AGRICULTURE DECISIONS

Volume 76

Book Two

Part One (General)

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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

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Errata

The Editor regrets having overlooked the timely inclusion of an Initial Departmental Decision in Volume 73, specifically:

> *Justin Jenne*, HPA Docket No. 13-0308 (U.S.D.A. July 29, 2014).

The Decision follows this page with special pagination for citation guidance.

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ERRATA

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

73 Agric. Dec.
July – Dec. 2014

In re: JUSTIN JENNE.
Docket No. 13-0308.
Decision and Order.
Filed July 29, 2014.

[Cite as: 76 Agric. Dec. WW (U.S.D.A. 2014)].

HPA.

Thomas Bolick, Esq., for APHIS.
Justin Jenne, pro se Respondent.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

I. INTRODUCTION

The above-captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service [APHIS], an agency of the United States Department of Agriculture [USDA; Complainant], against Justin Jenne, doing business as Justin Jenne Stables and Justin Jenne Stables at Frazier and Frazier Farms [Respondent; Jenne]. Complainant alleges that Respondent violated the Horse Protection Act, as amended (15 U.S.C. §§ 1821-1831) [the Act; HPA], and the Regulations and Standards issued under the Act (9 C.F.R. §§ 11.1-11.40 and §§ 12.1-12.10) [Regulations; Standards]. The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

[1] In this Decision and Order, the transcript of the hearing shall be referred to as "Tr. at [page number]." Complainant's evidence shall be denoted as "CX-[exhibit number]," and Respondent's evidence shall be denoted as "RX-[exhibit number]."

II. ISSUE

Did Respondent violate the HPA, and if so, what sanctions, if any, should be imposed because of the violations?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

In a complaint filed on August 2, 2013 [Complaint], Complainant alleged that Respondent willfully violated the Act and the Regulations on or about August 27, 2012, when he entered the horse "Led Zeppelin" at a show while the horse was sore. Respondent timely filed an answer, and the parties exchanged evidence and filed submissions.

A hearing was held on March 11, 2014,[2] by means of an audio-visual connection between Washington, DC and Nashville, Tennessee. Respondent appeared at the Nashville site, and I presided at the Washington site, where Complainant's counsel and witnesses appeared. I admitted to the record the exhibits proffered by both Complainant (CX-1 through CX-8B). Respondent did not proffer any documentary evidence.[3] I heard the testimony of Respondent and witnesses for Complainant. Complainant's counsel timely filed written closing argument, and Respondent did not file closing argument. The record is closed, and this matter is ripe for adjudication.

B. Summary of Factual History

Dr. Bart Sutherland is a veterinarian who is employed by APHIS as a veterinary medical officer [VMO]. Tr. at 113-114. He was hired in the fall of 2010 to attend horse shows and enforce the HPA. Tr. at 114-115. Before

[2] The hearing in this matter was held after a hearing on a complaint also alleging violations of the Act by Mr. Jenne, Docket No. 13-0080. The instant Decision and Order may refer to Mr. Jenne's testimony in that case.

[3] I held the record open for the receipt of a report of examination by Respondent's veterinarian, but that report was not submitted. A report by a different veterinarian pertaining to the examination of the horse involved in Docket No. 13-0080 was received and admitted to the record in that matter.

he came to work for APHIS, Dr. Sutherland operated a general large animal veterinarian practice for approximately sixteen years. Tr. at 116.

Dr. Sutherland attended the 74th Annual Tennessee Walking National Celebration [the Celebration] in Shelbyville, Tennessee in August and September of 2010. Tr. at 117. Dr. Sutherland examined Respondent's horse, Led Zeppelin, who was being led by an individual other than Mr. Jenne. Tr. at 119. Dr. Sutherland viewed a videotaped recording of his examination of the horse and pointed out that the horse "starts pulling his left leg forward right off the bat. . . ." Tr. at 120. The horse reacted consistently to Dr. Sutherland blanching his thumb along the horse's foot. Tr. at 120-121. Dr. Sutherland also described how he believed that the person who was leading the horse was trying to distract it from the palpations and had to be instructed not to pet the horse's head. Tr. at 122; 124-126.

Dr. Sutherland testified that Led Zeppelin was randomly selected for examination at the Celebration, where he examined between 100 and 200 horses. Tr. at 141. He found between ten and twenty horses sore during the seven-day event. Tr. at 142. Dr. Sutherland considered palpation an objective test that is performed uniformly by inspectors. Tr. at 142-143. In Dr. Sutherland's experience, most sore horses are not so sore that their gait would be affected. Tr. at 143-144.

Dr. Sutherland explained that he found soreness where other inspectors did not because the other inspectors had not performed their examinations properly. Tr. at 161. Dr. Sutherland and another APHIS VMO were concerned about the performance of inspectors and had advised their supervisor of those concerns. Tr. at 160. The inspectors, known as Designated Qualified Persons [DQPs], were not employees of USDA but worked for Horse Industry Organizations [HIO] who were certified by USDA. Tr. at 168.

Justin Jenne started riding horses when he was four years old and started competing in shows of Tennessee Walking Horses when he was six. Tr. at 73. Mr. Jenne testified that "horses are [his] life" and that "[he] would never engage in any type of soring or potentially hurt a horse in anyway or allow anyone that works for [him] to do so." *Id.* Mr. Jenne trains horses and specializes in training two- and three-year-old horses, which

are usually brought to his facility. Tr. at 73. Most of the horses he trains have not been ridden before, and Mr. Jenne and his staff teach the horses all that they know. *Id.*

Mr. Jenne brought a two-year-old stallion named Led Zeppelin to the Celebration on August 27, 2012. Tr. at 146-147. Mr. Jenne had shown the horse five times throughout the show season, and he passed USDA inspection each time. Tr. at 147. USDA inspectors complimented Mr. Jenne on the horse's condition at one post-show inspection. *Id.*

Mr. Jenne described the inspection process at the Celebration as a "gauntlet" that involved several stations where the horse was swabbed by individual DQPs and then inspected by USDA at another location. Tr. at 148. After the swabbing, the horse was thermographed and "then he had to lead around the cones for the show DQPs to examine his locomotion." *Id.* Led Zeppelin's feet were palpated by DQPs, and the DQPs passed the horse on both the locomotion and palpation tests. *Id.* USDA required the horse to go around the cones, and he passed that test. *Id.* Mr. Jenne testified that the inspection of the horse at the Celebration took longer than usual and that horses were lined up for a long time waiting for inspection. Tr. at 149; 152.

Mr. Jenne disagreed with Dr. Sutherland's conclusions, noting that he observed very little movement of his horse during the doctor's palpation, considering its age. Tr. at 149. Mr. Jenne compared Led Zeppelin to "a thirteen year old adolescent boy" (Tr. at 146-147), explaining "it's very easy for them to become agitated and bored and ready to move on." Tr. at 153.

Mr. Jenne observed the entire testing of Led Zeppelin, which was lad by his employee, Mr. Ricardo. Tr. at 149. He did not believe that Mr. Ricardo was attempting to distract the horse during the inspection and explained that Mr. Ricardo is "a fellow that spent some time with that horse, loves him and he's just trying to assure him everything's all right." Tr. at 128. Mr. Jenne regretted that the video did not show the horse's locomotion and how well he presented himself. *Id.* Mr. Jenne maintained that USDA always filmed horses walking around the cones, but the video omitted that part of the inspection. Tr. at 128-129.

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Mr. Jenne had no documentation of the passing locomotion and palpation tests performed by the DQPs, who are licensed by USDA. Tr. at 153-154. He conjectured that DQPS document only horses that are found in violation and explained that one needed to pass DQP inspection to get to USDA inspection. Tr. at 154. Many horses were inspected that night, and the percentage of the horses that failed inspection was high. Tr. at 149-150. After the show, Mr. Jenne's veterinarian, Dr. Richard Wilhelm, inspected the horse and found no problems.

Mr. Jenne posited that Horse Industry Organizations who produce horse shows make money by disqualify horses for a show and fining trainers and owners. Tr. at 183. He believed that a lot of revenue was generated by writing citations and disagreed that DQPs have an incentive to pass horses belonging to friends. Tr. at 183-14.

Beverly Hicks has been employed by APHIS as an animal-care inspector since November 2006. Tr. at 104-105. Her primary duties are to inspect facilities where animals are subject to APHIS's jurisdiction are housed, including horses subject to the HPA. Tr. at 105. Ms. Hicks attended the Celebration in August and September 2012 and filmed the inspection of horses, including the horse named Led Zeppelin on August 27, 2012. Tr. at 107-109. Ms. Hicks made copies of her audio-visual film onto CD, which was admitted to the record as CX-4B. Tr. at 109.

C. Prevailing Law and Regulations

In passing the Horse Protection Act, Congress observed that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1823. The Act defines the deliberate injuring of show horses as "soring", and includes the practice of applying an irritating or blistering agent to any limb of a horse; of injecting any tack, nail, screw or chemical agent on any limb of a horse, or using any practice on a horse that reasonably can be expected to cause the animal suffering, pain, distress, inflammation, or lameness when "walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3)(A)(B)(D).

The HPA is administered by USDA through APHIS. A 1976 amendment to the Act led to the establishment of the Designated Qualified Person [DPQ] program by regulations promulgated in 1979. 15 U.S.C. §

1823(c); *see also* 9 C.F.R. § 11.7. A DQP is a person who may be appointed and delegated authority by the management of a horse show to enforce the Act by inspecting horses for soring. DQPs must be licensed by a Horse Industry Organization [HIO] certified by the Department.

The HPA mandates that "[i]n any civil or criminal action to enforce this Act or any regulation under this Act. A horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs and both of its hindlimbs." 15 U.S.C. § 1825(d)(5). In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (U.S.D.A. 1981), the court held that the § 1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that Federal Rules do not directly apply to administrative hearings. Rule 301, *Presumptions in General in Civil Actions and Proceedings*,[*] provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[4]

In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer [VMO] digital palpation test by setting limits on appropriated funds to enforce the HPA. Congress

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[*] *EDITOR'S NOTE*: *See* FED. R. EVID. 301 advisory committee's note (stating that, in 2011, "[t]he language of Rule 301 [was] amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."). Per the 2011 amendments, Rule 301 was retitled "Presumptions in Civil Cases Generally." It now states: "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." FED. R. EVID. 301.

[4] FED. R. EVID. 301 (1974).

directed "that none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. §§ 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act." *See* Pub. L. No. 101-341, 105 Stat. 873, 881-82 (1992).

In applying the statutory presumption, the Department's Judicial Officer [JO] and Administrative Law Judges [ALJs] have consistently observed that "it is the Secretary's belief that the opinions of its veterinarians as to whether a horse is sore is more persuasive than the opinion of DQPs." *Fields*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995); *Oppenheimer*, 54 Agric. Dec. 221, 270 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334, 340 (U.S.D.A. 1992), *aff'd*, 990 F.2d 140 (4th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993); *Sparkman*, 50 Agric. Dec. 602, 613-14 (U.S.D.A. 1991); *Edwards,* 49 Agric. Dec. 188, 205 (U.S.D.A. 1990), *aff'd per curiam*, 943 F. 2d 1318 (11th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992). Although the *Landrum* case held that the presumption may be rebutted by a respondent, the history of Decisions by the JO and ALJs strongly suggests that rebutting the presumption is an all but impossible burden in any case where a VMO employed by the Department opines that the horse is sore after being palpated.[5]

D. Discussion

Precedent dictates that for purposes of the HPA, Led Zeppelin must be presumed to have been sore based upon the findings of a USDA veterinarian. The USDA JO has routinely concluded that the opinions of USDA veterinarians as to whether a horse is sore are more persuasive than the opinions of DQPs. *Oppenheimer*, 54 Agric. Dec. 221, 270 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334, 340 (U.S.D.A. 1992), *aff'd*, 990 F.2d 140 (4th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993); *Sparkman*, 50 Agric. Dec. 602, 613-14 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188,

[5] *See* Beltz, 64 Agric. Dec. 1438, 1445-46 (U.S.D.A. 2005), *rev'd*, 64 Agric. Dec. 1487 (U.S.D.A. 2005), *mot. for recons. denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006); *aff'd sub nom.* Zahnd v. Sec'y of Dep't of Agric., 479 F.3d 767 (11th Cir. 2007).

205 (U.S.D.A. 1990), *aff'd per curiam*, 934 F.2d 1318 (11th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

Once the presumption of soreness is established, the burden of persuasion shifts to Respondent to provide that the horse was sore or that its soreness was due to natural causes. Although I credit the evidence that DQPs passed Led Zeppelin, their test results have little validity where, as here, an APHIS VMO finds soreness through palpation. Further, the case law suggests that the presumption of soreness must be rebutted by more proof than speculation about other natural causes, even where the evidence preferred to rebut the presumption consists of a reasoned medical opinion by a licensed veterinarian with experience in an equine practice. *See Lacy*, 66 Agric. Dec. 488, 499-500 (U.S.D.A. 2007), *aff'd*, *Lacy v. United States*, 278 Fed. App'x 616 (6th Cir. 2008).[6]

I credit Mr. Jenne's testimony that the horse passed inspections at other events before the Celebration. However, it has been held that it is not unusual for a horse to be found sore at one examination and not sore at another. *See Fields*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995).

Accordingly, I find that the evidence is not sufficient to rebut the presumption that Led Zeppelin was sore for purposes of compliance with the HPA. As a matter of law, I must find that Respondent violated the HPA when he entered a sore horse at the Celebration in 2012.

E. Sanctions

The purpose of assessing penalties is not to punish actors but to deter similar behavior in others. *Zimmerman*, 57 Agric. Dec. 1038, 1062-64 (U.S.D.A. 1997). In assessing penalties, the Secretary must give due

[6] In *Lacy,* 65 Agric. Dec. 1157 (U.S.D.A. 2006), the ALJ found that evidence from a veterinarian with equine experience who opined that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the JO reversed the ALJ's findings on the grounds that the statutory presumption was not rebutted. 66 Agric. Dec. 488, 499-500 (U.S.D.A. 2007). On appeal, the Sixth Circuit affirmed the decision of the JO, relying upon *Chevron* doctrine of giving agency determinations deference. *See* 278 Fed. App'x 616, 622 (6th Cir. 2008); Chevron, USA, Inc. v. Nat'l Res. Defense Council, Inc., 467 U.S. 837, 844-45 (1984)).

consideration to the size of the business, the gravity of the violation, the person's good faith, and history of previous violations. *See* 15 U.S.C. § 1825(b); *Hampton*, 53 Agric. Dec. 1357, 1392-93 (U.S.D.A. 1994). Any person who violates the HPA shall be subject to a civil penalty of not more than $2,200.00 for each violation. 15 U.S.C. § 1825(b)(1); 28 U.S.C. § 2461; 7 C.F.R. § 3.91(b)(2)(vii). In addition to any fine or civil penalty assessed under the HPA, any person who violates the Act may be disqualified from showing or exhibiting any horse, judging or managing any horse show, exhibition, or horse sale, or any auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

It has been held that most cases involving violation of the HPA warrant the imposition of the maximum civil penalty per violation. *McConnell*, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 Fed. App'x 417 (6th Cir. 2006). It further has been held that disqualification is appropriate in almost every HPA case, in addition to civil penalties, including cases involving a first-time violator of the Act. *Back*, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010).

Respondent has not presented any argument or evidence to assess when considering the penalty. In the absence of evidence supporting a lesser penalty, I find that Respondent is liable to pay a civil money penalty in the amount of $2,200.00. I also find that the circumstances warrant Respondent Justin Jenne's disqualification from participating in any manner in the exhibition, transportation, or managing of any horse for a period of one year.

Complainant requested that any disqualification of Respondent be imposed consecutive to any sanction imposed in the other case that involved an incident earlier to the instant matter. Because the HPA requires a longer disqualification for subsequent offenses, I find it appropriate that the disqualification of one year in this matter be consecutive to the one-year disqualification imposed in Docket No. 13-0080. *See Bobo*, 53 Agric. Dec. 176, 194 (U.S.D.A. 1994), *pet. for review denied*, 52 F.3d 1406 (6th Cir. 1995).

F. Findings of Fact

1. Justin R. Jenne is an individual whose mailing address is in ***.

2. APHIS VMO dr. Bart Sutherland inspected horses participating in the 74th Annual Tennessee Walking National Celebration in Shelbyville, Tennessee in August and September of 2012 for compliance with the HPA.

3. On August 27, 2012, Justin Jenne entered a horse known as "Led Zeppelin" as Entry No. 542, Class No. 110 A, at the 74th Annual Tennessee Walking Horse Celebration.

4. The horse was led to inspection by Mr. Jenne's employee, Robert Ricardo.

5. Dr. Sutherland examined Led Zeppelin before the show.

6. Dr. Sutherland's examination was videotaped.

7. Dr. Sutherland concluded that the horse was sore within the meaning of the HPA.

G. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On August 27, 2012, Respondent Justin Jenne violated the Act when he entered the horse known as Led Zeppelin into a show while the horse was sore.

3. Because Respondent knowingly entered the horse in an exhibition and the horse was deemed sore, Respondent's actions were willful.

4. Sanctions are warranted in the form of a civil money penalty and disqualification from participating in any manner in exhibitions for a period of time.

ORDER

Respondent Justin Jenne shall pay a civil money penalty of twenty-two hundred dollars ($2,200.00) for the instant violation of the HPA.

ERRATA

Within thirty (30) days form the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

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

Respondent's payment shall include a notation of the docket number of this proceeding.

Respondent Justin Jenne is also disqualified for one (1) uninterrupted year 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. "Participating" means engaging in any activity beyond that of a spectator and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas or in any area where spectators are not allowed, and financing the participation of others in equine events.

The disqualification associated with the instant action shall begin consecutively to, and immediately upon, the completion of the disqualification period imposed in Docket No. 13-0080 and shall continue until the civil penalty assessed is paid in full.

This Decision and Order shall become effective and final thirty-five (35) days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

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

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ANIMAL WELFARE ACT

COURT DECISION

ANIMAL LEGAL DEFENSE FUND, INC. v. PERDUE.
No. 16-5073.
Court Decision.
Decided September 29, 2017.

AWA – Administrative Procedure Act – Animal welfare – *Chevron* deference – Citations – Compliance – "Demonstrate," meaning of – Enforcement – Exhibition – Inspections – "Issue," meaning of – License, issuance of – License, renewal of – Regulations – Renewal scheme – Standards.

[Cite as: 872 F.3d 602 (D.C. Cir. 2017)].

United States Court of Appeals,
District of Columbia Circuit.

