UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
SPLISH SPLASH II, LLC,	)	AWA Docket No. 19-J-0050
an Oklahoma limited liability company,	)	
	)	

DECISION AND ORDER DENYING PETITIONER'S REQUEST FOR NEW HEARING AND PETITION FOR APPEAL

Appearances:

Stephen P. Gray, Esq., Stephen P. Gray & Associates, 3101 North Hemlock Circle, Suite 112, Broken Arrow, Oklahoma 74012, for the Petitioner, Splish Splash II, LLC, an Oklahoma limited liability company; and

Colleen A. Carroll, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250, for the Respondent, Animal and Plant Health Inspection Service ("APHIS").

On Appeal to the Judicial Officer, Judge Bobbie J. McCartney.

Introduction

This is a proceeding under the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act"); the regulations promulgated pursuant to the AWA (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules of Practice"). On April 12, 2019, Chief Administrative Law Judge Channing D. Strother ("Chief Judge") issued a decision and order granting summary judgment in favor of the Animal and Plant Health Inspection Service ("APHIS") and affirming APHIS' denial of Splish Splash II, LLC's application for a Class C exhibitor's license. On May 3, 2019, Splish Splash II, LLC appealed the Chief Judge's Decision and Order to the Judicial Officer and requested a new hearing on the ground that "the basis for the prohibition of [Splish Splash II, LLC] obtaining a license is no

longer appropriate."[1]

For the reasons discussed more fully herein below, Splish Splash II, LLC's petition for appeal and request for new hearing are denied, and the Decision and Order issued by the Chief Judge on April 12, 2019 is ***affirmed*** and ***adopted*** as the final decision of the Secretary.

Relevant Procedural History

On February 21, 2019, Mr. Joseph M. Estes filed a petition for review and request for hearing ("Petition") on behalf of Splish Splash II, LLC ("Petitioner") in accordance with section 2.11(b) of the Regulations.[2] Attached to the Petition was a February 5, 2019 letter ("APHIS Denial Letter") from the Assistant Deputy Administrator of APHIS ("Respondent") denying Petitioner's application for a Class C exhibitor's license[3] on the basis that Mr. Estes has had an AWA license revoked.[4] Petitioner seeks reversal of APHIS' denial.[5]

On February 26, 2019, Respondent filed a motion for summary judgment ("Motion"), including a memorandum of points and authorities ("Memorandum") that attached several exhibits based on section 1.143(d) of the Rules of Practice[6] and on all the pleadings, documents, points, and authorities filed as part of the Motion. Petitioner did not file a response to Respondent's Motion.

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[1] Appeal Petition at 1.

[2] 9 C.F.R. § 2.11(b). *See* Petition at 1 ("This letter is to appeal revoke Licenseing [sic] due to payment was made. I request a hearing in accordance with section 2.11b[.]").

[3] On or about March 15, 2018, APHIS received an application for an AWA license from an applicant named "Splish Splash II, LLC." The application was signed by Mr. Estes, who identified himself as "President" of the corporation. *See* Response to Appeal Petition at 4.

[4] *See* APHIS Denial Letter at 1 ("We are denying this application based on sections 2133 and 2131 of the AWA (7 U.S.C. §§ 2133, 2151), and section 2.11(a)(3) of the AWA regulations (9 C.F.R. § 2.11(a)(3)).").

[5] *See* Petition at 1.

[6] 7 C.F.R. § 1.143(d).

On April 12, 2019, the Chief Judge issued a Decision and Order granting summary judgment in favor of APHIS. The Chief Judge ruled "there [were] no material issues of fact requiring a resolution before issuing a decision" and found that: (1) Mr. Estes's previous AWA exhibitor's license (No. 73-C-0133) was revoked; (2) Mr. Estes has a substantial interest, financial or otherwise, in Splish Splash, II, LLC; and (3) APHIS properly found Petitioner unfit to be licensed under the AWA and Regulations due to Mr. Estes's previous license revocation.[7] Accordingly, APHIS' denial of Petitioner's license application was affirmed.

