulation requires that enclosures be maintained in "good repair to protect the animals from injury" and does not require proof of injury caused by the non-compliant structure.

I find that on or about November 21, 2013, Respondent willfully violated Standard 9 C.F.R.§ 3.127(b) by failing to provide tigers with adequate shelter from inclement weather. Dr. Navarro testified that the shelter provided in the tiger enclosure was not tall enough for the tigers to seek shelter from the elements as needed. The photographs of the wooden shelter (CX 19 at 6-7) clearly show that the shelter only goes up to the tiger's neck and the tiger would have to crouch down to get inside. Respondent's contention that these shelters have been in place for sixteen years and not found non-compliant until 2013 does not obviate the violation. [217]

V. Penalty Considerations

Complainant requests, Brief at 30, that "license 58-C-0883 be revoked" because "[t]he evidence establishes that . . . Stearns Zoo repeatedly handled animals in a manner that placed the animals (and people) at risk of harm, and repeatedly failed to provide access for inspection, in violation of the Regulations." Further, Complainant contends that "the evidence supports a finding that Stearns Zoo committed 23 violations. Complainant seeks the assessment of a civil penalty of $23,000. (The maximum civil penalty that could be assessed under the Act is $230,000.)"[218]

Under the AWA, the appropriateness of the civil penalty should be determined "with respect to the size of the business of the person involved,

---

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)).

[217] *See Tri-State Zoological Park of W. Md., Inc.,* 72 Agric. Dec. 128, 138 (U.S.D.A. 2013) (where then Judicial Officer found that, although a squirrel monkey was housed in the same conditions for five years without the respondent being cited for violation, the violation was proved by a preponderance of the evidence).

[218] Brief at 31.

the gravity of the violation, the person's good faith, and the history of previous violations." [219] Suspension or revocation of an AWA license are provided for under 7 U.S.C. § 2149 (a). As discussed *supra* pp. 20-21, the finding of only one willful violation is needed to justify AWA license revocation. It is well settled that the "Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Act, and the Act has no requirement that there by uniformity in sanctions among violators."[220] As set out herein, I recognize that Respondent has not been subject to a previous administrative action, and is not found to have a history of violations or to have acted in bad faith. Thus, I find that the issuance of a cease and desist order and suspension of Respondent's AWA license, as opposed to revocation, is appropriate considering Respondent's history as a licensee.

In consideration of each of these factors, as well as the number of violations,[221] I find that the amount of the civil penalty should be $16,000, a cease and desist order is proper, and AWA license number 58-C-0883 should be suspended for not less than ninety (90) days.

a) Penalty Considerations: Size of Business

I find that Respondent's business size is moderate to large due to the number of animals on the property, size of property, and business activity.[222] Complainant contends that:

---

[219] 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,* 331 U.S. 519, 528–29 (1947).

[220] *Terranova*, 78 Agric. Dec. 248, 342 (U.S.D.A. 2019) (citing *ZooCats, Inc*., 68 Agric. Dec. 1072, 1079 n.5 (citing *Morgan*, 65 Agric. Dec. 849, 874-75 (U.S.D.A. 2006); *Volpe Vito, Inc.,* 56 Agric. Dec. 166, 257 (U.S.D.A. 1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Cir. R. 206), *printed in* 58 Agric. Dec. 85 (U.S.D.A. 1999)).

[221] Herein I have found sixteen (16) willful violations of the AWA and Regulations.

[222] *See Terranova Enters., Inc.*, 71 Agric. Dec. 876, 881 (U.S.D.A. 2012) (finding Respondent Terranova to be a large-sized business); *Yost*, 78 Agric. Dec. 23, 38-

> Respondent operates a zoo exhibiting domestic, wild, and exotic animals. In 2011, respondent represented to APHIS that it held 61 animals, in 2012, respondent represented to APHIS that it held 97 animals, in 2013, respondent represented to APHIS that it held 126 animals, in 2014, respondent represented to APHIS that it held 98 animals, and in 2015, respondent represented to APHIS that it held 139 animals.[223]

Respondent states that its zoo is operated over "22 acres with approximately 300 animals . . . [,] has been in business for 16 years and has grown from nothing to being open six days a week."[224]

b) Penalty Considerations: Gravity of Violations

I find the gravity of violations to be great. Complainant contends that "[t]he gravity of the violations alleged in this complaint is great, involving multiple failures to handle animals carefully and to provide access for inspection."[225] Respondent contends that "Complainant failed to show that

---

39 (U.S.D.A. 2019) (finding Respondent to be at least a moderately-sized business based on the number and type of exhibitions).