The Court affirmed the district court's judgment that the Department's license-renewal scheme is consistent with the Animal Welfare Act [AWA], which requires applicants to demonstrate compliance with certain regulations and standards to be issued a license. The Court found that, by neglecting to address the subject of renewal in the AWA, Congress granted the Secretary the discretion to administer license renewals and the authority to establish procedures for demonstrating compliance. The Court held that the Department's renewal scheme—which demands an initial inspection to obtain the AWA license, self-certification of continued compliance, and availability for inspection at both the time of renewal and after—constitutes a reasonable interpretation of the AWA's demonstration requirement. In addition, the Court concluded the district court erred by rejecting the appellant's contention that the Department arbitrarily and capriciously relied on self-certification in violation of the Administrative Procedure Act. The Court found that, because the Department had reason to know that the licensees in question were not in compliance at the time of renewal, its explanation for renewing the license contradicted the evidence before it. Accordingly, the Court vacated the district court's order dismissing the appellant's arbitrary-and-capricious claim and remanded the case to the district court with instructions to remand the record to USDA.

OPINION

HON. HARRY T. EDWARDS, SENIOR CIRCUIT JUDGE, DELIVERED THE

OPINION OF THE COURT.*

The Animal Welfare Act ("AWA" or "Act") charges the United States Department of Agriculture ("USDA") with administering a licensing scheme for animal exhibitors, including zoos. 7 U.S.C. § 2133 (2012). The Act directs the Secretary of Agriculture ("Secretary") to promulgate regulations governing minimum animal housing and care standards, *id.* § 2143, and also to issue licenses to entities and individuals seeking to engage in exhibition activities, *id.* § 2133. Although the Act leaves many regulatory details to the agency's discretion, it specifies that "no license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary." *Id.*

USDA has bifurcated its approach to licensing: For initial license applications, an applicant must agree to comply with the agency's prescribed standards and regulations, pay an application fee, keep its facilities available for agency inspection, and pass an agency compliance inspection of its facilities before the license may be issued. 9 C.F.R. §§ 2.1-2.12. For license renewals, an applicant must submit an annual report, pay the appropriate application fee, certify compliance and agree to continue to comply with agency standards and regulations, *id.*, and agree to keep its facilities available for inspection by the agency "to ascertain the applicant's compliance with the standards and regulations," *id*. § 2.3(a). The agency treats the renewal procedure as administrative—that is, if the requirements are met, the agency will issue a license renewal. *Id.* § 2.2(b). Separately, USDA conducts random inspections of licensed facilities as part of its enforcement regime. *See id.* § 2.126. Violations discovered during these inspections may lead to license revocation or suspension, following notice and an opportunity for a hearing. *Id.* § 2.12; 7 U.S.C. § 2149.

Tom and Pamela Sellner own and operate the Cricket Hollow Zoo in Manchester, Iowa. USDA granted their initial license application in 1994, and it has renewed their license each year since. Appellants Tracey and Lisa Kuehl, along with the Animal Legal Defense Fund ("ALDF"), a non-profit animal rights organization, brought suit against the agency

* Thomas B. Griffith, United States Circuit Judge, filed a separate concurring opinion.

challenging its most recent renewal of the Sellners' license. Appellants alleged that, at the time of the renewal, the agency was aware that Cricket Hollow was in violation of numerous animal welfare requirements under the Act and its implementing regulations. Accordingly, they argued, the agency's decision to renew the Sellners' license was contrary to AWA's requirement that "no . . . license shall be issued until the . . . exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary." 7 U.S.C. § 2133. They also asserted that the agency's reliance on the Sellners' self-certification of compliance as part of its renewal determination, despite having knowledge that the certification was false, was arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

The District Court dismissed the case, concluding that USDA's license renewal regulations constituted a permissible interpretation of the Act. *ALDF v. Vilsack*, 169 F. Supp. 3d 6 (D.D.C. 2016). Finding that the challenged license renewal was issued in accordance with those regulations, the court held that none of the challenges in the complaint could succeed. *Id.* at 20. The Kuehls and ALDF appealed the District Court's decision to this court. We find that AWA's compliance demonstration requirement does not unambiguously preclude USDA's license renewal scheme and that the scheme is not facially unreasonable. Accordingly, for the reasons set forth below, we affirm the judgment of the District Court on the statutory claim. However, we vacate the District Court's order granting the Government's motion to dismiss Appellants' arbitrary and capricious claim, and remand the case to the District Court with instructions to remand the record to the agency for further proceedings consistent with this opinion.

I. BACKGROUND

A. Statutory and Regulatory Background

Congress enacted the Animal Welfare Act in 1966 to ensure the humane treatment of animals used in medical research. Pub. L. 89-544, 80 Stat. 350 (Aug. 24, 1966); *see also* 7 U.S.C. § 2131. In 1970, Congress amended the Act to cover animal "exhibitors," a category that includes zoos. Pub. L. 91-579, 84 Stat. 1560-61 (Dec. 24, 1970); *see also* 7 U.S.C. § 2132(h). The Act authorizes the Secretary of Agriculture to "promulgate

standards to govern the humane handling, care, treatment, and transportation of animals by . . . exhibitors," including minimum standards addressing the animals' "handling, housing, feeding, watering, sanitation, ventilation, shelter . . ., adequate veterinary care, . . . [and] for a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a).

In order to ensure compliance with those standards, the Act prohibits an individual from exhibiting animals "unless and until" he or she has "obtained a license from the Secretary and such license shall not have been suspended or revoked." *Id.* § 2134. The Act delegates to the Secretary authority to prescribe the "form and manner" by which an exhibitor must apply for a license, "[p]rovided[ ] [t]hat no such license shall be issued until the . . . exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of [the AWA]." *Id.* § 2133 (emphasis omitted).

The Act also grants the agency enforcement authority. "If the Secretary has reason to believe that any person licensed as a[n] . . . exhibitor . . . has violated or is violating any provision of [the Act], or any of the rules or regulations or standards promulgated by the Secretary [t]hereunder, he may suspend such person's license temporarily . . . ." *Id.* § 2149(a). "[A]fter notice and opportunity for hearing," the Secretary "may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred." *Id.* The Secretary may also impose civil and criminal penalties. *Id.* § 2149(b), (d).

Finally, the Secretary may "promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the statute]." *Id.* § 2151.

The Secretary has delegated his responsibilities under the Act to the Administrator of the Animal and Plant Health Inspection Service ("APHIS"). *See* Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42089, 42089 (July 14, 2004) (to be codified at 9 C.F.R. pts. 1, 2). Pursuant to that authority, APHIS has adopted a comprehensive scheme of animal welfare requirements applicable to licensees. *See* 9 C.F.R. §§ 3.1-3.142 (2017). These include general and species-specific requirements, such as providing potable water daily, *id.* §

3.55, keeping enclosures reasonably free of waste and regularly sanitized, *id.* § 3.1, removing feces and food waste daily, *id.* § 3.11, and addressing social needs of primates to "promote [their] psychological well-being," *id.* § 3.81.

The agency has also promulgated a series of regulations governing the granting, renewal, and revocation of animal exhibition licenses. Since 1989, the implementing regulations have distinguished between applications for an initial license and those for annual license renewal. In their present form, the regulations direct that an applicant for an initial license must (1) "acknowledge receipt of the regulations and standards and agree to comply with them by signing the application form," *id.* § 2.2(a); (2) submit the appropriate fee, *id.* § 2.6; and (3) "be inspected by APHIS and demonstrate compliance with the regulations and standards . . . before APHIS will issue a license," *id.* § 2.3(b). By contrast, an applicant for a license renewal must (1) pay the annual fee before expiration of the license, *id.* § 2.1(d)(1); (2) self-certify "by signing the application form that to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with [the same]," *id.* § 2.2(b); and (3) submit an annual report detailing the number of animals owned, held, or exhibited at his or her facility, *id.* § 2.7. Both types of applicants "must make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and APHIS." *Id.* § 2.3(a). "A license will be issued to any applicant" that has met the relevant regulatory requirements and has paid the application and license fees. *Id.* § 2.1(c).

B. Factual and Procedural Background

Tom and Pamela Sellner first applied for an animal exhibition license over twenty years ago. At the time, the couple operated a small "mobile zoo" that included only a few animals. *See Kuehl v. Sellner*, 161 F. Supp. 3d 678, 690 (N.D. Iowa 2016). USDA granted the application and issued a license for Cricket Hollow Zoo on May 27, 1994. Appellees' Br. 16. The Sellners have since complied with the administrative license renewal requirements at every anniversary of the license's issuance. USDA has, in turn, granted their renewal applications each year. *Id.* The Sellners' 2015 license renewal application indicates that the Zoo now houses

approximately 193 animals. 2015 License Renewal Application, *reprinted in* Appendix ("App.") 384.

Sisters Tracey and Lisa Kuehl are Iowa residents. Supplemental Complaint ("Supp. Compl.") ¶¶ 13-14, 24, *reprinted in* App. 46, 50. They allege that they visited Cricket Hollow Zoo on several occasions between 2012 and 2013. *Id.* ¶¶ 13-30, App. 46-51. Both sisters claim that they experienced distress and anguish as a result of witnessing animals in what they felt were inhumane and harmful conditions. *Id.* Tracey Kuehl asserts that she observed animals in enclosures that had "standing water and accumulating excrement," and that "a lion was repeatedly ramming itself against the cage wall," which she interpreted as a sign of obvious psychological distress. *Id.* ¶ 15, App. 47. She later learned that three Meishan piglets had died in their enclosure and that their bodies had not been removed before the facility was opened to the public. *Id.* ¶¶ 18-19, App. 48. Lisa Kuehl similarly alleges that she witnessed animals in isolated confinement and in cages that lacked drinking water. *Id.* ¶¶ 25-28, App. 50-51. She asserts that she observed "lions and wolves covered with flies . . . [which] filled up the interior of the animals' ears," as well as a baby baboon who was "separated from the other animals and being continuously handled by humans." *Id.* ¶¶ 25, 27, App. 50.

The Kuehls met with several state public officials and organizations to share their concerns about the Zoo. *Id.* ¶¶ 19-20, 26, App. 48-50. Tracey Kuehl repeatedly wrote to USDA about the conditions of the animals' enclosures. *Id.* In 2014, she wrote a letter asking that the agency "carefully review the consistent poor record of compliance [with AWA standards] and not renew [the Zoo's] license to exhibit the animals to the public." *Id.* ¶ 20, App. 49.

The Kuehls also assert that USDA officials had knowledge, apart from their letters, of Cricket Hollow's failure to comply with certain AWA regulations and standards. Appellants' Br. 3-5; *see also* Appellees' Br. 16-17. Appellants allege that agency inspectors have repeatedly reported that the animals lacked adequate veterinary care, and that "[t]here are not enough employees to clean [the Zoo] to meet appropriate husbandry standards . . . [or] provide for the health and well-being of the animals." Supp. Compl. ¶¶ 99-129, App. 63-68. They assert that USDA has sent official warnings to the Sellners for these "numerous non-compliances,"

id. ¶ 117, App. 66, and the USDA regional director has concluded that "it is clear that there is a chronic management problem" at the Zoo, *id.* ¶ 108, App. 64. Nonetheless, the agency granted the Sellners' license renewal application in May of 2014. *Id.* ¶ 81, App. 59.

Upon learning of the agency's 2014 renewal decision, the Kuehls and ALDF filed this action against the Secretary in the District Court on August 25, 2014. The original complaint alleged that USDA's decision to renew the Zoo's license in 2014 violated the Act because the Sellners had not "demonstrated that [their] facilities comply" with the requisite animal welfare provisions of the Act or its regulations, which Appellants claim AWA § 2133 requires before a renewal may be issued. Complaint ¶¶ 123-28, *ALDF*, 169 F. Supp. 3d 6 (D.D.C. 2016) (Dkt. No. 1). In the alternative, the complaint asserted that the agency's reliance on the Sellners' self-certification of compliance in connection with the renewal decision was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *Id.*

In 2015, USDA again renewed the Zoo's license, and Appellants filed a supplemental complaint on July 17, 2015, challenging the 2015 renewal and the Zoo's "pattern and practice" of renewing Cricket Hollow Zoo's license despite knowing that the Zoo is not in compliance with AWA regulations and standards. Supp. Compl. ¶¶ 131-36, App. 68-69.

On July 28, 2015, USDA moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Appellants opposed that motion.

When USDA produced its administrative record to the District Court, it included only the Sellners' renewal application, annual report, and evidence of payment of the renewal fee. While the Government's motion to dismiss was pending, Appellants moved for the court to compel inclusion of additional administrative documents related to the Cricket Hollow Zoo which they alleged were in the agency's records, including inspection reports indicating that the Zoo was out of compliance with AWA standards. The agency opposed the motion, claiming that it did not rely on those records in making its renewal decision and that they were properly excluded from the record on review. On June 23, 2015, the District Court denied Appellants' motion. *ALDF v. Vilsack*, 110 F. Supp.

3d 157, 161-62 (D.D.C. 2015).

On March 24, 2016, the District Court granted USDA's motion to dismiss the complaint. *ALDF*, 169 F. Supp. 3d at 20. The court first concluded that the AWA is ambiguous as to whether "issu[ance of] a license" encompassed renewals. *Id.* at 13-15. It then accepted the interpretation put forth by Government counsel that § 2133 applies only to initial license applications. *Id.* at 16-19. Determining that the agency had "exercised its expertise to craft a reasonable license renewal scheme," *id.* at 19 (quoting *ALDF v. USDA*, 789 F.3d 1206, 1225 (11th Cir. 2015)), the court concluded that "under the *Chevron* doctrine, the Court need not say any more in order to conclude that the 2015 renewal of the Cricket Hollow Zoo's license was not unlawful" under the AWA. *Id.*

The District Court also rejected Appellants' arbitrary and capricious claim. It held that there was "no basis . . . to conclude that the licensing decision was arbitrary and capricious or an abuse of discretion" because it was undisputed that the Sellners satisfied the administrative criteria for license renewal, and the regulatory framework afforded no discretion to the agency in implementing the renewal process. *Id.* Finally, the court held that Appellants' "pattern and practice" claim necessarily failed as a result of its determination that the regulatory scheme was consistent with both the AWA and APA. *Id.* This appeal followed.

As of July 30, 2015, USDA had filed an administrative complaint against the Zoo and commenced a formal investigation into its substantive violations of the Act. Appellees' Br. 17. That investigation is pending before the agency. *Id.*

II. ANALYSIS

A. Standard of Review

We review *de novo* the District Court's dismissal for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *See Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001). In doing so, "we must treat the complaint's factual allegations as true, must grant plaintiff the benefit of all reasonable inferences from the facts alleged, and may uphold the dismissal only if it appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks omitted).

The APA requires that we "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We review USDA's interpretation of the AWA under the familiar standard established in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See ALDF v. Glickman*, 204 F.3d 229, 233 (D.C. Cir. 2000). Under the *Chevron* framework,

> an agency's power to regulate "is limited to the scope of the authority Congress has delegated to it." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). Pursuant to *Chevron* Step One, if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent. If Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* Step Two. Under Step Two, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Where a "legislative delegation to an agency on a particular question is implicit rather than explicit," the reviewing court must uphold any "reasonable interpretation made by the administrator of [that] agency." *Id.* at 844. But deference to an agency's interpretation of its enabling statute "is due only when the agency acts pursuant to delegated authority." *Am. Library Ass'n*, 406 F.3d at 699.

EDWARDS, ELLIOT, & LEVY, FEDERAL STANDARDS OF REVIEW 166-67 (2d ed. 2013).

We also review the agency's exercise of its delegated authority under the traditional "arbitrary and capricious" standard. Agency action is

arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court's task in evaluating agency action under this standard is to ensure that "the process by which [the agency] reache[d] [its] result [was] logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). In doing so, however, the court must "not . . . substitute its [own] judgment for that of the agency." *State Farm*, 463 U.S. at 43. The court will ordinarily uphold an agency's decision so long as the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action [,] including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted).

Finally, we review the "[D]istrict [C]ourt's refusal to supplement the administrative record for abuse of discretion." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). "When reviewing agency action under the APA, we review 'the whole record or those parts of it cited by a party.'" *Id.* (quoting 5 U.S.C. § 706). The administrative record typically consists of "the order involved; any findings or reports on which it is based; and the pleadings, evidence, and other parts of the proceedings before the agency." FED. R. APP. P. 16(a). We allow parties to supplement the record only when they are able to "demonstrate unusual circumstances justifying a departure from this general rule." *Am. Wildlands*, 530 F.3d at 1002 (internal quotation marks omitted). "We have recognized such circumstances in at least three instances: (1) '[T]he agency deliberately or negligently excluded documents that may have been adverse to its decision'; (2) 'the [D]istrict [C]ourt needed to supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors'; or (3) 'the agency failed to explain administrative action so as to frustrate judicial review.'" *Id.* (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)).

B. The Statutory Claim

1. USDA's Interpretation of the Statute

The central question presented in this appeal is whether APHIS' renewal of the Sellners' license was contrary to § 2133 of the Act. That provision states, in relevant part, that:

> The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title.

7 U.S.C. § 2133. Appellants argue that, because the renewal of a license involves issuance of a license, an exhibitor must have "demonstrated that his facilities comply" with AWA standards in order to be eligible for a license renewal. Because USDA's regulations do not require an on-site "inspection" (and the agency did not conduct one) to determine that Cricket Hollow Zoo had returned to compliance before renewing its license in 2015, Appellants claim that the renewal violated the statute. The parties consequently spent much time in their briefs and at oral argument debating whether a license is "issued" when it is renewed.

On this point, Appellants argue that "issue" unambiguously encompasses license renewal. Appellants' Br. 32. In their view, a renewal is merely a "form and manner" of application for a license. *Id.* at 33. It thus falls under § 2133 and is subject to the same restrictions that apply to initial license grants under that provision. *Id.* at 32. In particular, Appellants argue that § 2133 mandates that the agency withhold a license's renewal until the applicant affirmatively demonstrates compliance with the regulations and standards. *Id.* at 26-27. The fact that the agency was aware at the time it granted the 2015 renewal that the Sellners were not in compliance, Appellants claim, indicates that the decision to grant the renewal necessarily violated the Act. *Id.* They further contend that the agency's automatic renewal scheme violates both the statutory text and the intent behind the AWA. *Id.* at 27.