On May 3, 2019, Stephen P. Gray, Esq. filed on Petitioner's behalf an Entry of Appearance and "Petitioner's Appeal of Decision and Order Granting Respondent's Motion for Summary Judgment" ("Appeal Petition"). The Appeal Petition states, in pertinent part, as follows:

> . . . Mr. Joseph M. Estes . . . hereby requests a new hearing and an appeal of the Decision and Order Granting Respondent's Uncontested Motion for Summary Judgment that was entered on April 12, 2019. The purpose of this appeal is brought in good faith in that the basis for the revocation of Mr. Joe Estes' license was a failure to timely pay a fine of $10,000.00. Said fine was ultimately paid. Hence, the basis for the prohibition of him obtaining a license is no longer appropriate. Mr. Estes and his company would like to present further evidence to this Court to prove this assertion so that the Court may reverse its Order granting the Motion for Summary Judgment, and to allow him to proceed with his application to obtain a license.
>
> **WHEREFORE**, premises considered, the Petitioner would respectfully request that the Court set this matter for hearing to entertain new evidence showing that Mr. Estes is in good standing to obtain a license.

Appeal Petition at 1.

On May 16, 2019, Respondent filed its "Response to Petition for Appeal and for a New Hearing." On May 21, 2019, the Hearing Clerk transmitted the record to the Office of the

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[7] Chief Judge's Decision and Order at 2.

Judicial Officer for consideration and decision.

DECISION

Statutory and Regulatory Framework

The AWA authorizes the Secretary of Agriculture to issue licenses to dealers and exhibitors, upon application, in such form and manner as the Secretary of Agriculture may prescribe and to promulgate such rules, regulations, and orders as the Secretary of Agriculture may deem necessary in order to effectuate the purposes of the Act.[8] The Regulations preclude issuance of an AWA license to any person who has had an AWA license revoked, as well as to any legal entity in which a person who has had a license revoked has a substantial interest, as follows:

> **§ 2.9 Officers, agents, and employees of licensees whose licenses have been suspended or revoked.**
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> Any person who has been or is an officer, agent, or employee of a licensee whose license has been suspended or revoked and who has responsible for or participated in the violation upon which the order of suspension or revocation was based will not be licensed within the period during which the order of suspension or revocation is in effect.
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> **§ 2.10 Licensees whose licenses have been suspended or revoked.**
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> . . . .
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.
>
> **§ 2.11 Denial of initial license application.**
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> (a) A license will not be issued to any applicant who:
> . . . .
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10[.]

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[8] *See* 7 U.S.C. §§ 2133, 2151.

9 C.F.R. §§ 2.9, 2.10(b), 2.11(a)(3).

Discussion

The Chief Judge correctly concluded that the material facts of this case are not in dispute.[9] The sole issue is whether APHIS properly denied Petitioner's March 2018 license application on the grounds that Mr. Estes is "an applicant who . . . [h]as had a license revoked, as set forth in § 2.10."[10] APHIS' denial letter, which is addressed to Mr. Estes, states:

> [T]he application materials indicate you are the president of Splish Splash II, LLC. Pursuant to 2.10(b), because you have a revoked AWA exhibitor's license, you shall not be licensed in your own name or in any manner, including but not limited to a corporation in which you have a substantial interest, financial or otherwise.

APHIS Denial Letter at 1-2.

The record clearly establishes – and Petitioner admits[11] – that Mr. Estes previously held an AWA exhibitor's license that was revoked by the Secretary of Agriculture on December 1, 2003.[12] The Regulations provide that an AWA license will not be issued to an applicant who has had an AWA license revoked;[13] therefore, APHIS' denial of Petitioner's license application was proper, and there are no genuine issues of fact to be heard.

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, the Judicial Officer has consistently held that hearings are futile and

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[9] Chief Judge's Decision and Order at 12.

[10] APHIS Denial Letter at 1 (citing 9 C.F.R. § 2.10(b)).

[11] *See* Appeal Petition at 1.