[223] Complaint ¶ 2. *See also* Complainant's Brief at 30 (stating that "Stearns Zoo operates a large business exhibiting animals" and citing *Huchital*, 58 Agric. Dec. 763, 816-17 (U.S.D.A. 1999); *Browning*, 52 Agric. Dec. 129, 151 (U.S.D.A. 1993) *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994).

[224] Respondent's Brief at 18 (citing Tr. 6/30, 6-9, 13).

[225] Complaint ¶ 3. *See also* Complainant's Brief at 30 (stating "Stearns Zoo's violations put both people and animals at risk of injury or death. Stearns Zoo's actions-and inaction-demonstrate a callous disregard for the welfare of the animals that they acquire and use for financial gain. Stearns Zoo has not shown good faith."); Complaint ¶ 4 (stating "On May 31,2012, APHIS issued an Official Warning to respondent with respect to violations documented on May 4, 2010 (perimeter fence), September 21, 2010 (veterinary care, facilities, and drainage), May 17, 2011 (non-human primate enclosure), September 14, 2011 (careful handling of a tiger),[footnote omitted] and February 23, 2012 (serval enclosure). The Official Warning stated: "After providing you with an opportunity for a hearing, we may impose civil penalties of up to $10,000, or other sanctions, for each violation described in this Official Warning. Although we generally pursue

any of the alleged violations involved any harm to an animal or a person" and, regarding Complainant's request to revoke Respondent's AWA license, that the "alleged violations fall short of the violations that have resulted in such a severe penalty."[226]

I take into account that the record demonstrates that Respondent's first failure to have someone available for inspection was not an outright refusal to allow entry, but instead a failure to have a responsible adult present. I also take into account that many of the housing violations were immediately corrected during or after inspections. However, of the sixteen (16) established violations, several were of a serious nature including willfully refusing access to APHIS officials to inspect facilities, animals, and records during normal business hours (7 U.S.C. § 2146(a); 9 C.F.R. § 2.50(c)); and the handling violations (9 C.F.R. §§ 2.131(b)(1), (b)(2)(i), (c)(1)).

c) Penalty Considerations: Good Faith and History of Previous Violations

Typically a lack of good faith and a history of previous violations is found where the respondent was involved in a formal disciplinary proceeding and continued to violation the AWA.[227] However a lack of good faith and history of previous violation can be found "where a petitioner receives notice of his violations yet continues" to violate the AWA.[228] Further, "under departmental precedent the JO has held that a

---

penalties for this type of violation(s), we have decided not to pursue penalties in this instance so long as you comply, in the future, with laws that APHIS enforces.").

[226] Respondent's Brief at 18 (citing *White*, 2014 WL 4311058 (U.S.D.A. 2014) (revoking license due to multiple violations including failure to develop and follow a plan for veterinary care that led to multiple deaths of animals); *Pearson*, 68 Agric. Dec. 685, 698, 732-33 (U.S.D.A. 2009) (revocation warranted for 281 violations and animals kept in "appalling conditions")).

[227] *See Ramos v. USDA*, 322 F. App'x 814, 820 (11th Cir. 2009); *Horton*, 73 Agric. Dec. 77, 88 (U.S.D.A. 2014) (citing *Mitchell*, 2010 WL 5295429, at *8 (Dec. 21, 2009); *Shepherd*, 66 Agric. Dec. 1107, 1116 (U.S.D.A. 2007)).

[228] *Id.* at 89 (citing *Richardson*, 66 Agric. Dec. 69, 88-89 (U.S.D.A. 2007) ("I have consistently held under the Animal Welfare Act that an ongoing pattern of

respondent's ongoing pattern on noncompliance is sufficient to establish a history of violations, for purposes of 7 U.S.C. § 2149(b)."[229]

Complainant contends that "Respondent has not shown good faith. Despite having received multiple inspection reports identifying noncompliance with the Regulations and failures to comply with the Standards, and the receipt of an Official Warning, respondent has continued to mishandle animals, particularly infant and juvenile tigers, exposing these animals and the public to injury, disease, and harm. Respondent held or participated in events that included allowing members of the public to handle young and juvenile tigers, to paint the fur of young and juvenile tigers, and to force young and juvenile tigers to 'swim' and to 'play' with members of the public."[230]