In addition, Appellants contend that the agency should not prevail even

if the court considers "issue" to be ambiguous. *Id.* at 39. They note that the Secretary has never issued a regulation through notice-and-comment rulemaking stating that renewal of a license does not involve the issuance of a license and so is not governed by § 2133. *Id.* at 40. Rather, they argue that this position was first articulated in a declaration the Government submitted in the course of unrelated litigation in 2013. *Id.* (citing Dr. Elizabeth Goldentyer Declaration (March 24, 2013), *Ray v. Vilsack*, No. 5:12-CV-212-BO, 2014 WL 3721357 (E.D.N.C. July 24, 2014)), *reprinted in* App. 258. Appellants point to earlier iterations of USDA's regulations that they claim "explicitly disavowed" the position that license renewal applicants need not demonstrate compliance with the regulations and standards. *Id.* at 41-42 (quoting Notice of Proposed Rulemaking, Animal Welfare Regulations, 54 Fed. Reg. 10835, 10840 (March 15, 1989); Animal Welfare; Licensing and Records, 60 Fed. Reg. 13893, 13894 (March 15, 1995)). Therefore, according to Appellants, this interpretation of the statute is merely a "post hoc litigation position" that is not entitled to *Chevron* deference. *Id.* at 39, 44-45 (quoting *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002)).

In response, USDA argues that the statute "is silent as to the need for license renewal and any requirements for renewal." Appellees' Br. 24 (capitalization and emphasis omitted). As a result, the agency asserts, the court should defer to its reasonable interpretation that no "demonstration" requirement is applicable to renewal applications. *Id.* at 22. The Government relies on the Eleventh Circuit's analysis of the definition of "issue" in a similar case, arguing that its plain meaning "does not necessarily include 'renew.'" *Id.* at 26 (quoting *ALDF*, 789 F.3d at 1216). It urges the court to adopt the Eleventh Circuit's position that "[n]o license is given out during the renewal process" and that "Congress has [not] spoken to the precise question" of whether § 2133 governs renewals. *Id.*; *see also People for the Ethical Treatment of Animals v. USDA*, 861 F.3d 502, 509 (4th Cir. 2017).

Yet, neither in its briefs nor at oral argument was agency counsel able to identify anything in the agency's regulations to support this position. Indeed, at oral argument, counsel appeared to concede that the Government developed its interpretation of "issue" in response to Appellants' briefing, rather than through rulemaking or any other agency proceeding. *See* Tr. of Oral Argument at 35-36.

The "issue" debate thus confuses the question before the court. The AWA implementing regulations make it clear that the agency interprets the statute not to require an existing licensee to satisfy the same requirements that an applicant for an initial license must satisfy in order to have its license renewed. *See* 9 C.F.R. §§ 2.1-2.3. Nothing in the agency's regulations suggests that USDA interprets § 2133 as not applying to renewals, or even that it believes renewal applicants need not demonstrate compliance with the regulations and standards in order to qualify for a renewal license. Rather, USDA's position since at least 1989 has been that it has broad authority, conferred under the AWA, to fill any gaps in the statute by implementing an administrative renewal scheme that imposes different requirements on existing licensees than apply to initial license applicants.

In support of this view, the agency's regulations state:

> *Application for license renewal.* APHIS will renew a license after the applicant certifies by signing the application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards. APHIS will supply a copy of the applicable regulations and standards to the applicant upon request.

9 C.F.R. § 2.2(b).

> Each applicant must demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply with the regulations and standards set forth in parts 2 and 3 of this subchapter. Each applicant for an initial license or license renewal must make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and APHIS, to ascertain the applicant's compliance with the standards and regulations.

Id. § 2.3(a).

> Each applicant for an initial license must be inspected by APHIS and demonstrate compliance with the regulations and standards, as required in paragraph (a) of this section, before APHIS will issue a license. . . .

Id. § 2.3(b). *See* Appellees' Br. 11-12, 37-39. It is clear from the foregoing provisions that the agency treats applicants for initial licenses and applicants for license renewals differently. It is also noteworthy that neither these regulatory provisions nor any others to which the parties point purport to define "issue" in § 2133 of the Act.

The Government's attention to the "issue" debate is thus merely a tangent. Rather, the heart of the Government's argument is that "the statute is silent as to whether an existing licensee must satisfy the same requirements, or any requirements at all, to have its license renewed." Appellees' Br. 3. The Government is explicit in contending that "the USDA's administrative regulatory renewal scheme is based upon a permissible construction of the AWA." *Id.* at 31 (capitalization and emphasis omitted). This entire argument rests on the cited agency regulations, which themselves focus on what an applicant must "demonstrate" in order to qualify for either an initial license or a renewal. *Id.* at 31-38. A careful review of the regulatory history of the licensing scheme makes this clear.

In 1987, USDA published in the Federal Register a proposal to amend its licensing regulations. Notice of Proposed Rulemaking, Animal Welfare Regulations, 52 Fed. Reg. 10,298 (Mar. 31, 1987). In 1989, the agency issued a second notice of proposed rulemaking, in which it proposed a revision that would "require that each applicant for a license *or renewal of a license must demonstrate compliance* with the regulations and standards." 54 Fed. Reg. 10,840 (emphasis added). The notice also clarified "that licenses are valid and effective if renewed each year and have not been terminated, suspended, or revoked" in order to "avoid any misconception that every license automatically terminates at the end of its 1-year term and that each year an applicant must follow the procedure applicable to obtaining an initial license." *Id.* at 10,841. Pursuant to this

regulatory initiative, the agency proposed several revisions to clarify that different requirements for demonstrating compliance apply to license renewals and initial license applications. *See, e.g.*, *id.* at 10,838 ("We have made conforming changes throughout Subpart A to differentiate between new license applications and license renewals."); *id.* at 10,842 (revising proposed annual reporting requirement to apply only to license renewal applications).

The Final Rule promulgated in 1989 was consistent with the proposal. *See* Animal Welfare, 54 Fed. Reg. 36,123, 36,149 (Aug. 31, 1989). The subsection of the regulation entitled "Demonstration of compliance with standards and regulations" addressed and distinguished between the requirements for both initial license and renewal applicants. *Id.* Section 2.3 stated that "[e]ach applicant"—whether for an initial license or a license renewal—"must demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply" with the Act and regulations. *Id.* The hurdles each type of applicant was required to overcome in order to make this statutorily required showing were not identical, however. Both types of applicants were required to "make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection," but only applicants for an initial license had to demonstrate compliance *through an actual inspection* before a license could be granted. *Id.*

In 1995, USDA promulgated a Final Rule amending the regulations to impose an additional self-certification requirement on applicants for license renewal. *See* 60 Fed. Reg. 13,893. The stated purpose of this amendment was to "help ensure that applicants for license renewal are in compliance with the regulations . . ., thus promoting compliance with the Animal Welfare Act." *Id.*

Finally, in 2004, the agency expressly rejected commenter suggestions to "add [ ] criteria for renewal of licenses" such that "no license should be renewed unless the facility was inspected and found compliant just prior to the renewal date." 69 Fed. Reg. 42,094. The agency determined that "[i]t is unrealistic and counterproductive to make license renewal contingent on not having any citations." *Id.* The Final Rule also clarified that so long as a license renewal applicant met the requirements set forth

in sections 2.2, 2.3, and 2.7, the agency would reissue the license. *Id.* In other words, if the applicant submitted an annual report, paid the appropriate application fee, certified compliance and agreed to continue to comply with agency standards and regulations, and agreed to keep the facility available for inspection by the agency, the applicant would be deemed to have complied with the requirements for issuing a renewal license—including the compliance demonstration requirement.

There is no language in any proposed or final rule, or in the regulations themselves, to suggest either that license renewal applicants are not required to make *any* demonstration of compliance, or that license renewal applicants must demonstrate compliance above and beyond the stated requirements of self-certification and availability for inspection as a condition precedent to renewing a license.

The regulations say nothing about the meaning of the term "issue" under 7 U.S.C. § 2133 and do not suggest that USDA has ever interpreted that section not to encompass license renewal. We accordingly need not consider that interpretation. Courts do not apply *Chevron* deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *see also City of Kansas City v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 192 (D.C. Cir. 1991) ("That counsel advances a particular statutory interpretation during the course of trial does not confer upon that interpretation any special legitimacy. Deference under *Chevron* . . . can be accorded only to a judgment of the agency itself."); *Church of Scientology of Cal. v. I.R.S.*, 792 F.2d 153, 165 (D.C. Cir. 1986) (en banc) (Silberman, J., concurring) ("Courts have rejected as inadequate agency counsel's articulation of a statutory interpretation when that interpretation has been inconsistent with a prior administrative construction[,] when the record evidence before the court demonstrates no link between counsel's interpretation and administrative practice[,] or when agency counsel's interpretation is revealed as no more than a current litigating position." (internal citations and quotation marks omitted)).

We will instead focus our analysis on the agency's consistent interpretation, clearly evidenced by the regulatory history, that the AWA leaves to the Secretary's discretion how to handle license renewals, and that as part of that discretion, the Secretary may determine the appropriate

means of demonstrating compliance with the regulations and standards applicable to licensed entities. This is consistent with USDA's core contention on appeal that its administrative renewal scheme is a permissible interpretation of the Act, necessary to fill the gaps left open by Congress' decision not to address renewal specifically. *See* Appellees' Br. 31. The Government confirmed at oral argument that its renewal scheme embodies a permissible interpretation of § 2133's "demonstrate" requirement. *See* Tr. of Oral Argument at 36. And the Government has previously defended its renewal scheme on exactly this basis, explicitly arguing that "demonstrate" is ambiguous and that its interpretation survives scrutiny under *Chevron*. *See* USDA Reply Br. at 4, *Ray v. Vilsack*, 5:12-CV-212-BO (E.D.N.C. Jan. 22, 2013) (No. 24) ("[S]tep one of *Chevron* weighs in favor of the agency's authority to construe this statute and determine the means of demonstrating compliance with the AWA. The renewal approval process ... satisfies step two of *Chevron.*"). It is this interpretation—which is consistent with the agency's established regulations and administrative practice—that the court must evaluate to determine whether the renewal scheme is permissible under the statute. After all, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

2. Chevron *Analysis*

Appellants contend that USDA's renewal of Cricket Hollow Zoo's license "even when the agency kn[ew] the facility [was] operating in violation of the AWA and regulatory standards, violates the plain language of" the statutory requirement that no license may be issued until the exhibitor "shall have demonstrated that his facilities comply with the standards promulgated by the Secretary." Appellants' Br. 26-27 (quoting 7 U.S.C. § 2133). Appellants appear to concede that the agency granted the renewal only after the Sellners complied with the renewal requirements set forth in the agency regulations. Because the decision to renew the Cricket Hollow Zoo license was consistent with the regulations, Appellants' challenge to this specific renewal, and to the agency's alleged "pattern and practice of rubber-stamping license renewal applications," is a challenge to the legality of the regulations themselves. We thus must determine whether the agency's administrative renewal scheme is "unambiguously foreclosed" by the statute. *Village of Barrington v.*

Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (quotation mark omitted).

We begin, of course, with the statutory text. *Maslenjak v. United States*, 137 S.Ct. 1918, 1924 (2017). The word "renewal" never appears in the AWA. Instead, the statute provides that "[t]he Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe . . . ." 7 U.S.C. § 2133. The statute limits this explicit grant of discretion: issuance of a license must be conditioned "upon payment of such fee" as the Secretary shall establish, and on the exhibitor's "hav[ing] demonstrated that his facilities comply with the standards promulgated by the Secretary." *Id.* As the Government has emphasized, the statute does not set forth any length of time that a license should remain valid. Its only discussion of a license ending pertains to the possibility of revocation or suspension. *See id.* § 2149. The statute thus neither provides expressly for a renewal process, nor expressly sets forth standards that must govern the renewal process specifically.

Appellants contend, however, that a renewal plainly constitutes "issuance of a license" under § 2133 and that the process for granting renewals therefore must comply with the standards set out above. They assert that USDA's administrative renewal scheme is unlawful because, by permitting renewal even when the agency has reason to know the facility is operating in violation of the AWA and regulatory standards, it flouts the compliance demonstration requirement. The Act does not define "demonstrate," and Appellants have not pointed us to any statutory provision that would appear to give additional content to the term. Appellants nonetheless assert that a demonstration of compliance cannot possibly be accomplished when the entity to whom the demonstration must be made is already aware of non-compliance, whether due to prior inspections or public reports. *See* Appellants' Br. 26-27.

Had Congress required that before issuing a license, the agency must find that the applicant is actually in compliance, Appellants' interpretation would be on strong footing. But Congress required merely a demonstration. And "demonstrate" may mean "to show," not "to be." *See* BLACK'S LAW DICTIONARY 432 (6th ed. 1990) ("[t]o show ... by operation, reasoning, or evidence"). This definition comports with the ordinary usage of the term. It is common for a teacher to say that a student

has demonstrated proficiency on an English exam, regardless of whether the student has actually mastered the rules of grammar. Similarly, one might be designated as having demonstrated compliance with applicable guidelines because he or she has met some minimum standard that an evaluating entity has set.

This latter meaning is consistent with the common legal use of "demonstrate." Statutes and regulations frequently require an entity to demonstrate something by meeting certain criteria or going through a process that either Congress or an agency has deemed indicative. *See*, *e.g.*, Clean Air Act, 42 U.S.C. § 7511d(e) (2012) (exempting from sanctions those ozone nonattainment areas that "can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone . . . transported from other areas"); EPA National Emission Standards for Hazardous Air Pollutant Emissions for Polyvinyl Chloride & Copolymers Production, 40 C.F.R. § 63.11896(c) (2012) (directing that sources wishing to make process changes "must demonstrate continuous compliance" with emissions and work practice standards "according to the procedures and frequency" set out in separate regulations).

So too with § 2133. It is difficult to imagine how the agency could administer the provision's compliance demonstration requirement without establishing some procedure that license applicants must follow to make an appropriate showing. By declining to set forth the requirements of that demonstration procedure, Congress effectively delegated this authority to USDA. This is precisely the type of statutory gap-filling that "involves difficult policy choices that agencies are better equipped to make than courts," and to which federal courts must defer, so long as the agency's construction is reasonable. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66).

Having concluded that Congress has implicitly delegated the authority to establish the procedure for demonstrating compliance to USDA, we must next ask, at *Chevron* Step Two, whether the process the agency developed to fill the statutory gap is consistent with the statute. That is, we may uphold the renewal scheme only if the agency reasonably determined that the renewal procedures fulfill the statutory demonstrati*on*

requirement. See id.

USDA asserts that its renewal scheme balances the AWA's "dual, but sometimes competing, goals of protecting both the animals and the businesses that exhibit them." Appellees' Br. 33. The agency has explained that it would be too burdensome to require more from applicants in the context of license renewals than the regulations currently demand. *See* 69 Fed. Reg. 42,094. Specifically, USDA contends it would be "unrealistic" to make renewal contingent on licensees having no citations whatsoever. *Id.*

In other words, the agency has concluded that self-certification and availability for inspection are sufficient to demonstrate compliance in a license renewal. The agency has never said that self-certification alone is positive proof of compliance. Rather, the agency's regulations and the regulatory history make clear that self-certification and availability for inspection are enough, in the context of renewal, to satisfy the demonstration requirement because a renewal involves an applicant who has already survived a compliance inspection when the agency initially granted its license. To put it simply, the agency has concluded that (1) the initial inspection that was necessary to secure the initial license, plus (2) the self-certification of continued compliance, plus (3) availability for inspection at and beyond the time of renewal are enough to satisfy the statute. Considered in the context of the enforcement authority provided for elsewhere in the statute, and the attendant procedural protections afforded to license-holders in revocation and suspension proceedings under § 2149, we find that the agency's administrative renewal scheme embodies a reasonable interpretation of the statutory demonstration requirement.

In light of our determination that the agency's renewal scheme is consistent with the demonstration requirement in § 2133, we need not reach the "issue" issue. Regardless of whether "issue" encompasses renewal, the agency's scheme complies with the statute. As the Government has argued before us and before the District Court, the Secretary has consistently said that what an applicant must demonstrate when seeking the issuance of an initial license is different from what an applicant must demonstrate in order to qualify for the issuance of a renewal; and for a renewal, all that is required is that the applicant self-

certify and make his or her premises available for inspection. The Government asserts that this scheme is consistent with the Act, and we agree. Because the agency's decision to renew the Cricket Hollow Zoo license was made in compliance with that regulatory scheme, it was not inconsistent with the Act.

C. The Arbitrary and Capricious Claim

Appellants also contend that, even if USDA's regulatory renewal scheme is generally consistent with the statute, the District Court erred in rejecting their claim that the agency's reliance on the Sellners' self-certification of compliance was arbitrary and capricious in violation of the APA. *See* Appellants' Br. 48.

To support this claim, they assert, *inter alia*, that "[f]rom December 16, 2013 to August 15, 2016, APHIS documented 77 violations at [Cricket Hollow Zoo] over the course of 14 inspections." Appellants' Br. 22 (citing APHIS, Inspection Reports, *available at* https://acis.aphis.edc.usda.gov/ords/f?p=116:203:0::NO (search Certificate Number 42-C-0084)). They allege that one such inspection occurred on the same day in 2015 that APHIS renewed Cricket Hollow Zoo's license, and resulted in eleven violations, including one "direct" violation and numerous repeat violations. *Id.* (citing APHIS Inspection Report 147151639230365 (May 27, 2015), *reprinted in* App. 387-92). Appellants also detail their own first-hand accounts in the record in order to highlight the deplorable conditions in which Cricket Hollow Zoo's animals must live and the "chronic noncompliance recognized by APHIS's own officials." *Id.* at 22-23 (citing Compl. ¶ 112, *reprinted in* App. 65).

Appellants also allege that Tracey Kuehl sent a letter to USDA on April 28, 2014, expressing concerns about the Zoo's noncompliance and requesting that the agency not renew the Zoo's license. The Administrator of APHIS, Kevin Shea, responded on May 23, 2014, indicating that the agency would continue to renew the Zoo's license, although APHIS had recently opened an official investigation into the Zoo's mistreatment of animals. *Id.* at 24.

In Appellants view, these allegations demonstrate that the agency had

reason to *know* at the time it renewed the Cricket Hollow Zoo license that the Sellners were out of compliance with the regulations and standards. They argue that the agency's action in renewing the license was therefore arbitrary and capricious because the agency had information showing that the Sellners' practices violated the regulations. In other words, Appellants assert that we are facing a "smoking gun" case in which the agency actually knows with certainty that the exhibitor's self-certification that it is "in compliance with all regulations and standards in 9 CFR, Subpart A, Parts 1, 2, and 3," APHIS Application for License Form 7003, *reprinted in* App. 384, is false. They claim it is arbitrary and capricious to nonetheless rely on the form as a demonstration of compliance in these circumstances.