[12] APHIS Denial Letter at 1. Mr. Estes was required, pursuant to the terms of a consent decision, to pay a civil penalty of $10,000 in full by November 30, 2003. *See Estes*, AWA Docket No. 02-0026 (U.S.D.A. June 11, 2003) (Consent Decision and Order). When that payment was not made, Mr. Estes's AWA exhibitor's license (No. 73-C-0133) was "revoked automatically on December 1, 2003." APHIS Denial Letter at 1.

[13] 9 C.F.R. §§ 2.10(b), 2.11(a)(3).

summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[14] I conclude that the Chief Judge correctly denied Petitioner's request for a hearing and that a "new hearing," which Petitioner has requested on appeal, is not necessary in this case.[15] Furthermore, I adopt as the final order in this proceeding the Chief ALJ's April 12, 2019 Decision and Order Granting Summary Judgment in which the Chief Judge found the material facts in this proceeding are not in dispute, entered a summary judgment in favor of APHIS, and affirmed APHIS' denial of Mr. Estes's March 2018 AWA license application.

Splish Splash II, LLC's Request for New Hearing

Petitioner requests that the Judicial Officer "set this matter for hearing to entertain new evidence showing that Mr. Estes is in good standing to obtain a license."[16] Petitioner seeks to present "further evidence" that an outstanding civil penalty – which was "the basis for the revocation of Mr. Joe Estes's license" in the past – "was ultimately paid. Thus, the basis for the prohibition of him obtaining a license is no longer appropriate."[17]

With regard to new hearings, the Rules of Practice provide:

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[14] *See, e.g.*, *Knaust*, 73 Agric. Dec. 92, 99 (U.S.D.A. 2014); *Pine Lake Enter, Inc.*, 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009). *See also Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of allegations).

[15] *See Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir. 1996) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc.*, 832 F.2d at 607-08 (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Cmty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986).

[16] Appeal Petition at 1.

[17] *Id.*

> **§ 1.146 Petition for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
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> (a) *Petition requisite--* (1) *Filing; service; ruling.* A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the Judicial Officer, must be made by petition with the Hearing Clerk.
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> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(1), (2). Petitioner's request fails to meet these requirements and must therefore be denied.

Petitioner's request for a new hearing fails to state the nature of evidence to be adduced and that such evidence is not merely cumulative.[18] Petitioner submits that the purpose of its request is to present evidence "showing that Mr. Estes is in good standing to obtain a license."[19] However, merely stating a desire to present evidence to show "good standing," without more, is insufficient grounds for rehearing.

Although it is unclear what Petitioner's new evidence would consist of,[20] Petitioner seems to suggest the evidence would prove that the $10,000 civil penalty "was ultimately

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[18] *See* 7 C.F.R. § 1.146(a)(2).

[19] Appeal Petition at 1.

[20] *Cf. Paradise Corner, LLC*, 75 Agric. Dec. 687, 688-89 (U.S.D.A. 2016) (Remand Order) (where a filing that did not identify any error by the ALJ, identify any portion of the ALJ's Decision and Order or any ruling which the petitioner disagreed, or allege any deprivation of rights was not an appeal petition but "a petition for reopening the hearing to admit as evidence the documents attached to" the filing).

paid."[21] I conclude that such evidence would be "merely cumulative."[22] APHIS' Denial Letter already acknowledges that "Mr. Estes paid the civil penalty in several installments, making the last installment in 2006."[23] Moreover, the Chief Judge addressed the subject of payment in his April 12, 2019 Decision and Order:

> Because Petitioner did not answer Respondent's motion for summary judgment, it is unknown what "payment" referenced in its Petition Petitioner might contend "was made" or how Petitioner might contend the circumstance would allegedly support the Petition. Perhaps Petitioner is simply stating that it has paid the civil penalties previously imposed on Mr. Estes. Payment of those penalties would not entitle it to a license.

Chief Judge's Decision and Order at 9.

I agree with the Chief Judge and find that evidence of Mr. Estes's civil-penalty payment would be inconsequential here.