Respondent contends that Ms. Stearns has not acted in bad faith as evidenced by her history of working with animals, participation in conferences and compliance trainings, member ship in the Florida Fish and Wildlife Conservation Commission Technical Advisory Group, and her activities in genome research and philanthropy for endangered species.[231] Respondent also avers that Complainant can show no previous violations.[232]

---

violations over a period of time establishes a violator's "history of previous violations,' even if the violator has not been previously found to have violated the Animal Welfare Act."); *Howser*, 68 Agric. Dec. 1141, 1143 (U.S.D.A. 2009) (where the Secretary found a history of previous violations in the absence of formal complaints or penalties); *Mazzola*, 68 Agric. Dec. 822, 827 (U.S.D.A. 2009) (where the petitioner's choice to disregard a clear warning, even in the absence of prior formal disciplinary proceedings, was sufficient to establish a history of previous violations and a lack of good faith)).

[229] *Yost*, 78 Agric. Dec. 23, 43-44 (U.S.D.A. 2019) (citing *Staples*, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014); *Perry*, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013)).

[230] Complaint ¶ 5.

[231] *See* Respondent's Brief at 19.

[232] Respondents Brief at 20 (quoting *Hansen*, 57 Agric. Dec. 1072 (U.S.D.A. 1998) ("It bears repeating that an inspector is only an evidence gatherer. The inspector has no authority to find that anyone violated the Animal Welfare Act or the Regulations and Standards, but merely presents evidence, first to the agency and the agency's counsel, and then before an administrative law judge.")).

As mentioned previously, Respondents received written inspection reports providing notice of only eleven (11) of the twenty-four (24) alleged violations. Out of the sixteen (16) violations of the AWA established, only eight (8) were included in those inspection reports and most, if not all, were corrected during or immediately following the inspection. Complainant has not provided evidence to show that Respondent was made aware in writing of the complaints filed against its handling of the tiger swim sessions. Therefore, Complainant has not established that Respondent has shown bad faith or has a history of repeated violations.

FINDINGS OF FACT

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

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

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

4. In 2011, Stearns Zoo represented to APHIS it held sixty-one animals; in 2012, Stearns Zoo represented that it held ninety-seven animals; in 2013, Stearns Zoo represented that it held 126 animals; in 2014, Stearns Zoo represented that it held ninety-eight animals; and in 2015, Stearns Zoo represented that it held 139 animals. Complaint at ¶ 2; CX 1.

5. On May 31, 2012, APHIS issued an Official Warning to Stearns

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

6. On November 21, 2013, Veterinary Medical Officer (YMO) Dr. Luis Navarro conducted a compliance inspection of Stearns Zoo's facilities, equipment, and animals, found that Stearns Zoo had failed to identify a dog as required, and documented his observations in a contemporaneous inspection report. CX 19 at 1; Stipulations, ¶ 1.C.; Tr. 6/28, 132:16-134:6.

7. On January 26, 2012, Dr. Navarro attempted to conduct a compliance inspection at Stearns Zoo's facility, but no one was available to provide access or to accompany him. VMO Navarro prepared a contemporaneous inspection report. CX 15; Stipulations, ¶ I.A; Tr. 6/28, 122:14-124:12.

8. On September 9, 2013, VMO Dr. Robert Brandes attempted to conduct an inspection at Stearns Zoo's facility. No one from Stearns Zoo was available to provide access or to accompany him. He prepared a contemporaneous inspection report. CX 18; Stipulations, ¶ I.B; Tr. 6/28, 163:18-167:6.

9. On September 30, 2011, Stearns Zoo exhibited a young tiger (Rory or Rajah) to the public, including Barbara Keefe, a lay person, in a pool, without any distance and/or barriers between the tiger and the public, despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool. CX 9; CX 1O; CX 11; CX 12; Tr. 6/28, 25:22-32:2 (Keefe).

10. On October 10, 2012, Stearns Zoo exhibited a young tiger (Tony) in a pool, with a member of the public (a television reporter), who was permitted to handle the tiger directly. CX 4; CX 6; Tr. 6/28, 192:12-194:14; 202:9-203:2; 205:21-208:1 (Gage); Stipulations, ¶ D.

11. On October 18, 2012, Stearns Zoo exhibited a juvenile tiger (Tony)

in a pool outdoors in New York City, as part of a television show, with no barrier, and scant distance, between the tiger and a television reporter, and despite the tiger's repeated, consistent attempts to exit the pool. CX 5; CX 6; Tr. 6/28, 213:18-22; 217:13-219:5 (Gage); Stipulations, ¶ E.