USDA first responds that Appellants' arbitrary and capricious claim must fail because the reliance on the self-certification was consistent with the regulations, and the regulations are consistent with the statute. *See* Appellees' Br. 42-43. The District Court relied on a similar line of analysis when it dismissed Appellants' claim. *ALDF*, 169 F. Supp. 3d at 19 (concluding that the licensing decision cannot be arbitrary and capricious because the regulatory framework was consistent with the Act and affords the agency no discretion to refuse to rely on a self-certification form). The agency next argues that its reliance on the self-certification process, regardless of whether it knows that the licensee is failing to comply with AWA standards, is reasonable because the agency retains discretionary enforcement authority to suspend or revoke the licensee's license under § 2149. Appellees' Br. at 43.

As an initial matter, both USDA and the District Court are incorrect that the arbitrary and capricious claim must fail solely because the agency prevailed on the AWA claim. Agency action may be consistent with the agency's authorizing statute and yet arbitrary and capricious under the APA. *See, e.g.*, *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 599–601 (D.C. Cir. 2017). The court's inquiry on the latter point depends not solely on the agency's legal authority, but instead on the agency's ability to demonstrate that it engaged in reasoned decisionmaking. *See State Farm*, 463 U.S. at 52. The mere fact that a regulatory scheme is generally consistent with the agency's authorizing statute does not shield each agency action taken under the scheme from arbitrary and capricious review.

The agency's second argument, at least as currently articulated, is insufficient as well. USDA explained its decision to renew the Sellners' license as being based on the Sellners' compliance with the regulatory renewal requirements: filing an annual report, the application fee, availability for inspection, and the self-certification of compliance. But, as explained above, an agency's decision is arbitrary and capricious when its "explanation for its decision ... runs counter to the evidence before the agency." *Id*. at 43. According to Appellants' allegations, USDA knew that the Sellners were grossly and consistently out of compliance with AWA standards. In basing its explanation for the renewal decision in part on the basis of the Sellners' self-certification, the agency's explanation for its decision runs counter to the evidence allegedly before it. "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). The agency has not explained how its retention of authority to enforce the standards through an enforcement proceeding on its own indicates that the agency acted rationally when relying on the self-certification form.

Neither does the agency's assertion that withholding renewals for any citation would be unrealistic provide an adequate justification in the "smoking gun" case. According to Appellants' allegations, Cricket Hollow Zoo did not merely have a few citations. They allege that USDA had a consistent record of the Zoo's chronic noncompliance, and that the agency had no reason to suspect that anything had changed at the time of the renewal. In fact, Appellants claim that an inspection that took place on the same day that the 2015 renewal issued resulted in the agency finding a number of serious violations. *See* Appellants' Br. 22 (citing APHIS Inspection Report 147151639230365 (May 27, 2015), *reprinted in* App. 387-92).

Finally, the fact that the agency has now taken enforcement action against the Sellners does not moot Appellants' arbitrary and capricious claim. The Cricket Hollow Zoo continues to operate as a USDA-licensed animal exhibition. A decision that the agency's renewal scheme or its grant of the Sellners' 2015 license renewal application is invalid under the APA would alter that state of affairs in a manner likely to remedy, at least in part, Appellants' injuries. So long as that is the case, the controversy

before the court remains live. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)).

We hold that, on this record, the District Court erred in granting the Government's motion to dismiss Appellants' arbitrary and capricious claim. We therefore vacate that judgment and remand the case to the District Court with instructions to remand the record to the agency. "Where we 'cannot evaluate the challenged agency action on the basis of the record before [us], the proper course . . . is to remand to the agency for additional investigation or explanation.'" *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 416 (D.C. Cir. 2011) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). On remand, the agency must, at a minimum, explain how its reliance on the self-certification scheme in this allegedly "smoking gun" case did not constitute arbitrary and capricious action. The agency may revisit its decision to renew the disputed license. And, of course, the agency may opt to take appropriate action to amend its regulatory scheme.

Should the agency choose to reissue its license renewal decision or to maintain its position that it may rely on a license renewal applicant's self-certification to demonstrate compliance, even when it has concrete evidence that the applicant is routinely and currently out of compliance with AWA standards, the District Court may not uphold that action unless it finds that USDA acted rationally and engaged in reasoned decisionmaking. As part of this inquiry, the District Court should reconsider its decision denying Appellants' motion to supplement the administrative record. In order to analyze the agency's rationale for relying on the self-certification scheme in an allegedly "smoking gun" case such as this, the court must have access to other records the agency had in its possession at the time of its decision. The court may compel the agency to include such "background information" if it finds it necessary to review those documents "in order to determine whether the agency considered all of the relevant factors" when making its decision. *Am. Wildlands*, 530 F.3d at 1002 (internal quotation marks omitted).

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the District Court on the statutory claim. We vacate the District Court's order granting the Government's motion to dismiss Appellants' arbitrary and capricious claim, and remand the case to the District Court with instructions to remand the record to the agency for further proceedings consistent with this opinion.

So ordered.

HON. THOMAS B. GRIFFITH, CIRCUIT JUDGE, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT:

I concur in the opinion of the majority except as to the reasoning in Section II.B. The analysis of the district court and the arguments of the parties focused almost entirely on whether a license renewal by the agency is "issued" under 7 U.S.C. § 2133. Although I agree with the majority that the agency's scheme for renewing licenses is permissible under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, I am more comfortable resting that determination upon the question that has driven this litigation.

The Act is silent, or at least ambiguous, as to what process (if any) is required for license renewals. As other courts have recognized, the plain meaning of "issue" does not necessarily include renewals. *See People for the Ethical Treatment of Animals v. USDA*, 861 F.3d 502, 509 (4th Cir. 2017); *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1216 (11th Cir. 2015). Nothing in the statute instructs the agency to require a renewal process at all. Even so, USDA has established a regulatory scheme for license renewals, but that scheme requires only the filing of an application, the payment of a fee, and self-certification of compliance with agency standards. *See* 9 C.F.R. §§ 2.1(d), 2.2(b), 2.5-2.7. We typically defer to an agency's interpretation of the statute it administers so long as the statute is "silent or ambiguous with respect to the specific issue" and the interpretation is "reasonable." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

USDA argues that "issue" is ambiguous and the agency has interpreted the term to exclude renewals. As it explains, a license is "issued" only when first granted. After that, the same license is continued through an annual administrative process. The agency actually added language to its

licensing regulations "necessary to avoid any misconception that every license automatically terminates at the end of its 1-year term." Animal Welfare Regulations, 54 Fed. Reg. 10,835, 10,841 (Mar. 15, 1989).

In my view, it is perfectly reasonable for the agency to establish an administrative renewal scheme and allocate its limited resources elsewhere. *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). This allows the agency to focus on initial license applications and unannounced inspections. Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,094 (July 14, 2004); *see also Animal Legal Def. Fund*, 789 F.3d at 1224 (finding that the renewal scheme reasonably balanced Congress's "conflicting policy interests" of licensee due process rights and animal health and welfare). We should defer to the agency's judgment. *See Chevron*, 467 U.S. at 844 ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

The majority sidesteps the meaning of "issue" because, in its view, the explanation the agency has advanced in this case is nothing more than a post-hoc litigation strategy. According to the majority, the agency has never actually interpreted the term and therefore is not entitled to deference. "The regulations say nothing about the meaning of the term 'issue' under 7 U.S.C. § 2133 and do not suggest that USDA has ever interpreted that section not to encompass license renewal." Maj. Op. at 615.

I read the agency regulations differently. When the Act first became law, the renewal process the agency created required only the paying of a fee and the filing of revenue receipts. Laboratory Animal Welfare, 32 Fed. Reg. 3270, 3271 (Feb. 24, 1967). No demonstration of compliance was required. That was called for in an entirely separate section of the regulations related to the "[i]ssuance of licenses." *Id.* The regulation of renewals came four sections later. *See id.*

The majority notes a later revision to the regulations requiring that "each applicant for a license *or renewal of a license must demonstrate*

compliance with the regulations and standards." Maj. Op. at 614(emphasis in majority opinion) (quoting 54 Fed. Reg. at 10,840). But this revision also removed "before a license will be issued" from the same provision on the ground that it was incongruent with renewals. 54 Fed. Reg. at 10,840; *see* Animal Welfare, 54 Fed. Reg. 36,123, 36,149 (Aug. 31, 1989). The clear implication is that the agency never understood "issue" to include renewals.

I would join our sister circuits and defer to USDA's considered judgment that a renewal is not "issued" under § 2133, and that its renewal scheme is therefore a permissible interpretation of the Act. *See People for the Ethical Treatment of Animals*, 861 F.3d at 508-12; *Animal Legal Def. Fund*, 789 F.3d at 1215-25. Because the majority is clear that its analysis does not "reach the 'issue' issue," Maj. Op. at 618, there is nothing in the opinion that prevents the agency from interpreting "issue" as it has in its arguments to us.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

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 CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Decision and Order.
Filed September 1, 2017.

AWA – Animal welfare – Evidence, relevance of – Interest in proceeding – Intervention – Motion to intervene – Sanctions – Third-party participation.

Colleen A. Carroll, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Order Denying Motion to Intervene issued by Janice K. Bullard, Acting Chief Administrative Law Judge.
Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER ON REMAND AS TO ALDF'S MOTION TO INTERVENE

PROCEDURAL HISTORY

On October 28, 2015, the Animal Legal Defense Fund, Inc. [ALDF], filed a motion for leave to intervene in this proceeding.[1] On December 30, 2015, former Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] issued an Order Denying Motion to Intervene, and, on February 4, 2016, ALDF appealed the Chief ALJ's order to the Judicial Officer. On March 14, 2016, I issued an order denying ALDF's appeal, in which I rejected ALDF's contentions that ALDF is either an "interested party," as that term is used in the 5 U.S.C. § 554(c), or an "interested person," as that term is used in 5 U.S.C. § 555(b), and entitled to intervene in this proceeding.[2]

[1] Motion for Leave to Intervene by the Animal Legal Defense Fund [Motion to Intervene].
[2] Cricket Hollow Zoo, Inc., 75 Agric. Dec. 236 (U.S.D.A. 2016) (Order Den. Appeal).

ALDF sought review of *Cricket Hollow Zoo, Inc.*, 75 Agric. Dec. 236 (U.S.D.A. 2016) (Order Denying Appeal), in the United States District Court for the District of Columbia. The Court: (1) found ALDF's demonstrated interest in the welfare of Cricket Hollow Zoo, Inc.'s animals falls within the scope of this proceeding; (2) found ALDF qualifies as an "interested person" under 5 U.S.C. § 555(b); (3) found no basis in the record to uphold my denial of ALDF's Motion to Intervene as an "interested person" under 5 U.S.C. § 555(b); (4) vacated *Cricket Hollow Zoo, Inc.*, 75 Agric. Dec. 236 (U.S.D.A. 2016) (Order Denying Appeal); and (5) remanded the case to the United States Department of Agriculture for a more thorough consideration of ALDF's Motion to Intervene in light of factors relevant to third-party participation in agency proceedings under 5 U.S.C. § 555(b).[3]

On April 24, 2017, I conducted a telephone conference with Christopher Berry, counsel for ALDF, Larry J. Thorson, counsel for Respondents, and Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], to discuss the manner in which to proceed on remand. Mr. Thorson and Ms. Carroll each requested the opportunity to file a brief on remand, and I provided the Respondents, the Administrator, and ALDF an opportunity to brief the issues on remand.[4]

On May 26, 2017, Respondents filed "Brief of Respondents in Resistance to Animal Legal Defense Fund's Motion to Intervene," on June 1, 2017, ALDF filed "Animal Legal Defense Fund's Motion for Leave to Intervene Brief on Remand," and on June 5, 2017, the Administrator filed "Complainant's Brief on Remand." On June 9, 2017, the Administrator filed "Complainant's Reply Brief on Remand," and, on June 12, 2017, ALDF filed "Animal Legal Defense Fund's Motion for Leave to Intervene Reply Brief on Remand." On June 19, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision on remand.

[3] Animal Legal Defense Fund, Inc. v. Vilsack, 237 F. Supp. 3d 15, 18-19 (D.D.C. 2017).
[4] Order Setting Schedule for Filing Briefs on Remand.

DISCUSSION

The Court identified the factors relevant to third-party participation in an agency proceeding under 5 U.S.C. § 555(b), as follows: (1) the nature of the contested issues in the agency proceeding; (2) the prospective intervenor's precise interest in the agency proceeding; (3) the adequacy of representation of the prospective intervenor's interest provided by existing parties to the agency proceeding; (4) the ability of the prospective intervenor to present relevant evidence and argument in the agency proceeding; (5) the extent to which the prospective intervenor would assist in agency decision making; (6) the burden that intervention would place on the agency proceeding; and (7) the effect of intervention on the agency's mandate.[5]

(1) The Nature of the Contested Issues

The Administrator instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice]. The Administrator alleges that the Respondents willfully violated the Animal Welfare Act and the Regulations on multiple occasions during the period June 12, 2013, through May 27, 2015.[6]

This proceeding is an individualized enforcement action against four Respondents. There are only two issues in the proceeding: (1) whether any of the four Respondents committed any of the violations alleged in the Complaint; and (2) the sanctions that should be imposed on any Respondent found to have committed a violation. The proceeding is targeted and has no broad economic or policy implications that affects a wide range of animal rights advocates, competitors, consumers, humane societies, taxpayers, zoos, or other persons. Based on the limited nature of the proceeding and the two contested issues, I do not find that the

[5] *Animal Legal Defense Fund, Inc.*, 237 F. Supp. 3d at 23-24.
[6] Compl. ¶¶ 9-19 at 3-20.

appearance of ALDF in the proceeding would be useful.

(2) ALDF's Precise Interest in the Proceeding

ALDF's asserts that, generally, ALDF has an interest in captive animal mistreatment at roadside zoos, and, specifically, ALDF has an interest in captive animal mistreatment at Cricket Hollow Zoo.[7] ALDF seeks closure of Cricket Hollow Zoo and relocation of the animals currently located at Cricket Hollow Zoo to facilities at which the animals will receive veterinary care, food, water, and psychological enrichment.[8]

(3a) Adequacy of Respondents' Representation of ALDF's Interest

The Respondents oppose intervention by ALDF and state "[t]o allow the ALDF to intervene and take the actions it proposes would deny procedural due process to the Respondents."[9] Based on the position Respondents have taken in this proceeding and ALDF's stated goals of closing Cricket Hollow Zoo and relocating the animals located at Cricket Hollow Zoo to other facilities, I find Respondents do not represent ALDF's interest in this proceeding.

(3b) Adequacy of the Administrator's Representation of ALDF's Interest

The Administrator contends the sanctions sought by ALDF (closure of Cricket Hollow Zoo and the relocation of the animals located at Cricket Hollow Zoo) are not sanctions the Secretary of Agriculture is authorized to impose on the Respondents in this proceeding and ALDF has demonstrated that it does not understand the Animal Welfare Act or the nature of this proceeding.[10] In light of the divergent positions taken by the Administrator and ALDF regarding the nature of this proceeding and the sanctions that the Secretary of Agriculture is authorized to impose on the Respondents in this proceeding, I find the Administrator does not represent ALDF's interest in this proceeding.

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[7] ALDF's Mot. for Leave to Intervene Br. on Remand at 11-12.
[8] *Id.* at 14-15.
[9] Br. of Resp'ts in Resistance to ALDF's Mot. to Intervene at 2.
[10] Complainant's Br. on Remand at 16-18; Complainant's Reply Br. on Remand.

(4a) ALDF's Ability to Present Relevant Evidence

ALDF asserts it has evidence related to Cricket Hollow Zoo's care of its animals which ALDF obtained as part of its Endangered Species Act case involving Cricket Hollow Zoo. This evidence consists of deposition testimony from Cricket Hollow Zoo's owners, which ALDF asserts will shed light on Cricket Hollow Zoo's ability and willingness to abide by the Regulations in the future, and veterinary records and death certificates relating to Cricket Hollow Zoo's animals.[11]

The Administrator asserts the deposition testimony of Cricket Hollow Zoo's owners, Pamela J. Sellner and Thomas J. Sellner, in ALDF's Endangered Species Act case against Cricket Hollow Zoo would not be relevant to the issues in this proceeding and both Mr. Sellner and Mrs. Sellner testified at the hearing in this proceeding with respect to the specific violations alleged in the Complaint. I agree with the Administrator that deposition testimony that sheds light on Cricket Hollow Zoo's ability and willingness to comply with the Regulations in the future is not relevant to whether the Respondents violated the Animal Welfare Act and the Regulations in the past, as alleged in the Complaint.

The Administrator addresses the relevance of Cricket Hollow Zoo's veterinary records and death certificates which ALDF intends to present, as follows:

> [T]he Complaint in the instant case contains nine paragraphs detailing alleged violations of the veterinary care regulations. These allegations are based on noncompliance identified and documented by [Animal and Plant Health Inspection Service] personnel, and supported by evidence in the form of inspection reports, photographs, videotape, veterinary records, affidavits, programs of veterinary care, and feeding and enrichment plans gathered by [the Animal and Plant Health Inspection Service]. Respondents in the instant case introduced also some of their own veterinary records. To

[11] ALDF's Mot. for Leave to Intervene Br. on Remand at 16.

> the extent that ALDF's "veterinary records" are those used as exhibits in ALDF's [Endangered Species Act] case, those that have any relevance to the issues in the administrative complaint appear to be largely duplicative of materials already in the record.
>
> . . . . ALDF appears to believe, erroneously, that an animal death is *per se* a violation. That is simply not the case. The. . . Regulations require exhibitors to handle animals in their custody carefully, and to provide them with adequate veterinary care and husbandry; they do not provide that the death of an animal necessarily constitutes a violation of the Regulations. In the instant case, the complaint alleges that respondents did violate the Regulations by failing to carefully handle and provide adequate veterinary care to pigs, specifically, a Meishan pig housed outdoors who gave birth to four piglets, three of whom died. Complaint at 3-4, 6-7. Respondents did not deny that the three piglets died, and complainant did not need to introduce "death certificates" either to prove the deaths or to prove the alleged violations.

Complainant's Brief on Remand at 15-16. I find the death certificates ALDF intends to present would not be relevant to this proceeding and the veterinary records ALDF intends to present would be irrelevant or merely cumulative.[12]

(4b) ALDF's Ability to Present Relevant Argument

ALDF contends that it can present relevant argument regarding the humane disposition of Cricket Hollow Zoo's animals. Specifically, ALDF asserts it "can assist the parties and the Court in fashioning an appropriate remedy that will take into account the interests of the actual animals at issue in this proceeding."[13]

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[12] The Rules of Practice require that any petition to reopen the hearing to take further evidence must show that the evidence to be adduced is not merely cumulative (7 C.F.R. § 1.146(a)(2)).

[13] ALDF's Mot. for Leave to Intervene Br. on Remand at 16.