> [A]t issue is not the revocation of a license. The revocation of Mr. Estes['s] previous exhibitor's license became final and unappealable long ago. No payment at any time could alter that revocation. What is at issue here is the denial of a license to Splish Splash II, LLC, on the grounds set out herein, which are essentially the previous revocation of Mr. Estes' license. I find no payment could affect that denial or the grounds therefore.

Chief Judge's Decision and Order at 9-10. Revocation of licensure is a permanent remedy that affords no opportunity for reinstatement.[24] Therefore, I affirm the Chief Judge's finding and conclude that payment of a civil penalty has no bearing on the license denial at issue.

Additionally, Petitioner's request for a new hearing must be denied because it fails the

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[21] Appeal Petition at 1.

[22] 7 C.F.R. § 1.146(a)(3).

[23] APHIS Denial Letter at 1 n.2.

[24] *See Kollman v. Vilsack*, No. 8:14-CV-1123-T-23TGW, 2015 WL 1538149, at *3-*4 (M.D. Fl. Apr. 7, 2015) (upholding the Department's interpretation of "revoke" "to mean not only a permanent revocation but a prohibition against applying for another license").

good-cause requirement of the Rules of Practice.[25] Petitioner had an opportunity to present its evidence in a response to the Motion for Summary Judgment but elected not to file a response or to present any evidence whatsoever and failed to explain why.[26] As the Chief Judge noted: "Petitioner and Mr. Estes have failed to file any pleadings rebutting Respondent's Motion for Summary Judgment."[27] Thus, Petitioner's "failure to set forth a good reason why such evidence was not adduced at the hearing" justifies denial of its request for rehearing.[28]

Splish Splash II, LLC's Appeal Petition

On appeal, Petitioner requests that the Judicial Officer reverse the Chief Judge's Decision and Order granting summary judgment because "the basis for the prohibition of [Petitioner] obtaining a license is no longer appropriate."[29] The Rules of Practice set forth the requirements for filing an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
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> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an

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[25] *See* 7 C.F.R. § 1.146(a)(2) ("A petition to reopen a hearing . . . shall set forth a good reason why such evidence was not adduced at the hearing.").

[26] *See Holt v. Blakely*, 167 F. App'x 86, 89 (11th Cir. 2006) ("If the party seeking summary judgment meets its burden, the burden shifts to the non-moving party to submit evidence to rebut the showing with affidavits or other relevant and admissible evidence."); *Rosberg*, 74 Agric. Dec. 384, 391-92 (U.S.D.A. 2015) ("If the moving party supports its motion for summary judgment, the burden shifts to the nonmoving party, who may not rest upon mere allegations, denials, speculation, or conjecture to defeat summary judgment but must, instead, resist the motion for summary judgment by setting forth specific facts, in affidavits, deposition transcripts, exhibits, or other evidence, that raise a genuine issue for trial.").

[27] Chief Judge's Decision and Order at 9. *See Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993) ("While we view the record in the light most favorable to the nonmoving party, the party opposing summary judgment may not rest on its pleadings but must set forth specific fats showing there is a genuine issue for trial[.]") (internal quotation omitted).

[28] 7 C.F.R. § 1.146(a)(2).

[29] Appeal Petition at 1.

> oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling before the Judge may be relied upon in an appeal. Each issue shall set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a).

At the outset, Petitioner's Appeal Petition fails to comply with the requirements of the Rules of Practice. The Appeal Petition does not identify any portion of the Chief Judge's Decision and Order or any ruling by the Chief Judge with which Petitioner disagrees, and it does not allege any deprivation of rights.[30] Furthermore, the issues and arguments are not separately numbered; the issues and arguments are not plainly stated; and the Appeal Petition contains no citations to the record, statutes, regulations, or case law in support of Petitioner's arguments.[31] The Judicial Officer has consistently dismissed purported appeal petitions that do not conform to the requirements of 7 C.F.R. § 1.145(a).[32] Thus, denial of the instant Appeal Petition is appropriate.