12. On October 10, 2012, during exhibition, Stearns Zoo's employees or agents lowered a young tiger into a pool by the tiger's tail, pulled the tiger's tail to restrain it while it was in the pool, and pulled the young tiger out of the pool by the tiger's right front leg. CX 4; CX 6.

13. On October 13, 2012, during exhibition, Stearns Zoo's principal, Randy Stearns, handled or worked a young tiger (Tony) by pulling the tiger's tail,. CX 7; CX 8 at 2, 7; Tr. 6/27 35:14-36:3; 39:8-13; 38:9-39:9; 40:14- 19; 52:12-53:5; 55:1-19; 57:18-58:5; 90:14-91 :3 (Seiler).

14. On May 1, 2013, VMO Navarro conducted a compliance inspection at Stearns Zoo. CX 17. He observed and documented in an inspection report that the enclosure for two baboons had a support pole that had detached from the side and front of the enclosure. CX 17; Tr. 6/28, 129:130:10 (Navarro); Stipulations at 1 ¶ G.

15. On November 21, 2013, Dr. Navarro conducted a compliance inspection at Stearns Zoo. CX 19. He observed and documented in an inspection report that Stearns Zoos enclosure for a pig contained a rusted jagged pipe, and there was inadequate shelter from inclement weather for tigers. CX 19; Tr. 6/28, 132: 16-137:19 (Navarro); Stipulations at 1 ¶ C.

LEGAL CONCLUSIONS

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

2. On November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog as required. 9 C.F.R. § 2.50(c).

3. On or about January 26, 2012, and September 9, 2013, Stearns

Zoo willfully violated the AWA and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

4. On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.13l(b)(l), by failing to handle tigers as carefully as possible in a manner that would not cause behavioral stress, physical harm, or unnecessary discomfort.

5. On October 10 and 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131 (b)(2)(i), by using physical abuse to handle or work young tigers.

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

7. On October 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(3), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being.

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

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

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

    c. November 21, 2013. Inadequate shelter from inclement

weather for tigers. 9 C.F.R. § 3.127(b).

ORDER

It is therefore ordered that:

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

2. AWA license number 58-C-0883 is hereby suspended for ninety (90) days.

3. Stearns Zoo is assessed a civil penalty of $16,000, to be paid by check, including reference to the Docket No. 15-0146, made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to:

USDA, APHIS
Miscellaneous
P.O. Box 979043
St. Louis, MO 63 197-9000

or by overnight delivery addressed to:

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

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

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

___

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: JEFFREY L. GREEN, an individual.
Docket No. 17-0205.
Decision and Order of the Judicial Officer.
Filed February 25, 2020.

HPA – Amended complaint – Answer, failure to file timely – Certified mail – Complaint – Default – Electronic mail – Federal Rules of Civil Procedure – Service.

John V. Rodriguez, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent.
Initial Decision and Order by Channing D. Strother, Chief Administrative Law Judge.
Decision and Order issued by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER SETTING ASIDE DEFAULT AND REMANDING FOR FURTHER PROCEEDINGS

Preliminary Statement

This is a proceeding under the Horse Protection Act, as amended (15 U.S.C. §§ 1821 *et seq*.) ("HPA" or "Act"); the regulations promulgated thereunder (9 C.F.R. §§ 11.1 through 11.4) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice"). The matter initiated with a complaint filed on February 3, 2017 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant"), against Jeffrey L. Green ("Respondent") and others.[1] The

[1] In addition to Mr. Green, the following respondents were named in the February 3, 2017 Complaint: Christopher Alexander, an individual (HPA Docket No. 17-0195); Alias Family Investments, LLC, a Mississippi limited liability company (HPA Docket No. 17-0196); Margaret Anne Alias, an individual (HPA Docket No. 17-0197); Kelsey Andrews, an individual (HPA Docket No. 17-0198); Tammy Barclay, an individual (HPA Docket No. 17-0199); Ray Beech, an individual (HPA Docket No. 17-0200); Noel Botsch, an individual (HPA Docket No. 17-0201); Lynsey Denney, an individual (HPA Docket No. 17-0202); Mikki Eldridge, an individual (HPA Docket No. 17-0203); Formac Stables, Inc., a

Complaint alleged, *inter alia*, that Respondent committed multiple violations of the Act[2] and requested that any "order or orders with respect to sanctions issued be as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[3]