This proceeding is conducted pursuant to 7 U.S.C. § 2149. This provision of the Animal Welfare Act authorizes the Secretary of Agriculture to impose certain specified sanctions on those found to have violated the Animal Welfare Act or the Regulations. These sanctions are limited to revocation or suspension of an Animal Welfare Act license, assessment of a civil monetary penalty, and issuance of an order to cease and desist from future violations of the Animal Welfare Act and the Regulations. There is no provision under 7 U.S.C. § 2149 that authorizes the Secretary of Agriculture to seize and relocate animals or to close a facility as a sanction for violations of the Animal Welfare Act and the Regulations. Therefore, arguments by ALDF regarding the humane disposition of Cricket Hollow Zoo's animals and the closure of Cricket Hollow Zoo would not be relevant to this proceeding.

(5) The Extent to which ALDF Would Assist in Agency Decision Making

The decision maker in this proceeding must determine whether any of the Respondents committed any of the violations alleged in the Complaint and the sanctions that should be imposed on any Respondent found to have committed any violation alleged in the Complaint. ALDF intends to present evidence which either is not relevant to the violations alleged in the Complaint or is merely cumulative. Moreover, ALDF seeks sanctions which the Secretary of Agriculture is not authorized to impose.[14] Under these circumstances, I find ALDF would not assist the decision maker either with the determination of whether any of the Respondents committed any of the violations alleged in the Complaint or with the sanctions that should be imposed on any Respondent found to have committed any of the violations alleged in the Complaint.

(6) The Burden that Intervention Would Place on the Agency Proceeding

ALDF asserts, if allowed to intervene, it will not delay this proceeding. Respondents contend that the burden and delay caused by ALDF's intervention would be substantial, as follows:

[14] *See* 7 U.S.C. § 2149 (authorizing the Secretary of Agriculture to suspend or revoke Animal Welfare Act licenses, assess civil monetary penalties, and issue cease and desist orders).

> The language of 5 U.S.C. § 555(b) states "So far as the orderly conduct of business permits, an interested person may appear before an agency . . . ." In this instance this would require a new trial of this matter before an Administrative Law Judge (presumably Judge Channing [Strother]) along with a time and location for said trial convenient to all parties. This is not the orderly conduct of business but instead a strung out affair that would tax the resources of all involved (other than ALDF).
>
> This would not be in keeping with the very next sentence of 5 U.S.C. § 555(b) which states "With due regard for the convenience [and necessity] of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." This matter has or will shortly (with the Reply Brief of the USDA) be presented to the Administrative Law Judge for a determination on the merits after over 100 exhibits and testimony from over 10 witnesses as well as extensive briefing that has been submitted to the Court for its determination. Any attempt by ALDF at this point in time to add to the evidence would violate the mandate contained in 5 U.S.C. § 555(b) by extending this matter out indefinitely when an end is in sight to these allegations at this time.

Brief of Respondents in Resistance to ALDF's Motion to Intervene at 3. While I do not agree with Respondents that a new hearing would be necessary if ALDF were to intervene, the hearing would have to be reopened if ALDF were to be allowed to present the evidence that it seeks to introduce. Reopening the hearing would increase the time necessary for the final disposition of this proceeding and increase the cost of this proceeding.

> *(7) The Effect of Intervention on the Secretary of Agriculture's Mandate*

ALDF contends its intervention in this proceeding would not impair the Secretary of Agriculture's mandate under the Animal Welfare Act.[15] I find nothing in the record that indicates that ALDF's intervention in this proceeding would impair the Secretary of Agriculture's mandate under the Animal Welfare Act.

(8) Summary

ALDF's interest in this proceeding is not represented either by the Respondents or by the Administrator and ALDF's intervention in this proceeding would not impair the Secretary of Agriculture's mandate under the Animal Welfare Act. However, I deny ALDF's October 28, 2015 Motion to Intervene because: (1) due to the limited nature of the proceeding and contested issues, ALDF's appearance would not be useful; (2) ALDF is not able to present relevant evidence and argument; (3) ALDF is not able to assist the decision maker; and (4) ALDF's intervention would delay the final disposition of this proceeding and increase the cost of this proceeding.

For the foregoing reasons, the following Order on Remand is issued.

ORDER ON REMAND

ALDF's October 28, 2015 Motion to Intervene is denied.

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER THOMAS J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154; 15-0155.
Decision and Order.
Filed November 30, 2017.

AWA.

[15] ALDF's Mot. for Leave to Intervene Br. on Remand at 17.

Colleen A. Carroll, Esq., and Matthew Weiner, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.

DECISION AND ORDER

Summary of Decision

This is a disciplinary proceeding under the Animal Welfare Act [AWA].[1] The evidence shows that Respondents are hardworking and do not wish to harm their animals. And at least some of those who come to see it, and even volunteer work at, this private zoo enjoy it. But the Animal and Plant Health Inspection Service [APHIS], although it did not prove every alleged violation, demonstrated in the record the zoo has had numerous violations over time, requiring repeated visits by APHIS inspection personnel. The record shows that there were insufficient zoo employees to meet the AWA Regulations and Standards for the number of animals the zoo has, yet during the period of the violations at issue in this matter, the number of animals significantly increased. It is inconsistent with the AWA to allow a licensee with these chronic violations to continue to operate without sanctions. The violations are in such frequency and numbers that a fine is insufficient. Revocation of the license is necessary.

Jurisdiction and Burden of Proof

The AWA regulates the commercial exhibition, transportation, purchase, sale, housing, care, handling, and treatment of "animals," as that term is defined by the AWA and in the AWA regulations, 9 C.F.R. Part 1. Congress delegated to the Secretary of Agriculture [USDA] authority to enforce the AWA.[2]

The July 30, 2015 APHIS[3] Complaint, which initiated this proceeding under the Rules of Practice Governing Formal Adjudicatory Proceedings

[1] 7 U.S.C. §§ 2131 *et seq.*
[2] 7 U.S.C. § 2146.
[3] Although the July 20, 2015 Complaint states the APHIS Administrator issued the Complaint and is signed by Kevin Shea, then and now the APHIS Administrator, the terms "APHIS" or "Complainant" and the pronoun "it" will be used to refer to the Complainant in this Decision and Order.

Instituted by the Secretary Under Various Statutes [Rules of Practice],[4] alleges Respondents[5] violated the AWA and the regulations and standards issued thereunder[6] [Regulations and Standards]. Respondents' August 20, 2015 timely Answer, among other things, admits the jurisdictional allegations and certain others, and requests a hearing.

The case was reassigned by the Chief Administrative Law Judge to the undersigned on August 23, 2016. It is properly before me for resolution.

The burden of proof is on Complainant, APHIS.[7] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[8] such as this one, is the preponderance of the evidence.[9] A preponderance of the evidence here supports findings that, in most but not all instances, Respondents violated the Regulations and Standards as alleged in the Complaint. At each of the relevant inspections conducted by APHIS, the inspectors documented their observations of Respondents' facilities, animals, and records. The inspectors took photographs during the inspections, conducted post-inspection exit interviews with Respondents to explain their findings, and gave Respondents copies of inspection reports that described the deficiencies.

Procedural Background

The July 30, 2015 APHIS Complaint alleges Respondents violated the AWA and Regulations on multiple occasions between June 2013 and May 2015. Respondents' August 20, 2015 Answer admits certain and denies

[4] 7 C.F.R. §§ 1.130 *et seq*.
[5] Respondents are Cricket Hollow Zoo, Inc. [sometimes referred to herein as "CHZI"] 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 Cricket Hollow Zoo. In this Decision and Order the Respondents will be referred to, collectively, as simply "Respondents." "The Sellners" refers to Pamela J. and Tom J. Sellner.
[6] 9 C.F.R. §§ I.I *et seq.*
[7] 5 U.S.C. § 556(d). *See* JSG Trading Corp., 57 Agric. Dec. 710, 721-22 (U.S.D.A. 1998).
[8] 5 U.S.C. §§ 551 *et seq.*
[9] *See JSG Trading Corp.*, 57 Agric. Dec. at 724 (a non-AWA proceeding discussing application of Administrative Procedure Act, 5 U.S.C. § 556(d), and citing precedent).

other material Complaint allegations, and, as previously noted, requests a hearing.

On October 28, 2015, the Animal Legal Defense Fund [ALDF], which described itself as "a national non-profit organization dedicated to protecting animals, including animals exhibited by zoos and menageries,"[10] moved to intervene as a party to this proceeding. Its intervention was opposed by both APHIS and the Respondents[11] and was denied on December 30, 2015 by then Presiding Administrative Law Judge Bullard. This denial was upheld by the Judicial Officer on March 14, 2016. On February 15, 2017 the United States District Court for the District of Columbia remanded the issue of ADLF's intervention to the Judicial Officer.[12] On September 1, 2017, the Judicial Officer entered a decision and order denying ALDF's Motion to Intervene. The denial of ALDF's Motion to Intervene is not currently within my jurisdiction and will not be addressed in this Decision.

An oral hearing on the record was held before the undersigned January 24 through January 27, 2017 in Davenport, Iowa. The parties entered into written stipulations as to witnesses and exhibits, which were filed on January 31, 2017. APHIS introduced the testimony of six veterinarians: Dr. Robert M. Gibbens, APHIS Director of Animal Welfare Operations for Animal Care; APHIS Veterinary Medical Officers [VMOs] Drs. Margaret Shaver, Heather Cole, and Jeffrey Baker; and former APHIS VMOs Drs. Katheryn Ziegerer and Natalie Cooper. Respondents introduced the testimony of Respondents Pamela Sellner and Thomas Sellner; Dr. John H. Pries, Respondents' former attending veterinarian; and Douglas Anderson, Compliance Investigator, Iowa Department of Agriculture and Land Stewardship [IDALS]. Admitted to the record were APHIS's exhibits, identified as CX 1 through 39, CX 50, CX 52, CX 53, CX 58, CX 59, CX 62, CX 63, CX 65, CX 72, CX 72B, and CX 73 through 77; and Respondents' exhibits, identified as RX 1 through 10, RX 13 through 26, and RX 28.13 The parties were provided the opportunity to submit proposed transcript corrections, but the official files indicate that none were filed.

[10] ALDF Motion for Leave to Intervene at 1.
[11] *See* November 23, 2015 separate filings by APHIS and Respondents in opposition to ADLF intervention.
[12] Animal Legal Defense Fund, Inc. v. Vilsack, 237 F. Supp. 3d 15 (D.D.C. 2017).

APHIS filed its Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order on April 4, 2017 [APHIS Proposed Findings and Conclusions] and its Brief in Support [APHIS Initial Brief or IB] on April 7, 2017. Respondents filed their Answering Brief [Answering Brief or AB], which includes proposed findings, on May 5, 2017. APHIS filed its Reply Brief [sometimes herein referred to herein as "RB"] on May 23, 2017.

Analysis

The APHIS allegations are generally based on twelve APHIS inspections, or attempted inspections, of Respondents' facilities, animals, and records on the following dates:[13]

> June 12, 2013-Inspection conducted by Drs. Margaret Shaver and Natalie Cooper (CX 2-13, 15-18).
>
> July 31, 2013-Inspection conducted by Dr. Jeffrey Baker (CX 26-37).
>
> September 25, 2013-Inspection conducted by Dr. Heather Cole (CX 39-49).
>
> December 16, 2013-Inspection conducted by Dr. Heather Cole (CX 53-57).
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> January 9, 2014-Attempted inspection by Dr. Heather Cole (CX 59).
>
> May 12, 2014-Attempted inspection by Dr. Heather Cole (CX 68).
>
> May 21, 2014-Inspection conducted by Dr. Heather Cole (CX 69-69a).

[13] APHIS exhibits will be referred to as "CX" followed by the number. Notwithstanding that Respondents' exhibits were labelled "RXT" in the record, Respondents' exhibits will be referred to as "RX" followed by the number, except in quoted text where exhibits were originally denoted "RXT."

August 5, 2014-Inspection conducted by Drs. Heather Cole and Margaret Shaver (CX 72-72a).

October 7, 2014-Inspection conducted by Drs. Heather Cole and Margaret Shaver (CX 72-72b).

February 19, 2015-Attempted inspection by Dr. Heather Cole (CX 74).

March 4, 2015-Inspection conducted by Dr. Heather Cole (CX 75-75a).

May 27, 2015-Inspection conducted by Drs. Heather Cole and Amanda Owens (CX 76-77).

The record is clear that APHIS inspectors found numerous AWA violations in many of the instances where they were successful in conducting inspections. *See* Analysis and Findings of Fact, hereinbelow. It is also clear from the record that there were times the APHIS inspectors showed up at the Respondents' facilities but were unable to conduct inspections because no one was able to let them onto the premises.

Respondents defend against APHIS's allegations by contesting individually most of the APHIS allegations[14] and by contending in general terms: Respondents work hard;[15] this case was initiated because of public complaints;[16] Respondents corrected the deficiencies that APHIS inspectors identified;[17] the Regulations and Standards are unconstitutionally vague and therefore unenforceable against Respondents;[18] APHIS unreasonably demanded "perfection" of Respondents but did not provide information as to what such perfection would consist of;[19] and Respondents' veterinarian and a state inspector did

[14] Respondents expressly admit certain APHIS allegations, often with qualifications. *See* AB at 12. These admissions will be noted in the discussion of each particular allegation, *supra*.
[15] AB at 3-4.
[16] *Id.* at 2, 39; Tr. 545:22-546:7, 731:17-21.
[17] AB at 39-40; Tr. 150:5-17.
[18] AB at 7-10.
[19] *Id.* at 5-6.

not believe Respondents; animals suffered.[20] Essentially, in many respects, Respondents blame APHIS for their failure to pass inspections. As discussed hereinbelow, these defensive contentions by Respondents are not supported by the AWA, the Regulations and Standards, or case law.

Being hardworking, having genuine affection for one's animals and otherwise having a sincere subjective intent to take good care of and not to harm them, and correcting violations after they were found in inspections are all admirable things. But a good work ethic and good intentions are not defenses to objective AWA violations found by APHIS inspectors.

APHIS enforces the AWA and the Regulations and Standards through "unannounced" inspections. Licensees are responsible for violations found during such inspections. Violations correct d after they are found by inspectors still "count" as AWA violations.[21] Licensees must have a workforce sufficient to meet the AWA requirements and must be sufficiently knowledgeable as to the pertinent animal husbandry in order to meet the AWA requirements.[22] While APHIS inspections and inspectors may provide some education to licensees as to what the AWA and the Regulations and Standards require, the primary role of such APHIS personnel must be enforcement, and the primary means of such enforcement is through unscheduled "surprise" inspections.[23] APHIS does

[20] *Id.* at 15, 33-34; Tr. 568:1-25, 569:1-6, 577:20-23, 580:23-25, 581:1:-3.

[21] *See* Parr, 59 Agric. Dec. 601, 624 (U.S.D.A. 2000) ("It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.").

[22] It is notable that during 2013 to 2015 period in which Cricket Hollow was being cited for the AWA violations at issue in this proceeding, it was acquiring more animals. In 2013, the Sellner Partnership represented to APHIS that it had custody of 160 animals; in 2014, 170 animals; and in 2015, 193 animals. Answer ¶ 5; CX 1; CX 14.

[23] *See* Hodgins v. U.S. Dep't of Agric., 238 F.3d 421, 2000 WL 1785733, at *7 (6th Cir. 2000) ("The purposes served by the Animal Welfare Act are such as to present a need for surprise inspections. Stolen animals, for example, like stolen cars, can be moved or disposed of quickly. Dirty cages could be cleaned, improperly-treated animals euthanized or hidden, and records falsified in short order should a search be announced ahead of time.") (unpublished opinion; *see* 6 Cir. R. 32.1 (unpublished opinions are citable)); Berosini, 54 Agric. Dec. 886, 908 (U.S.D.A. 1995) ("The success of the Animal Welfare Act regulatory program is

not have the budget, workforce, or authority to educate licensees as to the requirements or to review licensee's compliance, except through inspections that may have consequences for licensees if those inspections reveal AWA violations.[24] Licensees are obligated obtain the skills and knowledge to meet the AWA, Regulations, and Standards through means other than what licensees may be told by the inspectors.[25]

Repeated violations by a particular licensee,[26] even where violations are corrected after the inspection and the violation are not exactly the same violation or violation-type as earlier violations, run afoul of APHIS's enforcement through surprise inspection program and unduly strain APHIS resources, as violations necessarily require follow-up for the particular violations and more frequent APHIS attention to the particular licensee that appears to not be meeting AWA requirements.[27]

There is no pleasure in sanctioning licensees with warm feelings and

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critically dependent upon the ability of APHIS inspectors to conduct thorough inspections to monitor compliance with the applicable regulations and standards.") (citing Serna, Inc., 49 Agric. Dec. 176, 183 (U.S.D.A. 1990)); Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,094 (July 14, 2004) (to be codified at 9 C.F.R. pts. 1, 2) ("Enforcement of the AWA is based on random, unannounced inspections to determine compliance.").

[24] *See* Davenport, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998) ("[I]t is the Respondent's duty to be in compliance with the [Animal Welfare] Act, and the Regulations and Standards at all times. It is not the duty of APHIS inspectors to instruct licensees as to the details of meeting those requirements. Inspectors do not certify or otherwise approve facilities, and conveyances are not required to be inspected or approved before they can be used.").

[25] *See id.*; Volpe Vito, Inc., 56 Agric. Dec. 166, 256 (U.S.D.A. 1997) (finding that respondent was "presumed to know the law" with regard to AWA requirements published in United States Code and was on constructive notice of AWA regulations published in Federal Register).

[26] The Sellners entered into two stipulated settlements with the USDA, one in April of 2007 (CX 64) and one in July of 2013 (CX 66), in which the licensee did not admit alleged violations. *See* Gibbens, Tr. 523. Respondents state that these stipulations are not probative of repeated violations by them or any bad faith. I agree. For purposes of the current case, the stipulations are probative only of Respondent's general knowledge of AWA requirements that must be met.

[27] *See* Gibbens, Tr. 727:15- 728:1.

subjectively good intentions. But in the circumstances here, sanctions must be applied to protect the animals, the public, and, indeed, the licensees themselves.