Petitioner's appeal seems to turn on the mistaken belief that Mr. Estes's belated payment of a civil penalty somehow reversed the Secretary's previous revocation of his AWA exhibitor's

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[30] *See id.*

[31] *See id.*

[32] *See, e.g.*, *Sims*, 75 Agric. Dec. 184, 188 (U.S.D.A. 2016); *Tierney*, 73 Agric. Dec. 574, 576 (U.S.D.A. 2014) (Order Dismissing Purported Appeal Pet.); *Kasmiersky*, 73 Agric. Dec. 275, 278 (U.S.D.A. 2014) (Order Dismissing Purported Appeal Pet.); *Oasis Corp.*, 72 Agric. Dec. 480, 483 (U.S.D.A. 2013) (Order Dismissing Purported Appeal Pet.).

license. As previously discussed, the Chief Judge addressed the "payment" referred to in the Petition for Review:

> Because Petitioner did not answer Respondent's motion for summary judgment, it is unknown what "payment" referenced in its Petition Petitioner might contend "was made" or how Petitioner might contend the circumstance would allegedly support the Petition. Perhaps Petitioner is simply stating that it has paid the civil penalties previously imposed on Mr. Estes. Payment of those penalties would not entitle it to a license. I am unaware of any payment that would support or otherwise be relevant to the Petition here, and thus find that there is none. Moreover, as set out herein, at issue is not the revocation of a license. The revocation of Mr. Estes['s] previous license became final and unappealable long ago. No payment at any time could alter that revocation. What is at issue here is the denial of a license to Splish Splash II, LLC, on the grounds set out herein, which are essentially the previous revocation of Mr. Estes'[s] license. I find no payment could affect that denial or the grounds therefore.

Chief Judge's Decision and Order at 9-10.

On appeal, Petitioner simply reasserts that payment of a prior civil penalty obviated Mr. Estes's license revocation but provides no support for its position. Petitioner's argument neither describes an error by the Chief Judge nor independently sets forth a question of error.[33] Petitioner's apparent disagreement with the Chief Judge's evaluation of evidence, application of the Regulations, findings, and conclusions, without more, is not a basis for overturning the Decision and Order.[34] In fact, the Chief Judge correctly applied the law to the facts of this case and specifically correctly addressed the regulatory implications of the revocation of Mr. Estes's license.[35] It is indisputable that the Regulations preclude issuance of a license to a person who has had a license revoked, as well as to any legal entity in which a person who has had a license

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[33] *See supra* notes 20-24 and accompanying text.

[34] *See Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 187 (6th Cir. 1983) ("The appellants' arguments, reduced to essentials, are merely disagreement with the evidentiary findings of the ALJ.").

[35] *See* Chief Judge's Decision and Order at 8-10.

revoked has a substantial interest, financial or otherwise.[36] The Chief Judge rendered a thorough, well-reasoned decision that is supported by the record.

Conclusion

Based on careful consideration of the record, I find no change or modification of the Chief Judge's April 12, 2019 Decision and Order is warranted. The Rules of Practice provide that when the Judicial Officer finds no change or modification of the administrative law judge's decision and order is warranted, the Judicial Officer may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
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> . . . .
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> (i) *Decision of the judicial officer on appeal.* . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

Based on the foregoing, the following Order is entered.

ORDER

1. Splish Splash II, LLC's Request for a New Hearing is DENIED.
2. Splish Splash, II LLC's Petition for Appeal is DENIED.
3. The Chief Judge's April 12, 2019 Decision and Order Granting Respondent's Motion for Summary Judgment is ADOPTED as the final decision of the Secretary.

RIGHT TO SEEK JUDICIAL REVIEW

Splish Splash II, LLC has the right to seek judicial review of the Order in this Decision

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[36] 9 C.F.R. §§ 2.9, 2.10(b), 2.11(a). *See Drogosch*, 63 Agric. Dec. 623, 648-49 (U.S.D.A. 2004) (explaining that a cancelled license may be revoked).

and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Splish Splash II, LLC must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[37] The date of entry of the Order in this Decision and Order is June 4th, 2019.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 4th day of June 2019

[redacted]
Judge Bobbie J. McCartney
Judicial Officer

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[37] 7 U.S.C. § 2149(c).