Service of the Complaint was made by both regular and certified mail to Respondent, Jeffrey Green, at XXXXX, in accordance with the Rules of Practice at 7 C.F.R.§ 1.147(c)(1).[4] It is undisputed that Respondent filed a timely answer to the Complaint.[5]

Tennessee corporation (HPA Docket No. 17-0204); William Ty Irby, an individual (HPA Docket No. 17-0206); James Dale McConnell, an individual (HPA Docket No. 17-0207); Joyce Meadows, an individual (HPA Docket No. 17-0208); Joyce H. Myers, an individual (HPA Docket No. 17-0209); Libby Stephens, an individual (HPA Docket No. 17-0210); and Taylor Walters, an individual (HPA Docket No. 17-0211). On June 13, 2017, then-Chief Administrative Law Judge Bobbie J. McCartney issued an order reassigning the dockets wherein timely answers were filed – including Mr. Green's docket (HPA Docket No. 17-0205) – to now Chief Administrative Law Judge Channing Strother. The case caption was amended several times thereafter to reflect the entry of consent decisions in various dockets, which resolved the case as to those respondents. Following a May 13, 2019 telephone conference with counsel for the parties, Judge Strother issued an order severing Mr. Green's proceeding (HPA Docket No. 17-0205) from the remaining two respondents: Tammy Barclay (HPA Docket No. 17-0199) and Noel Botsch (HPA Docket No. 17-0201).

[2] *See* Complaint at 16-18.

[3] *Id.* at 19.

[4] The record reflects that on February 8, 2017, the original Complaint was served by both regular and certified mail to Respondent Jeffrey Green at XXXXX. *See* United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX XXXX 4696. The receipt is unsigned and undated, and the envelope containing the Complaint is marked "Return To Sender, Unable to Forward" for both the certified mail copy and the regular mail copy which followed. The Rules of Practice at 7 C.F.R.§ 1.147(c)(1) provide that service of a complaint is to be made to the last known residence of an individual party and, further, if it is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

[5] Respondent, through his attorney of record, Robin L. Webb, timely filed an Answer on February 28, 2017. Attorney Webb provided her street address on both

On July 31, 2019, more than two years after the original Complaint filed on February 3, 2017, Complainant filed an amended complaint[6] asserting that "APHIS ha[d] identified evidence of additional alleged violations by the respondent."[7] In addition to nine allegations from the original Complaint, the Amended Complaint raised numerous new material allegations of violations of the Act,[8] and requested:

> that, in accordance with the Act, 15 U.S.C. §§ 1825(b)(1), 1825(c), respondent Jeffrey L. Green (1) be assessed a civil penalties [sic] of not more than $2,000 for each violation, and (2) be disqualified from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, or other device, for a period of not less than one year for each violation.

---

the Answer itself and on the Certificate of Service, as follows: XXXXX. However, she served the Answer to Complainant's attorney at the Office of General Counsel, as well as to the Hearing Clerk's Office, by electronic mail. The Hearing Clerk's Office then served the Answer to all parties utilizing only electronic mail, apparently obtaining Respondent's attorney's email address, XXXXX@lrc.ky.gov, from her submission.

[6] *See* 7 C.F.R. § 1.137 ("Any time prior to the filing of a motion for hearing, the complaint . . . may be amended."); *Meacham*, 47 Agric. Dec. 1708, 1709 (U.S.D.A. 1988). In his Answer, the Respondent requested "[t]hat this proceeding be set for oral hearing in conformity with the provisions of the Rules of Practice applicable to the Horse Protection Act[.]" Answer at 3. A request for hearing set forth in an answer "is not the same as a motion for hearing, referred to in §§ 1.137 and 1.141(b)" of the Rules of Practice. *Meacham*, 47 Agric. Dec. at 1709. Accordingly, as Complainant correctly notes, "[n]o motion for hearing has been filed in this case." Amended Complaint at 1.

[7] Amended Complaint at 1.

[8] The original nine allegations from the Complaint were incorporated into the Amended Complaint: #92/29, #93/30, #94/31, #95/32, #96/33, #97/34, #98/35, #99/36. #98/35 is a double allegation.