I. Respondents' Failure to Provide Access[28]

The AWA and the Regulations each require that licensees provide APHIS inspectors access to facilities, animals, and records during "business hours"[29] and that "a responsible adult shall be made available to accompany APHIS officials during the inspection process."[30] The Complaint alleges, Respondents admit, and the documentary and testimonial evidence establish that on the three occasions identified in the Complaint,[31] APHIS VMO Dr. Heather Cole attempted to conduct inspections of Respondents' facilities, animals, and records, and was unable to do so.[32] Dr. Cole described what occurs when inspectors are unable to conduct an inspection and testified that on each occasion she followed her normal procedure.[33]

Dr. Cole documented a January 9, 2014, attempted inspection in an inspection report, CX 59, and discussed this at Tr. 301:21-302:23. Dr. Cole documented a May 12, 2014, attempted inspection in an inspection report, CX 68, and discussed it at Tr. 304:3-13. Dr. Cole documented a February 19, 2015, attempted inspection in an inspection report, CX 74, and discussed it at Tr. 304:21-23.

Respondents, in their Answer and at the hearing, explained that (1) on January 9, 2014, their facility was not open for business; (2) on May 12,

[28] Complaint ¶ 9.
[29] *See* 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).
[30] 9 C.F.R. § 2.126(b).
[31] Respondents, AB at 12, state that ¶ 9 of the Complaint alleges a January 9, *2010* failed inspection, which could not be "complained about now because it would or should have been included in the settlement agreement of April 29, 2013 (CX-66)." But, the Complaint at ¶ 9 refers to a January 9, *2014* failed inspection, and thus could not be covered by a 2013 settlement.
[32] Complaint ¶ 9; Answer ¶ 9. In the latter, Respondents admit that APHIS inspectors were denied access on the three occasions.
[33] 9 C.F.R. § 2.126(b).

2014, there were lightning storms;[34] and (3) on February 19, 2015, they were in Monticello, Iowa, on business. None of these explanations obviates the access violations. It is well settled that the failure of an exhibitor either to be available to provide access for inspection or to designate a responsible person to do so constitutes a willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). *See Perry*:[35]

> It is undisputed that Mr. Perry intentionally left his and PWR's place of business during business hours on December 15, 2009, without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business, and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct the activities listed in 9 C.F.R. § 2.126.

That Respondents' facility was not open to the public is not an excuse. "Business hours," for purposes of AWA inspections, does not mean only those times when a licensee's facility is open to the public; rather:[36]

> *Business hours* means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holiday, each week of the year, during which inspections by APHIS may be made.

In their Answer, Respondents state that on May 12, 2014, there were "lightning storms in both the morning and afternoon and it was not safe to walk through the Zoo."[37] A letter from Mrs. Sellner to APHIS states:[38]

> Our Facebook & website both state that the zoo will not be open when lightning is present. My insurance company and our rules here are that no one is to be outdoors in active thunderstorms. I will not accompany an inspector to the highest point on this farm in an open area,

[34] *See* AB at 12.
[35] 71 Agric. Dec. 876, 880 (U.S.D.A.2012).
[36] 9 C.F.R. § 1.1. *See Perry*, 71 Agric. Dec. at 880.
[37] Answer ¶ 9; Tr. 665:2-666:17. *See* AB at 12.
[38] RX 2 at 4-5.

especially, when there is lightning present.

However, inspections may be conducted when a facility is not open to the public. Further, there is no reliable evidence that there was an "active thunderstorm" or that weather would have impeded an inspection at the time Dr. Cole arrived around noon. Mrs. Sellner wrote that she was not present from "'just before noon" until 2:15 p.m.[39] Respondents did not introduce credible evidence to support their weather explanation or explain why there was no responsible person available. Moreover, Respondents' facility is not located exclusively outdoors, and there is no evidence that an inspection on that day would have necessitated travel to "the highest point on this farm in an open area.'"[40]

That on February 19, 2015, no one was present to accompany Dr. Cole on an inspection because "the Sellners were filing farm taxes in Monticello, Iowa"[41] is not a defense. The Regulation requiring exhibitors to allow APHIS access to conduct inspections during business hours is unqualified.[42] "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."[43] "[A] responsible adult" may act in the licensee's stead.[44]

Respondents, however, do not employ staff, and instead rely exclusively on volunteers.[45] Respondents have elected not to designate a responsible person or persons to conduct inspections when Mr. Sellner or Mrs. Sellner is not available. Therefore, that an inspection cannot be conducted because Mr. or Mrs. Sellner is offsite is, under the circumstances, not an excuse for failing to provide access for inspection.[46]

II. Attending Veterinarian and Veterinary Care

[39] RX 2 at 4.
[40] *See* RX 2 at 5.
[41] Answer ¶ 9 (admitted).
[42] 9 C.F.R. § 2.126(a).
[43] Greenly, 72 Agric. Dec. 603, 617 (U.S.D.A. 2013).
[44] 9 C.F.R. § 2.126(b).
[45] Tr.at 628:9 to 629:3 (Mr. Sellner).
[46] *See* Perry, 72 Agric. Dec. 635,643 (U.S.D.A. 2013).

The Regulations provide: "Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section" and provide requirements as to the retention of such a veterinarian.[47] An exhibitor must employ a veterinarian, full-time or part-time, under formal arrangements that include an accurate, up-to-date, written plan for the care of animals and for regular visits.[48] Exhibitors must ensure their animals receive adequate care and take appropriate steps to prevent and treat diseases and injuries, communicate with the attending veterinarian, and educate their personnel.[49]

APHIS inspectors documented alleged deficiencies in compliance with the Regulations regarding veterinary care on nine inspections:[50]

> June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail, thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2). *See* Complaint ¶ 10(a) and Answer ¶ 10(a); CX 2 and CX 3; Tr. 50:10-52:23; Dr. Cooper, Tr. 397:7-11. *See also* Dr. Shave, Tr. 49:1-10.
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> October 26, 2013. Respondents failed to provide adequate veterinary care to animals, and failed to establish and maintain programs of adequate veterinary care that included the availability of appropriate facilities, equipment, and personnel, and specifically, Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. 9 C.F.R. §§ 2.40(a), 2.40(b)(l).
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> December 16, 2013. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of three goats were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

[47] 9 C.F.R. § 2.40(a).
[48] 9 C.F.R. § 2.40(a)(l),(2).
[49] 9 C.F.R. § 2.40(b)(l)-(5).
[50] Complaint ¶ 10.

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a female coyote had been bitten by another coyote three weeks earlier (on May 1, 2014), and failed to treat or to have the animal seen by a veterinarian, and the female coyote had a swollen digit on her right front foot that had hair loss, and was red, abraded, and moist, and the coyote was non-weight-bearing on that foot. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).[51]

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail a on its backbone, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

May 21, 2014. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of a Barbados sheep were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

August 5, 2014. Respondents failed to provide adequate veterinary medical care to a female Old English Sheepdog (Macey) who had large red sores behind both ears.... Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

August 25, 2014-October 7, 2014. Respondents failed to provide adequate veterinary medical care to a tiger (Casper). On August 25,

[51] Below I find that APHIS did not prove this alleged violation.

> 2014, Casper was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for Casper at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents have not had Casper seen by a veterinarian, and Casper has received no veterinary care, save Respondents' administration of a de-wormer in September 2014. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

Respondents had an attending veterinarian, Dr. Pries, during the period of the violations, but he appears to have been largely "hands-off."52 Mrs. Sellner, not Dr. Pries, filled out the written program of veterinary care for Dr. Pries's signature.[53] It appears from Dr. Pries's testimony that he relied on Mrs. Sellner's representations about the condition of Respondents' animals and the deficiencies cited by the APHIS inspectors; that he relied on Mrs. Sellner to draft the written programs of veterinary care and for environmental enrichment for nonhuman primates; and that he relied on Mrs. Sellner to trim hooves and to perform fecal tests in advance of administering deworming medication.[54]

Respondents supplied few veterinary medical records. Dr. Pries indicated that records for animals he saw at Respondents' facility were maintained by Mrs. Sellner rather than by him.[55] It appears that he relied on visual, rather than physical or clinical, examinations.[56] Dr. Pries did not

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[52] Tr. 486:13-487:2; 487:5-10 ("She had to have somebody listed that would check on things, but they didn't always buy stuff from us. We'd done some surgeries for her and treated some sick cats that she brought up to our clinic."); 505:13-19 ("I would do the inspections required by her licensing and I would, I would wait for her to need some assistance or ask questions.").
[53] Tr. 498:22-500:19; *see* RX 5, RX 13.
[54] Tr. 495:19-497:3; 502:18-503:503:5 ("I don't remember doing a fecal on any of them"). *See* Tr. 503:22-504:9.
[55] CX 21 at 2; Tr. 497:4-22 (Dr. Pries did not examine Ana and had no records about her).
[56] *See, e.g.*, Tr. 501:7-502:9.

appear to have a great deal of experience with exotic species, other than those at Respondents' facility.[57] His practice was "predominately dairy and beef cattle and small animal. . . ."[58] In particular, Dr. Pries had very little experience with nonhuman primates, other than those at Respondents' facility.[59]

As to the testimony offered by state-agency employee Mr. Anderson concerning veterinary care, it was clear that his function is not to determine whether a person is in compliance with the AWA.[60] It does not appear that Mr. Anderson possesses the education, training or expertise to determine (1) whether an animal is in need of veterinary care or (2) what the AWA requirements are with respect to adequate veterinary care.[61] [62]

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[57] Tr. 495:3-19.

[58] Tr. 469:3-15.

[59] Tr. 495:3-12. *See also* Tr. 720:11-19 ("Based on Dr. Pries' response that he hadn't worked on any nonhuman primates before he worked on Cricket Hollow Zoo's, no, he would not meet the definition of an attending veterinarian for the non-human primates.") (testimony of Dr. Robert Gibbens); 9 C.F.R. § 1.1 (definition of attending veterinarian). I do not reach any issue of whether Dr. Pries met the definition of an "attending veterinarian." Among other things, there was no allegation in the Complaint that he did not meet that definition.

60 RX 25; Tr. 568:10-13 ("Well, we have our criteria that we walk around and look at, at the farm and sometimes things could be better or things could be improved and so we will offer suggestions to see if we can improve the situation."); Tr. 571:572:9; Tr. 588:18-590:3 (regarding characterization of Mr. Anderson's statements in report as opinions).

[61] Tr. 588:23-589:22 ("I'm not terribly familiar with the USDA method of recording their US - or on their actual inspections."); 590:1-3 ("I would have to say I'm not, I'm not familiar with the specifics of the USDA, only in a general sense they would be similar."); Tr. 598:7-18 (regarding reliance on Dr. Cole); 601:22-24; 601:25-602 (Mr. Anderson's "practical experience in examining animals" is having been a livestock inspector, and looking at "a lot of kennels and livestock . . . usually accompanied by either a veterinarian or another livestock inspector," and "we would look for obvious signs of animals in distress, you know, from open wounds, sores, labored breathing, discharge from orifices."). *See* Tr. 588:18-22.

[62] Mr. Anderson could not confirm that RX 25 comprised "all of the reports from inspections conducted by IDALS between April 17, 2012, and October 7, 2014," or whether there were other reports missing from RX 25. Tr. 585:3-11. Mr. Anderson acknowledged that RX 25, page 10, was not a complete copy of the

A. June 12, 2013 (Cynthia)

During their inspection on June 12, 2013, Drs. Cooper and Shaver determined that a female capuchin monkey (Cynthia) was in need of veterinary care and had not been evaluated by a veterinarian.[63] They documented their observations in a contemporaneous inspection report, CX 2, and took photographs of Cynthia, all of which they authenticated and explained.[64] Dr. Cooper also prepared a declaration, CX 19, in which she stated:[65]

> [A]s I recall, the licensee was unable to provide myself and Dr. Shaver with a copy of the medical record pertaining to a female capuchin monkey named "Cynthia". I do not recall reviewing medical records of environmental enhancement documentation addressing "Cynthia's" hair loss condition which was observed and documented by myself and Dr. Shaver as a veterinary care non- compliance.

Dr. Shaver described her observations of Cynthia, the Capuchin monkey, at the hearing.[66]

In their Answer to the Complaint, Respondents admit that Cynthia "had hair loss and other behavioral problems," but they also assert that (1) she "came to the Zoo with behavioral problems" and (2) "Dr. Pries saw this monkey both before and after the inspection by USDA referred to."[67] Respondents' Answering Brief, p. 13, contends the same and that the testimony of APHIS witness Dr. Cole, Tr. 243, suggested cures for these behaviors-apparently "[p]roviding a wide variety of enrichment," Dr. Cole spoke only in general terms-which the Sellners were doing, and that Dr. Cole noted this type of behavior cannot always be eliminated. Respondents

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report. *Id.*; Tr. 585:12-586:1; *see also* Tr. 586:2-9 (no photos attached to the record version of Dr. Eibe's report, although it states photographs were attached).
[63] *See* Complaint ¶ 10(a); Answer ¶ 10(a).
[64] CX 3; Tr. 50:10-52:23. *See* CX 2 at 1.
[65] CX 19. *See also* Tr. 397:24-399:9.
[66] Tr. 49:25-50:9.
[67] Answer ¶ 10(a).

note that Dr. Shaver indicated he had looked at a plan the zoo had developed for Cynthia.[68]

That Cynthia arrived at Respondents' facility with a medical or behavioral problem does not mean that Respondents are not responsible for providing adequate veterinary care to her. The documentary evidence of the ways that Respondents addressed Cynthia's problems are inconsistent. Respondents' "Updated Primate Enrichment Program," dated January 3, 2013, specifically states that Cynthia "doesn't usually enjoy toys."[69] Cynthia does not appear on the subsequent enrichment program, dated November 20, 2013.[70] Mrs. Sellner's and Dr. Pries's January 2014 affidavits, however, state that Respondents nevertheless were using toys as environmental enrichment for Cynthia.[71]

Second, although there is evidence that Respondents' then-attending veterinarian, Dr. Pries, saw Cynthia a week after Dr. Cooper's and Dr. Shaver's inspection, APHIS could locate no evidence that supports Respondents' assertion that Dr. Pries saw Cynthia beforehand. Mrs. Sellner's affidavit states:[72]

> This monkey had always had some hair loss since I obtained 4 or 5 years ago. She had plucked hair more recently before the inspection. She was housed outside in an enclosure. We always tried to provide her with different toys. We did have our veterinarian, Dr. Pries come out and examine her and there were no skin problems. Dr. Pries examined her on June 19, 2013. We then provided additional toys to enhance her environment even more.

None of Dr. Pries's documentation in the record reflects a visit pre-June 12, 2013 for examination of Cynthia. Dr. Pries's July 1, 2013,

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[68] *Id.*, citing Tr. 180.
[69] CX 25 at 2.
[70] CX 52.
[71] CX 22 at I ("We always tried to provide her with different toys."); CX 21 at I ("Pam Sellner was using different toys at different times of the day to change things around and enhance the monkey's environment.").
[72] CX 22 at 1.

statement states:[73]

> On June 19th I checked a Capuchin monkey named "Cynthia" for Pam. An inspector was concerned about hair loss on the shoulder and other areas. No infection or infestation was seen. Previous owner had reported the picking and hair pulling also. The monkey seems to do more when nervous, upset or bored. Pam is going to try placing her in a more calming environment to see if she lets the hair grow back. This may be by changing cage mates, moving to other Capuchins, or isolation in a comfortable pen.

In his January 29, 2014, affidavit, Dr. Pries states:[74]

> Concerning a capuchin monkey by the name of "Cynthia" cited for hair loss on the USDA inspection reports of June 12, 2013, and July 31, 2013:
>
> I did examine this monkey and it was plucking its hair due to it being nervous. I did not observe any skin problems. I believe this monkey had some behavior problems when the Sellners obtained it. Pam Sellner was using different toys at different times of the day to change things around and enhance the monkey's environment. I have reviewed the Sellner's environment enhancement plan for their primates and when they make any changes to the plan, they always send me a copy for my review.

In his testimony, Dr. Pries explained that his "examination" of Cynthia was a visual examination only.[75]

Mrs. Sellner's appeal letter states: "My vet came out June 19th to look at her again. On inspection day she probably did more tail biting because

[73] CX 23 at 1.
[74] CX 21 at 1.
[75] Tr. 496:8-15. He did not conduct any other kinds of tests. Tr. 496:16-18. See Dr. Baker, Tr. 231 (He would have done things differently than Dr. Pries as to examining Cynthia, as a veterinary exam would commonly include palpation.).

the inspectors were right in front of her and she acts out more in these circumstances."[76] In his affidavit, Dr. Pries states: "I do not believe that I have any records here at the clinic for the animals listed above. Since I would have examined the animals at the facility, Ms. Sellner would have any medical records or notes that I might have made concerning the animals."[77]APHIS could not locate among the documentary evidence any medical records or notes identifying other examinations of Cynthia by Dr. Pries.

There is also mention in the record by Dr. Shaver of Cynthia being moved to a cage of a vervet, a nonhuman primate of a different species, possibly in an effort to address behavioral problems, but the plan for Cynthia had not been updated since the move.[78]

APHIS has carried its burden to show by a preponderance of record evidence that, as of the June 12, 2013 inspection, Cynthia was in need of veterinary care and had not been evaluated by a veterinarian and that Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for Cynthia, who was self-mutilating. Although there is some evidence of record that Respondents had some environmental enhancement plan for Cynthia, Respondents have not brought forth the documentary evidence they were required to develop and keep or other evidence that would overcome APHIS's proof.

B. October 26, 2013 (Meishan Pigs)[79]

It is undisputed that Respondents housed a pregnant Meishan pig who was due to farrow[80] in an outdoor enclosure, that the pig gave birth to four piglets, that three of the newborn piglets died, and that a zoo visitor notified Mrs. Sellner that the pig had given birth. In APHIS's December 16, 2013, inspection report, Dr. Cole wrote:[81]

> On Sunday October 26th four piglets were born to a

[76] CX 15; *cf.* CX 25 at 2 (stating that Cynthia "interact[s] with zoo visitors").
[77] CX 21 at 2.
[78] Dr. Shaver, Tr. 180-81.
[79] *See* Complaint ¶ 10(b); Answer ¶ 10(b).
[80] Farrowing means "to give birth." Tr. 308:3-6.
[81] CX 53 at 1. *See also* Tr. 305:7-307:20.

> female Meishan pig, three of which died. The licensee stated that a zoo visitor notified her that the piglets were out in the cold. The licensee immediately checked on the piglets. The licensee was unaware that the piglets had been born that day. Three of the piglets were dead and the one surviving piglet was taken into the house and recovered. The licensee stated that she knew the female was due to farrow soon, but she did not get her moved into the warm barn prior to farrowing. The licensee stated that it was a colder and windy day and they did not intend to farrow outside in the cold weather.

In their Answer,[82] Respondents state that "the Meishan pig was due to farrow a week later and would have been in the barn." The high temperature for that date was fifty-four degrees. When it was discovered that the pig had farrowed early, it was too late to save three of the piglets. The fourth was saved. The sow can tolerate cold weather.