Amended Complaint at 3-4. Furthermore, the Amended Complaint specified: "Failure to file a timely answer shall constitute the admission of all the material allegations of this amended complaint."[9] The Hearing Clerk's records reflect that the Amended Complaint was not served by certified or registered mail in accordance with the Rules of Practice at 7 C.F.R. § 1.147(c)(1) but was sent to Respondent's counsel via email on August 2, 2019.[10]

On August 28, 2019, Complainant filed a Proposed Decision and Order by Reason of Default ("Proposed Default Decision") and Motion for Adoption the Proposed Decision ("Motion for Default"), which were served by certified mail in accordance with the Rules of Practice at 7 C.F.R. § 1.147(c)(1) to Attorney Webb's street address of 102 South Hord Street, Grayson, Kentucky 41143, as well as by electronic mail (*see* Complainant's Response at 2-3). Respondent did not file any objections within the twenty-day period in accordance with the Rules of Practice (7 C.F.R. § 1.139).[11]

Based on Complainant's representation in the Motion For Default that Respondent failed to file a timely answer to the "duly served" Amended Complaint, on October 17, 2019, Chief Administrative Law Judge ("CALJ") Channing D. Strother granted Complainant's Motion for

---

[9] *Id.* at 9.

[10] The Hearing Clerk's records reflect that the Amended Complaint was sent to Respondent's counsel via email on August 2, 2019. Respondent's answer was due on or before August 22, 2019. Respondent has not filed an answer to the Amended Complaint.

[11] United States Postal Service records reflect that the Proposed Decision and Motion for Default were sent to Respondent's counsel via certified mail to Attorney Webb's street address of XXXXX and delivered on September 3, 2019. Additionally, service was made by electronic mail, and the address used was XXXXX@windstream.net. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections were due by September 23, 2019. Respondent has not filed any objections.

Decision Without Hearing by Reason of Default and issued a issued a Default Decision and Order ("Default Decision" or "DD") without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).[12] The Rules of Practice at 7 C.F.R. § 1.136(c) provide that failure to file a timely answer within twenty days after the service of the complaint as required in 7 C.F.R. § 1.136(a) ". . . shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint." [13] Accordingly, the Default Decision "deemed admitted" the material facts alleged in the Amended Complaint and adopted the findings of fact and conclusions of law contained therein. Based on these "deemed admitted" findings of fact and conclusions of law, the Default Decision disqualified Respondent Jeffrey L. Green for a period of thirty-four years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, or from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agency, employee, or other device and assessing Respondent a civil penalty of $74,800.[14]

On November 11, 2019, Respondent filed an "Appeal to the Judicial Officer and/or Motion to Reconsider to Vacate and Set Aside" along with a "Motion to Strike the Amended Complaint, or in the Alternative Accept Late Answer of Respondent" and an "Answer of Respondent to Amended Complaint." Respondent's Appeal argues, generally, that the Default Decision and Order should be vacated and dismissed for the following reasons: (1) the Amended Complaint does not comply with the Federal

[12] That the instant Motion for Default is based on Respondent's failure to answer the Amended Complaint – rather than the original Complaint, which Respondent timely answered – is of no consequence. The operative pleading in this case is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

[13] 7 C.F.R. § 1.136(c).

[14] The Default Decision and Order were served by the Hearing Clerk's Office to XXXXX@windstream.net, as well as by certified mail to Respondent's counsel, Robin L. Webb, at XXXXX. *See* United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX XXXX 6836.

Rules of Civil Procedure and is prejudicial; (2) the Rules of Practice deny due process as there is no procedure for the filing of a late answer; (3) an allegation based on the "scar rule" is void of due process and an arbitrary ultra vires action; and (4) the ALJ is not lawfully appointed.

The Amended Complaint Must Be Served by Certified Mail

The subject Default Decision has been timely appealed to the Judicial Officer as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145) raising several issues, including the dispositive issue of the sufficiency of service of the Amended Complaint. For the reasons discussed more fully below, it is the determination of the Judicial Officer that the Amended Complaint was not served by certified mail in accordance with the requirements of the Rules of Practice at 7 C.F.R. § 1.147(c)(1).[15]

Because this matter will be remanded back to the Chief Administrative Law Judge for further proceedings, the other issues raised in Respondent's appeal are premature and will not be addressed.

The Default Decision granting the Complainant's Motion for Default is based on Complainant's representation that Respondent failed to file a timely answer to the "duly served" Amended Complaint. Complainant goes on to explain that Respondent's timely filed Answer to the original Complaint is considered to be "of no consequence" under applicable jurisprudence because the "operative pleading" is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

Of course, such a holding contemplates that the Amended Complaint has been properly served in accordance with the Rules of Practice. With regard to service, the applicable Rules of Practice at 7 C.F.R. § 1.147(c)(1) provide in pertinent part as follows:

[15] It is well settled the Federal Rules of Civil Procedure do not apply to these proceedings. *See Mitchell,* 60 Agric. Dec. 91, 123, 123 n.1 (U.S.D.A. 2001).