In her affidavit, Mrs. Sellner stated:[83]

> I had a pregnant Meishan pig. I had planned to move the pig to a barn before she had the pigs. The pig had the piglets a couple of days early. A zoo visitor saw them and told me about the piglets. I immediately went and moved the pigs and bottle fed and saved the live piglet. I assume that someone complained to the USDA about the pigs.

On brief,[84] Respondents argue APHIS "has not even approached its burden of proof with regard to this allegation"; "[t]he State inspector, Douglas Anderson, found no fault in this incident[] (*See* RX-25 p. 6 of 13)"; there was no contemporaneous inspection by any means by the USDA; "[t]he inspection report that dealt with this cites no evidence that the piglets were born alive and not stillborn (*See* CX-53, p. 1)"; and the sow in question had two later farrows where the majority of the litter was stillborn.

[82] Answer ¶ 10(b).
[83] Ex. 22 at 18-19.
[84] AB at 13-14.

It is uncontroverted that Dr. Pries was not made aware of the pregnant Meishan pig, the conditions in which she was housed, or the subsequent deaths of the three piglets who were born outdoors.[85]

The Respondents were responsible for ensuring that their animals received adequate veterinary care and for having a program of adequate veterinary care that included the availability of appropriate facilities. Respondents housed the pregnant sow outside and unattended, based on an expectation that she would farrow on a date certain.[86] Respondents failed to use an interior enclosure for the pregnant pig or some other means to ensure that the pig and her soon-to-be-born piglets would be protected from the weather and failed to seek veterinary care for the pig in advance of her farrowing.[87]

Respondents' witness, Mr. Anderson, and his written report indicate that the situation had been remedied because "the sow had been moved to a better shelter so she couldn't have pigs out in the cold in the winter again," which indicates that he had concerns about the sow giving birth out of doors in the weather at the time.[88]

By Respondents' own admissions they did not intend this sow to farrow outside in the cold.[89] Regardless of whether or not the piglets would have been born dead or would have died before Mrs. Sellner attended to them even if they had been born inside in protected conditions, the record is clear that Respondents violated the AWA by allowing the sow to farrow, unattended, in the conditions she did.

c. December 26, 2013 (Goats)

On December 16, 2013, Dr. Cole observed that Respondents had failed

[85] CX 21 at 1 ("Concerning the death of 3 Meishan piglets reportedly being born out in the cold and dying on October 26, 2013, and cited on the USDA inspection report of December 16, 2013: I was not aware of this issue of the piglets being born and possibly dying due to cold weather."); Tr. 498:14-21.
[86] CX 22 at 18-19; CX 53 at l; Answer ¶ 10(b); Tr. 578:4-12, 590:4-591:18; 655:13-25, 657:4-14.
[87] CX 22 at 18-19; CX 53 at l; Tr. 578:4-12; 590:4-591:18; 655:13- 25; 657: 14.
[88] Tr. 590:4- 591:18.
[89] CX 22 at 19.

to trim the hooves of three goats.[90] As she wrote in her inspection report:[91]

> Three goats have excessively long hooves. Two older male goats have excessively long back hooves (one black Toggenburg, one black and white Alpine). One white and black pygmy goat has excessively long front hooves.
>
> Excessively long hooves can cause pain and discomfort to the goats. Further, it may cause the goats to alter their stance or their gait and create musculoskeletal related issues.
>
> The goats must have their hooves trimmed to remove the excessive growth and must be maintained routinely.

Dr. Cole testified about the physical problems that can result from permitting these animals' hooves to become too long.[92] Dr. Cole's contemporaneous photographs corroborate her observations, her inspection report, and her testimony.[93]

In their Answer, Respondents assert three defenses: First, that "there was no lameness to any of the animals;" second, that "they had been trimmed in April of 2013," but "the hooves had not worn down as usual" because "the year had been excessively wet;" and third, that they "were given until December 30, 2013 to correct this condition and did so on December 27, 2013."[94] On brief,[95] they argue Dr. Pries testified longer toes on goats are common and that the Sellners would trim them, Tr. 484, and Mr. Anderson, the state investigator, was along for this inspection and testified the goats needed their hooves trimmed but were not suffering because of it, Tr. 577.

That the goats' untrimmed hooves had not yet caused them to suffer lameness does not mean that there was not a violation of the veterinary

[90] *See* Complaint ¶ 10(c); Answer ¶ 10(c).
[91] CX 53 at 1.
[92] Tr. 308:13-23.
[93] CX 54; Tr. 309-311:6.
[94] Answer ¶ 10(c); CX 22 at 18.
[95] AB at 14.

care Regulations.

> While there is no allegation in the Complaint that Respondents' animals actually suffered injury, dehydration, or malnutrition, many of Respondents' violations constitute threats to the health and well-being of the animals in Respondents' facility.[96]

That the goats' hooves did not wear down "as usual" because of the weather does excuse letting their hooves go untrimmed for months, when they were visibly overgrown.

That the inspection report established a "correct by" date (which Respondents assert that they met), does not obviate the violations.

> Tri-State and Mr. Candy's corrections of their violations do not eliminate the fact that the violations occurred, and the Administrator is not barred from instituting a proceeding for violations of the Animal Welfare Act and the Regulations after the violations have been corrected.[97]

Moreover, the evidence contains no indication that Respondents have established a program of veterinary care that provides for trimming the hooves of goats and sheep at regular intervals, that they used a farrier, or that their attending veterinarian at the time, Dr. Pries, was involved to any significant extent.[98]

On cross examination, Mr. Anderson, conceded that he did not have any veterinary medical basis for concluding, in his IDALS report, that the

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[96] Mitchell, 60 Agric. Dec. 91, 128-29 (U.S.D.A. 2001).
[97] Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013) (citing Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *a.ff'd*, 411 F. App'x 866 (6th Cir. 2011)); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *a.ff'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).
[98] *See* Tr. 484:3-19. *See also* CX 21 at l; Tr. 484:483:25-484:19; 498:23-13.

goats' untrimmed hooves were not causing them to suffer.[99]

In sum, the record demonstrates that the goats' hooves were overgrown, and APHIS showed why this condition is a failure to provide adequate veterinary care under the regulations.

d. May 21, 2014 (Coyote, Coatimundi, Capbyara, Barbados Sheep)

On her May 21, 2014, inspection, Dr. Cole documented alleged veterinary care problems with respect to four animals.[100]

1. *Coyote.*[101]

Dr. Cole observed that Respondents had failed to notify Dr. Pries about an injured coyote or to provide care for her.[102] Dr. Cole's contemporaneous photograph of the coyote reveals a visible injury to the animal's paw.[103]

Respondents' Answer, ¶ 10(d), denied the allegation, stating:

> The coyote did not suffer a severe injury when she was bitten on May 1, 2014 by another coyote, and it did not require veterinarian care. The coyote was bitten again on May 21, 2014, the day the inspector arrived to do an inspection. Dr. Pries did put the coyote on an antibiotic as a preventive.

Respondents state that the female coyote was bitten for the second time on the same day that Dr. Cole inspected to show they did not have time to obtain care for the coyote.[104] They also contend, "the coyote bite from May 21, 2014 was healing according to Douglas Anderson, (RXT- 25 p. 8)."

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[99] Tr. 593:22-594:1.
[100] Dr. Cole returned to Respondents' facility on the following week, May 28, 2014, for a focused inspection to determine whether Respondents had obtained veterinary care for these animals. CX 71.
[101] Complaint ¶ 10(d); Answer ¶ 10(d).
[102] CX 69 at 1. *See* Tr. 317:17-318:9.
[103] CX 69a at l; Tr. 320:3-7.
[104] AB at 14 (citing RX 25 at 8, a report by Mr. Anderson of IDALS).

Respondents' witness, Mr. Anderson, did opine that he did not consider the coyote's bitten foot to be a serious situation "anymore" but admitted on cross-examination that he did not "know from a veterinary medical standpoint . . . whether the coyote, whose foot was bitten, was healing or not healing."[105]

The record does not show that the coyote had an injury sufficient to require veterinary care prior to the time of the second bite, which was the day of the relevant inspection. Thus, this alleged violation has not been proven by APHIS.

2. *Coatamundi.*[106]

Dr. Cole noted:[107]

> One of the coati mundi has an approximate 2 inch by 2 inch patch of hair-loss at the base of the tail (left side). The skin does not appear red or swollen. The licensee states no veterinarian has been consulted about this condition....
>
> Failure to seek medical care for the conditions listed above can lead to unnecessary pain and discomfort for the animals.
>
> The animals listed above must be examined by a licensed veterinarian BY 5:00 PM ON MAY 23, 2014 in order to ensure that an accurate diagnosis is obtained and an appropriate treatment plan is developed and followed. This information, including the diagnosis, treatment and resolution of the condition, must be documented and made available to the inspector upon request.

Dr. Cole's contemporaneous photograph of the coatimundi reveals a visible white area, which Dr. Cole explained was the area of hair loss.[108]

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[105] Tr. 596:2-5. *Cf.* Tr. 580:11-22. *See also* Tr. 597:12-598:6.
[106] Complaint ¶ 10(e); Answer ¶ 10(e).
[107] CX 69 at 1. *See* Tr. 318:10-21
[108] Tr. 320:8-17; CX 69a at 2.

Respondents' Answer denied the alleged violation, stating:[109]

[T]here was inconsequential hair loss at the base of the coatimundi' s tail that was lost in a brief scuffle with another male coatimundi. The veterinarian addressed this in his response to the USDA.

On brief, Respondents state:[110]

> Douglas Anderson mentioned the coatimundi in his testimony but stated that the small patch of hair loss was not affecting this animal. In his report from the day of the inspection, he states that the area was not oozing and the animal was not scratching. (RXT- 25, p. 8 of 13).

It does not appear that the Sellners or Dr. Pries testified regarding the coatimundi's hair loss. Mr. Anderson, however, testified on direct that the hair loss "[d]idn't appear to be affecting it at the moment."[111] Whether the hair loss appeared to Mr. Anderson "to be affecting" the coatimundi "at the moment" is itself of not determinative. APHIS is not required to prove that an animal is actively suffering, or visibly injured to establish a violation of the veterinary care Regulations. Mr. Anderson does not possess veterinary medical training, and lacks knowledge of the AWA Regulations.

Based on Dr. Cole's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to meet standards of veterinarian care.

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[109] Answer ¶ 10(e). APHIS stated it could not locate testimony by the Sellners or Dr. Pries regarding the coatimundi's hair loss. APHIS assumes, as do I for purposes of this decision, as Respondents provided no further explanation in their Answering Brief, that Respondents' reference to the coatimundi's hair loss having been "addressed" by the veterinarians (presumably Dr. Pries), in "his response to USDA" was a reference to CX 1, Dr. Pries's affidavit. That affidavit, however, was executed in January 2014, four months before Dr. Cole's May 2014 inspection, and APHIS could find no mention of a coatimundi in his affidavit.
[110] AB at 14-15.
[111] Tr. 581:1-3.

3. *Capybara.*[112]

Dr. Cole noted:[113]

> The capybara appears thin. The hip bones are prominent and the animal has scaly skin on the back half of the body with patches of hair-loss around the base of the tail and the backbone. The licensee states that this animal is old and no veterinarian has been consulted regarding these conditions.
>
> Failure to seek medical care for the conditions listed above can lead to unnecessary pain and discomfort for the animals.
>
> The animals listed above must be examined by a licensed veterinarian BY 5:00 PM ON MAY 23, 2014 in order to ensure that an accurate diagnosis is obtained and an appropriate treatment plan is developed and followed. This information, including the diagnosis, treatment and resolution of the condition, must be documented and made available to the inspector upon request.

Dr. Cole's contemporaneous photographs of the capybara corroborate her testimony.[114]

In their Answer Respondents denied the alleged violation. On brief, they simply referenced that Mrs. Sellners told Dr. Cole the animal is old and that the animal reflected the aging process.[115] Neither the Sellners nor Dr. Pries appear to have testified as to this allegation.

On direct examination, Mr. Anderson testified that the capybara "[d]id not appear to be" demonstrating "suffering or showing ill effects in any way," but on cross-examination Mr. Anderson conceded that he did not know, from a veterinary medical standpoint, that the capybara was not

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[112] Complaint ¶ 10(f); Answer ¶ 10(f).
[113] CX 69 at 1. *See* Tr. 318:22-319:8; 441:10-17.
[114] CX 69a at 3-5; Tr. 320:8-321:4
[115] AB at 15.

"suffering in any way."[116]

Based on Dr. Cole's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to provide adequate veterinary care.

4. Barbados sheep.

Cole noted:[117]

> One Barbados wether has excessively long back hooves. The hooves are splayed and are curled up at the ends. The licensee states all sheep hooves were trimmed on December 27th, 2013.
>
> Excessively long hooves can cause pain and discomfort to the animals. Further, it may cause the animals to alter their stance or their gait and create musculoskeletal related issues. This animal must have its hooves trimmed BY JUNE 4, 2014 to remove the excessive growth. The hooves must be maintained routinely in order to prevent and control diseases and injuries.

Dr. Cole's contemporaneous photographs of the Barbados wether corroborate her testimony.[118]

In their Answer, Respondents denied the allegation stating "[t]he Barbados sheep were in poor condition when they were sent to Respondents' Zoo."[119] On brief Respondents do not make that contention but contend that excessively long hooves on a Barbados sheep is "merely a cosmetic," not a veterinarian, issue, and cite that Dr. Pries stated longer toes on sheep are common, Tr. 484. They also state "[i]n her testimony, Dr. Cole . . . did not state that this was either a health or a veterinarian issue. (Tr. p. 319)."[120]

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[116] Tr. 595:19-596:1.
[117] CX 69 at 1. *See* Tr. 319:9-15.
[118] CX 69a at 6-7; Tr. 321:5-8.
[119] Answer ¶ 10(g).
[120] AB at 15.

Respondents did not offer testimony specifically on this allegation.

Respondents' Answer defense is without merit, as it does not appear that the Barbados wether was a recent arrival to Respondents' facility. According to Dr. Cole's inspection report, Mrs. Sellner stated that "all sheep hooves were trimmed on December 27, 2013," four months earlier. Presumably this included the one sheep whose hooves were the subject of Dr. Cole's concern.

As quoted above, Dr. Cole's inspection report explains: "Excessively long hooves can cause pain and discomfort to the animals [and] may cause the animals to alter their stance or their gait and create musculoskeletal related issues." Those are not merely cosmetic concerns, and Respondents proffered no evidence that they are. APHIS carried its burden on this allegation.

e. August 5, 2014 (Macey)[121]

On August 5, 2014, Drs. Cole and Shaver noted:[122]

> Adult, female Old English Sheepdog named "Macey" has sores behind both ears that are approximately one inch in diameter. The areas are red and moist but there is no discharge. The dog was not seen shaking her head or scratching the area. Skin lesions can be caused by trauma, parasites/pests, and other medical problems and can be painful. The licensee must have this animal examined by a licensed veterinarian in order to ensure that an accurate diagnosis is obtained and that an appropriate treatment plan is developed and followed. The licensee must document the outcome of this consultation and make it available to the inspector upon request.
>
> The licensee stated that she is using "Nolvasan" antiseptic ointment on the sores near the ears of the Old English Sheepdog. The expiration date listed on the container is

[121] Complaint ¶ 10(h); Answer ¶ 10(h).
[122] CX 71 at 1.

> Oct 07. Expired medications can experience spoilage or have reduced efficacy.
>
> This could lead to prolonged illness or suffering for the animals needing the drug. The licensee must ensure that all medications used in the facility are not expired and [are] labeled properly in accordance with standard veterinary practice.

Dr. Shaver testified about their observations about Macey and about Respondents' use of the expired medication.[123] Dr. Cole testified that she concurred with what was written in the report and that she took the photographs that appear at CX 71a.[124]

Respondents' Answer denied the allegations stating: "The dog had scraped its head two days before the inspection. The infection was not fly related and was treated with antiseptic ointment and her condition cleared up in two days."[125] On brief, Respondents simply recite some of what APHIS alleges and the inspectors reported and said.[126] Respondents proffered no evidence supporting that the dog had scraped its head just two days before the inspection or that the condition had cleared up in two days and do not reprise them on brief. Therefore, I am unable to give any credence to those assertions. As quoted above, the report explains why use of-or even simply having on the premises-a medication nearly seven years expired, for an undiagnosed problem, no less, was inappropriate and could cause suffering in an animal.

Based on Drs. Cole and Shaver's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to meet standards of veterinarian care.

f. August 25, 2014 – October 7, 2014 (Casper)[127]

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[123] Tr. 85:13-89:11; 141:21-142:20 (Dr. Shaver).
[124] Tr. 244:6-246:24.
[125] Answer ¶ 10(h). Notably, Respondents did not explain whether the dog's treatment and recovery was after it was examined by a veterinarian as required by the report.
[126] AB at 15.
[127] Complaint ¶ 10(i); Answer ¶ 10(i).

On October 7, 2014, Dr. Cole and Dr. Shaver noted:[128]

> There is [a] male, white tiger named "Casper" (date of birth 6/04) with an open wound on the inside of the left leg that is about two inches by three inches in size. The skin around the wound is red and swollen and the skin is pulled back exposing red tissue in two places. Casper was seen licking this wound. The animal also has a moderately thin body condition with mildly protruding hip bones and vertebrae. This animal was acquired on 10 July 2014. According to the licensee, he was thin and had cuts and sores on his face and hands at that time and she had documented those problems. The attending veterinarian evaluated the tiger on 25 August 2014. No treatment guidelines were given to the licensee at that time. No treatment for the skin or wounds has been given to this animal. The licensee gave deworming medication to the animal on 14 September 2014 because of the thin body condition. The licensee states that the animal has not gained weight as she expected after the deworming medication was given. The attending veterinarian has not evaluated this animal since initial exam in August. Skin wounds can become infected and be painful for the animal. Also, a thin body condition can indicate other medical problems occurring in the animal. The licensee must have this animal examined by a licensed veterinarian by close of business on 9 October 2014 in order to ensure that an accurate diagnosis for the thin body condition and skin wound is obtained and that an appropriate treatment plan is developed and followed. The licensee must document the outcome of this consultation, including the diagnosis, treatment and resolution of the condition, and make it available to the inspector upon request.