> (c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

In the instant proceeding, the Amended Complaint was "served" by the Hearing Clerk's Office on August 2, 2019 by electronic mail only, to Respondent's counsel, Robin L. Webb (*see* Complainant's Response at 2). Electronic mail is not sufficient to comply with the service requirements of the Rules of Practice at 7 C.F.R. § 1.147. While the use of electronic mail has developed as an expedient means of communication with the parties, unless a party has elected to waive the service requirements under 7 C.F.R.§ 1.147 and has affirmatively requested that service be effected only by electronic mail, service on a party other than the Secretary must comply with the provisions of 7 C.F.R. § 1.147. This is particularly important where failure to file an answer within twenty days from the date of service of the complaint is asserted in support of a Default Decision. 7 C.F.R. § 1.136(a) and (c). Here, however, there is no indication that the attorney of record for Respondent, Robin Webb, affirmatively waived the service requirements of 7 C.F.R. § 1.147.

Complainant argues that an amended complaint need not be considered one of the six documents required to be served by certified mail under the Rules of Practice based on the language in *Arbuckle Adventures, LLC*, 76 Agric. Dec. 38, 43 (U.S.D.A. 2017)[16] to the effect that, unlike an original complaint, an amended complaint is not one of the documents initially served on a person to make that person a party respondent in a proceeding. 7 C.F.R. § 1.137(c).

For the reasons discussed below, it is the determination of this Judicial Officer that the Rules of Practice require the same manner of service for an amended complaint as is required for an original complaint. The protections of service by certified mail of an amended complaint are consistent with the Rules of Practice when read as a whole. For example, a complainant may file an amended complaint at any time without the consent of the parties prior to the filing of a motion for hearing under the Rules of Practice at 7 C.F.R. § 1.137(a). In his timely filed Answer to the original Complaint, Respondent requested "[t]hat this proceeding be set for oral hearing in conformity with the provisions of the Rules of Practice applicable to the Horse Protection Act[.]" Answer at 3. However, as Complainant has correctly pointed out, a request for hearing set forth in an answer is not the same as a motion for hearing, referred to in sections 1.137 and 1.141(b) of the Rules of Practice. In this case, Complainant filed an Amended Complaint on July 31, 2019, more than two years after the original Complaint was filed on February 3, 2017. [17]

Further, with regard to newly raised material allegations of violations, an amended complaint *is* "[a]ny complaint or other document initially

[16] The dispositive issue was one of the timeliness of the Answer given USDA's failure to track the receipt of the Answer upon delivery. The Default Decision was set aside and the matter remanded to the Chief Judge for further proceedings.

[17] *See* 7 C.F.R. § 1.137 ("Any time prior to the filing of a motion for hearing, the complaint . . . may be amended."); *Meacham*, 47 Agric. Dec. at 1709. A request for hearing set forth in an answer "is not the same as a motion for hearing, referred to in §§ 1.137 and 1.141(b)" of the Rules of Practice. *Meacham,* 47 Agric. Dec. at 1709. Accordingly, as Complainant correctly notes, "[n]o motion for hearing has been filed in this case." Amended Complaint at 1.

served on a person to make that person a party respondent in a proceeding" within the meaning of 7 C.F.R. § 1.147(c)(1) because it supplants any preceding complaints and becomes the "*operative pleading*" in the proceeding for all purposes, [18] including newly raised material allegations, to which a party respondent must file an answer within twenty days of the date of service or suffer the severe regulatory ramifications of failure to file a timely answer. [19]

This result is supported by the very cases Complainant references in response to Respondent's appeal of the Default Decision. In *Walker*,[20] the Amended Complaint was served by certified mail, with the return receipt information provided in footnote 1.[21] Further, in *Mashburn*,[22] the respondent was granted an extension to file an answer to the amended complaint, which was also served by certified mail, with proof of service.[23]

Consistent application of the Rules of Practice, which do not draw a distinction between an original and an amended complaint with regard to service, requires that service of an amended complaint be made in the same manner as required for an original complaint, "by

[18] The operative pleading in this case is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

[19] *Knapp*, 64 Agric. Dec. 253, 295 (U.S.D.A. 2005) ("Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant does not object to setting aside the default decision, generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.").

[20] 65 Agric. Dec. 932 (U.S.D.A. 2006).

[21] *Walker*, 65 Agric. Dec. at 933.

[22] 63 Agric. Dec. 254 (U.S.D.A. 2004) (Order Vacating ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn).

[23] *Mashburn*, 63 Agric. Dec. at 255 n.1, 257-58.

certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]" 7 C.F.R. § 1.147(c)(1). In the instant proceeding, Respondent's attorney, Robin Webb, provided her mailing address as XXXXX, and this is the address that should have been utilized by the Hearing Clerk's Office for service of the Amended Complaint. For this reason, remand is required for further proceedings.

DECISION AND ORDER

For the foregoing reasons, it is the determination of the Judicial Officer that service of an amended complaint must be made by certified in the same manner as required for service of an original complaint. The subject Amended Complaint was not served upon Respondent by certified in accordance with the requirements of the Rules of Practice at 7 C.F.R. § 1.147(c)(1). Accordingly, the October 17, 2019 Default Decision granting Complainant's Motion for Decision Without Hearing by Reason of Default is set aside and this matter is hereby remanded to the Chief Administrative Law Judge for referral to the Hearing Clerk's Office for service of the Amended Complaint by certified mail.

Copies of this Order shall be served, by certified mail, by the Hearing Clerk upon each of the parties identified herein above.

___

MISCELLANEOUS ORDERS & DISMISSALS

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

AGRICULTURAL MARKETING AGREEMENT ACT

In re: WALNUTS GROWN IN CALIFORNIA.
Docket No. 20-J-0011.
Order Certifying Transcript.
Filed May 8, 2020.

ANIMAL WELFARE ACT

In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Stay Order.
Filed January 7, 2020.

AWA – Stay.

Ciarra A. Toomey, Esq., for APHIS.
William J. Cook, Esq., for Respondents.
Initial Decision by Erin M. Wirth, Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING STAY

On January 2, 2020, Respondents, Douglas Keith Terranova and Terranova Enterprises, Inc. by and through counsel, pursuant to 5 U.S.C. § 705, moved for a stay pending the outcome of proceedings for judicial review. Respondent has represented that Complainant has no objection to the requested stay.

In accordance with 5 U.S.C. § 705, Mr. Terranova's Motion for Stay Order is **granted**. For the foregoing reasons, and the reasons set forth in the Motion for Stay, the following Order is issued.

ORDER

The Order *In re Douglas Keith Terranova, an individual; and Terranova Enterprises, Inc.*, Petition for Reconsideration, AWA Docket Nos. 15-0058-59; 16-0037-38, denied on November 5, 2019, 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.

Further Ordered, copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

___

In re: LINDA L. HAGER, an individual; and EDWARD E. RUYLE, an individual.
Docket Nos. 16-0049, 16-0050.
Order Granting Complainant's Request to Close Cases.
Filed March 3, 2020.

HORSE PROTECTION ACT

In re: GAYLE HOLCOMB, an individual.
Docket No. 17-0034.
Dismissal With Prejudice.
Filed February 6, 2020.

___

DEFAULT DECISIONS

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

ANIMAL WELFARE ACT

In re: JOHN WALLACE.
Docket No. 20-J-0018.
Default Decision and Order.
Filed March 31, 2020.

___

CONSENT DECISIONS

ANIMAL WELFARE ACT

In re: CJ'S GREAT CATS WORLD PARK, INC., an Oregon corporation; and CRAIG WAGNER, an individual.
Docket Nos. 14-0035, 14-0036.
Consent Decision and Order.
Filed January 9, 2020.

COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT OF 1996

In re: RESOLUTE FP US, INC.; and RESOLUTE FP AUGUSTA LLC.
Docket Nos. 19-J-0151, 19-J-0152.
Consent Decision and Order.
Filed March 19, 2020.

In re: EURO-LUMBERJACK, LLC.
Docket No. 20-J-0125.
Consent Decision and Order.
Filed June 22, 2020.

HORSE PROTECTION ACT

In re: DIANA CRUSE, an individual.
Docket No. 17-0143.
Consent Decision and Order.
Filed January 31, 2020.

In re: HOWARD HAMILTON.
Docket No. 13-0365.
Consent Decision and Order.
Filed February 26, 2020.

In re: PATRICK W. THOMAS.
Docket No. 13-0366.
Consent Decision and Order.
Filed February 27, 2020.

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKE HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Consent Decision and Order.
Filed April 10, 2020.

In re: STEVEN ZAWILINSKI, an individual.
Docket No. 20-J-0029.
Consent Decision and Order.
Filed June 5, 2020.

___