The inspectors took a photograph and video of Casper.[129] Dr. Shaver

[128] CX 72 at 1.
[129] CX 72a; CX 72b.

testified at length about her observations about Casper.[130]

Respondents' Answer states "the tiger had issues" and "came into the respondents' facility in questionable condition," and it "den[ies] that the issues were the fault of the Respondents."[131] It states that Dr. Pries "stated that the tiger was going to abscess out and heal."[132] On brief Respondents contend:[133]

> Dr. Pries examined this tiger "Caspar" soon after it arrived at the Zoo. It was injured in transport and Dr. Pries' opinion was that the wound on its inner front leg needed to abscess and heal. (Tr. p. 501, see also the report of Douglas Anderson, IDALS inspector, who stated in his report that "it is old, has vision issues and poor body condition..." RXT-25, p. 10). His medical records reflect his examination of this cat. (RXT-26, p. 1 of 3 "exam of Caspar white tiger.") Mrs. Sellner was following the advice of her veterinarian. None of the veterinarians who testified are big cat specialists and none of them have as much experience as Dr. Pries in dealing with big cats.

Respondents' veterinary medical record for Casper contains only two notations: One noting a vaccination and declawing; and another noting administration of Panacur, which is a dewormer, on August 1, 2014.[134] The veterinary records contain no mention of the cuts, sores, wounds, or thinness observed and documented by Drs. Cole and Shaver. Dr. Priess's testimony about Casper reveals that his examination was visual only, and that he assumed that Mrs. Sellner "must have been gaining with the antibiotics because I didn't hear about it again."[135]

Respondents' contentions concerning Dr. Pries's expertise as to big cats would be more compelling if there was evidence, especially medical records, of Dr. Pries being much involved in the ongoing treatment of an

[130] Tr. 107:19-110:16; 112:21-113:13; 145:2-146:22; 150:8-151:20: 153:156:25.
[131] Answer ¶ 5.
[132] *Id.*
[133] AB at 16.
[134] RX 10 at 15.
[135] Tr. 502:2-9.

animal that clearly had, as Respondents admit, "issues." The evidence shows that the Respondents violated the AWA as to Casper by providing inadequate veterinary care.

III. Handling

Congress intended that animals be handled safely and carefully so as to ensure their health and well-being. The Regulations provide:

> Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. [9 C.F.R. § 2.13l(b)(l).]
>
> 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. § 2.131(c)(l).]
>
> A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact. [9 C.F.R. § 2.13l(d)(2).]
>
> When climatic conditions present a threat to an animal's health or well-being, appropriate measures must be taken to alleviate the impact of those conditions. An animal must never be subjected to any combination of temperature, humidity, and time that is detrimental to the animal's health and well-being, taking into consideration such factors as the animal's age, species, breed, overall health status, and acclimation. [9 C.F.R. § 2.131(e).]

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.]

The Complaint alleges three violations of the handling Regulations:[136]

> July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public, and (3) failed to have any employee or attendant present while the public had public contact with respondents' animals, including, inter alia, a camel, goats, sheep, and other hoofstock. 9 C.F.R. §§ 2.I3l(b)(l), 2.13l(c)(l), 2.13l(d)(2).
>
> October 26, 2013. Respondents failed to handle Meishan pigs as carefully as possible, in a manner that does not cause excessive cooling, physical harm, or unnecessary discomfort, and specifically, respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the respondents. 9 C.F.R. § 2.I31(b)(l).
>
> October 26, 2013. Respondents failed to take appropriate measures to alleviate the impact of climatic conditions that presented a threat to the health and well-being of one adult female Meishan pig, and four Meishan piglets, and, specifically, respondents exposed all five animals to cold temperatures, which exposure was detrimental to the animals' health and well-being. 9 C.F.R. § 2.13l(e).

A. July 31, 2013

[136] Complaint ¶ 11.

On July 31, 2013, VMO Jeffrey Baker documented alleged noncompliance with the handling Regulations, as follows:[137]

> There is not an identifiable attendant present at all times when the public is allowed contact with the animals. The public is allowed access to the area surrounding the enclosure that houses one goat and one sheep. The public is also allowed access to the animals housed on either side of the long narrow corridor that runs from the coyote enclosures out to the llama field. These animals include goats, sheep, a camel, and other hoofstock. The public is allowed to contact the animals through the enclosure fencing. The absence of an attendant in these areas endangers the health of the animals by allowing activity (rough handling, improper feeding, etc.) that is harmful to these animals. The licensee must ensure that when the public is present an easily identifiable attendant is present in these areas.

He took contemporaneous photographs that corroborate his observations and testimony.[138]

Respondents' Answer denied the allegation stating:[139]

> [T]his facility was not required to have a barrier for years prior to this inspection and further state that there was an attendant present and available to handle any concerns and further state that the Zoo never had any problems in all the years that they did this.

On brief Respondents contend:[140]

> [T]he Zoo is laid out with one long main street going between the exhibit areas. There is a clear view from one

[137] CX 27 at 1-2.
[138] Tr. 169:7-170:13.
[139] Answer ¶ 11(a).
[140] AB at 16.

> end of the Zoo to the other. For a good overview of the layout of the Zoo, please see CX-27, p. 1 of2 which shows the long walkway down the center of the Zoo. A person standing at one end of the Zoo can see the distance of the Zoo. There was no proof that Mrs. Sellner or her volunteers could not see the distance of the Zoo and keep a visual eye on what was going on.

In her affidavit, Mrs. Sellner stated that she is "always present in the area."[141]

But it is implausible that Mrs. Sellner has been or is capable of being "always present in the area," given the other activities that she described in her testimony.[142] The above was Respondents' only evidence that "there was an attendant present and available to handle any concerns." The preponderance of the evidence is that Respondents committed this handling violation.

B. October 26, 2013 (Meishan pigs)[143]

The evidence introduced regarding the Meishan pigs supports a finding that Respondents did not handle these animals as carefully as possible, as required by the handling Regulations. As discussed above, even Respondents' witness, Mr. Anderson of IDALS, testified that had Respondents placed the pregnant sow indoors in advance of farrowing, that the three piglets might not have died. Instead, Respondents took the chance that the sow would farrow on a date certain, and left her outside, notwithstanding the potential for adverse weather. This was not careful

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[141] CX 22 at 4. Mrs. Sellner said that she believes she is "being singled out" because she knows "of other public parks that allow public feeding and contact and they do not provide any attendants." *Id.* ("I do not believe I need an additional attendant present as I am always in the area when the public is present."). Respondents did not offer evidence other than their own testimony to support this argument. If there are such other public parks that allow public feeding and contact and do not provide any attendant, they may well be in violation of the AWA. It is not a defense to violations by this zoo that other zoos have, apparently, for one reason or another, escaped sanctions for violations.

[142] Tr. 707:24-709:4 (describing the time she spends at the dairy and at the zoo).

[143] Complaint ¶ 11(b).

handling.

In their Answer, Respondents suggest, with no supporting evidence provided, that the sow gave birth "prematurely," suggesting perhaps placement of blame on the sow herself for not having "farrowed when it was scheduled to."[144] Even so, Respondents' evidence with respect to the expected farrow date in contradictory. While Respondents averred that the sow gave birth a week early, according to their witness, Mr. Anderson, she was expected to farrow as soon as the next day. Regardless of the date that Respondents calculated, the careful thing do with a sow who was that close to giving birth, in late October, in Iowa, was to move her inside, and out of the elements. Respondents' failure to do so was not careful handling, and violated the handling Regulations as alleged in the Complaint.

On brief,[145] with respect to Complaint ¶ 11(b) Respondents simply referenced their brief on Complaint ¶ 10(b) that APHIS failed to carry its burden of proof to show a violation. But it appears that that briefs address of ¶ 11(c), which discusses the Meishan pig, is actually addressing ¶ 11(b). Respondents contend:

> The only evidence as to weather has been presented by the Respondents in the form of a calendar that shows 48° for a high. (RXT-21, p. 3 of 4). There is no indication that that temperature is dangerous to the pigs or had anything to do with the death or stillborn piglets that day.

Whether or not the weather had anything to do with the actual death or stillborn piglets, the point is, as stated above, the most prudent course of action to take as to a sow that close to giving birth, in late October, in Iowa, was to move her inside and out of the elements. The Sellners themselves stated they did not intend to have the sow give birth outdoors because of the potential weather.

IV. Standards

Section 2.100(a) of the Regulations provides:

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[144] Answer ¶ 11(c).
[145] AB at 16.

> 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. . . .[146]

APHIS alleges Respondents failed to meet the minimum standards in multiple respects, based on evidence gathered by APHIS inspectors during inspections on the following nine dates: June 12, 2013 (Drs. Cooper and Shaver); July 31, 2013 (Dr. Baker); September 25, 2013 (Dr. Cole); December 16, 2013 (Dr. Cole); May 21, 2014 (Dr. Cole); August 5, 2014 (Drs. Cole and Shaver); October 7, 2014 (Drs. Cole and Shaver); March 4, 2015 (Dr. Cole); May 27, 2015 (Drs. Cole and Owens).[147]

A. June 12, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[148]

> 12. On or about June 12, 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 provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. 9 C.F.R. § 3.10.
>
> b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).
>
> c. Respondents failed to store supplies of food in a

[146] 9 C.F.R. § 2.100(a). This Regulation applies to each incident of alleged noncompliance with the standards promulgated under the AWA [Standards].
[147] Initial Brief at 33-34.
[148] Complaint ¶ 12.

manner that protects them from spoilage, and specifically, the refrigerator in respondents' primate building was in need of cleaning and contained contaminated, fly-infested fruit. 9 C.F.R. § 3.75(e).

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. 9 C.F.R. § 3.80(a)(2)(iii).

e. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the chain that secured the gate of the enclosure housing two macaques was rusted. 9 C.F.R. § 3 .80(a)(2)(iii).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in disrepair, with bowed wire panels and separated wire. 9 C.F.R. § 3.125(a).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, respondents' enclosures for lions and cougars lacked adequate shade for all of the animals. 9 C.F.R. § 3.127(a).

i. Respondents failed to provide a suitable method of

> drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. 9 C.F.R. § 3.127(c).
>
> j. Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
>
> k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian cavies, as required. 9 C.F.R. § 3.131(a).
>
> 1. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. 9 C.F.R. § 3.131(d).

In their Answer, Respondents admitted ¶ 12(b) and denied the remaining allegations.[149] Dr. Shaver and Dr. Cooper conducted a compliance inspection and submitted their inspection report and photographs.[150] Dr. Shaver testified at hearing.[151] She described her occupation and her background.

Dr. Cooper testified by telephone.[152] She testified about this inspection and specifically testified that she wrote and concurred with the citations in CX 2.[153]

1. Watering for dogs (9 C.F.R. § 3.10).[154]

Dr. Shaver explained the alleged noncompliance with the Standards for dogs cited in the inspection report and described the contemporaneous

[149] Answer ¶ 12.
[150] CX 2; CX 3; CX 13.
[151] *See* Tr. 43:1-45:12; 45:24-48:2; 45:20- 77.
[152] *See* Tr. 395:23- 396:15; 397:4-13. *See also* CX 19; Tr. 397:15-399:9.
[153] Tr. 397:4-13. *See also* CX 19; Tr. 397:15-399:9.
[154] Complaint ¶ 12(a).

photograph.[155]

On brief Respondent contended:[156]

> With regard to paragraph 12(a) and the dogs' water bowl having a buildup of algae this water was never tested by the USDA inspectors to see if this was true. The Sellners testified that the water in the bowl was potable and fresh. See Affidavit of Pam Sellner, CX-22, p. 1 of21 under Section 3.10. She stated in that Affidavit that the bowl had been brushed that morning. The galvanization did have some dark green spots on it. Tom Sellner testified that he cleans the water bowls out all the time. (Tr. p. 620). Some of the bowls were stained with a greenish tint but they were not dirty. (Tr. p. 619). The photograph which the USDA has provided does not show greenish material. Instead it shows a slight green tint to the interior of the bowl and also shows the automatic waterer and hose attached to the bowl supplying fresh water. (See CX-4, p. 1 of 1). The USDA did not carry its burden with regard to this matter.

Admittedly there is somewhat conflicting evidence on whether the dog's water bowl had a build-up of algae. But Dr. Shaver's testimony and report[157] are clear that she found a build-up of green material. The CX 4 at 1 photograph is unclear. Mr. Anderson's, of IDALS, report[158] discusses algae build-up problems at the zoo and how difficult it is to keep algae from developing.

In this instance, I give substantial credibility to the APHIS inspectors and find that by a preponderance of evidence that there was a violation by Respondents due to a build-up of algae in the dogs' water bowl, and, thus, the violation of Complaint ¶ 12(a) was proved.

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[155] Tr. 52:24-54:13.
[156] AB at 17.
[157] CX 2 at 1.
[158] RX 25 at 8.

2. *Cleaning for non-human primates (9 C.F.R. § 3.75(c)(3)).*[159]

As noted, Respondents admitted this violation.[160]

3. Food storage for non-human primates (9 C.F.R. § 3.75(e)).[161]

Dr. Shaver explained the alleged noncompliance with the Standards for food storage cited in the inspection report and described the contemporaneous photographs she took.[162]

On brief,[163] Respondents contend:

> Paragraph 12(c) is denied and it is further stated that this is one of the allegations where the USDA inspectors use the term fly to refer to all flies without distinction between those that can actually be a vector for disease as opposed to fruit flies which two veterinarians testified were not vectors for disease because they did not land on feces but instead on fruit. See testimony of Dr. Pries, Tr. p. 504 (he was not concerned about fruit flies) and Dr. Shaver, Tr. p. 144 (admits that fruit flies are not the vector for disease that other flies are). Mrs. Sellner stated in her Affidavit that the leaves on the lettuce was turning brown so she disposed of the outer leaves. The lettuce itself was to be feed to the reptiles which are not Zoo animals. She also had done what a previous inspector told her and put up a sign that the food needed to be washed before feeding and she was still written up. (Sellner Affidavit CX-22, p. 2 of 21). The USDA had not carried its burden of proof.

This alleged violation largely goes to cleanliness, which a licensee is obligated to maintain. The allegation was not that only the lettuce was fly infested, but apples as well.[164] The refrigerator itself was in need of

[159] Complaint ¶ 12(b).
[160] Answer ¶12(c). *See* AB at 17.
[161] Complaint ¶ 12(c).
[162] CX 2 at 2-3; CX 6; Tr. 55:2- 57:18.
[163] AB at 17-18.
[164] CX 2 at 2.

cleaning.[165]

The preponderance of the evidence supports the alleged violation.

4. Enclosures for non-human primates (9 C.F.R. § 3.80(a)(2)(iii)).[166]

Dr. Shaver explained the instances of alleged noncompliance with the Standards for primary enclosures cited in the inspection report, and described the contemporaneous photographs she took of the baboon (bowed enclosure wall) and macaque (rusted chain) enclosures.[167] On brief,[168] Respondents contend:

> Paragraph 12(d) again is an instance of an alleged violation that is unproven and speculative. The slight bulge in the fence was never shown to be a structural issue. (See CX-7, p. 1 and 2 of 3, see Affidavit of Mrs. Sellner CX-22, p. 2 of 21).

Dr. Shaver testified as to the bowing of the chain link fence,[169] which appears to be more than a "slight bulge" as shown in the photograph that is CX 7 at 2.[170] Among other things, she testified that the fence was bowing out, away from an anchor or support pole. Dr. Shaver testified that a baboon was pushing against the enclosure walls hard enough to make them move. Contrary to Respondents contention, that the bowed fencing was structurally compromised and the concern that the baboon's activities made this a safety hazard as far as ensuring he was secured by the enclosure are well supported in the record.[171]

On brief,[172] Respondents also contend:

> Paragraph 12(e) is denied because there was no evidence

165 *See* Tr. 57 (Dr. Shaver).
166 Complaint ¶¶ 12(d) and (e).
167 CX 2 at 3; CX 7; Tr. 57:19-60:20.
168 AB at 18.
169 Tr. 57-60.
170 Mrs. Sellner herself referred to it as "bowed out" in CX 22 at 2.
171 *See* CX at 2.
172 AB at 18.

> that the rust on the chain affected its structure at all. There is no evidence as to the amount of the rust. A bit of rust in and of itself does not mean there is a structural defect. Testimony of Mrs. Sellner, (Tr. p. 680). (See also CX-7, p. 3) which clearly shows many of the links on the chain have no rust whatsoever.

The cited testimony by Mrs. Sellner supports that while the rather substantial chain may have been aesthetically compromised by superficial rust, it was not structurally compromised, and thus effectively rebuts APHIS's contentions. APHIS did not carry its burden of proof as to Complaint ¶ 12(e).

5. Structural strength (9 C.F.R. § 3.125(a)).[173]

Dr. Shaver explained the noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report and described the contemporaneous photographs she took of the fence separating the fallow deer and Jacob's sheep enclosures, and the fence for the Santa Cruz sheep.[174]

On brief,[175] Respondents contend:

> Paragraph 12(f) is contested to the extent that the defect mentioned was not dangerous to the animals (bowed and separated wires) and this was repaired immediately.

As discussed elsewhere herein subsequent repairs do not obviate violations. As to both Complaint 112(f) and (g), the cited APHIS testimony and evidence well support that a fence bowed and separated from support posts, concentrated toward the bottom of the fence, and chain-link fence bent inwards into the enclosure is structurally unsound and a danger.[176]

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[173] Complaint ¶¶ 12(f),(g).
[174] CX 2 at 3; CX 8; Tr. 60:21-63:11.
[175] AB at 18.
[176] *See* CX 2 at 3; Tr. 62-63.

6. Shelter (9 C.F.R. § 3.127(a)).[177]

Dr. Shaver explained the alleged noncompliance with the Standards for shelter from sunlight cited in the inspection.report, and described the contemporaneous photographs she took of the lion and cougar enclosures.[178]

On brief, Respondents state: "The lions and cougars had sufficient shade because of the surrounding trees, their dens, and the large hollow logs shown in (CX-9, p. 1-4). Testimony of Pamela Sellner, (Tr. pp. 681-683)."[179]

APHIS's testimony and evidence, including photos, paint a credible and convincing picture of insufficient shade. In particular, the "large" hollow logs, as Respondents refer to them, do not seem large enough to provide sufficient shade for large felines. Mrs. Sellner's testimony appears to rather overstate the shade available at the time of inspection. I give greater weight to APHIS's witness and evidence and find that it has proven Complaint ¶ 112(h).

7. Drainage (9 C.F.R. § 3.127(c)).[180]

Dr. Shaver explained the noncompliance with the Standards for drainage cited in the inspection report, and described the photographs she took of the Scottish Highland cattle enclosure.[181]This evidence demonstrates that the Scottish Highland cattle legs sank a substantial amount into the mud in the particular areas, regardless of whether they were up to their knees.[182] The report, supporting photos, and testimony demonstrate that these cattle were penned into excessively muddy conditions. APHIS carried its burden in showing that the fact that water from a half inch of rain[183] did not drain away more quickly, is a violation.

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[177] Complaint ¶ 12(h).
[178] CX 2 at 3-4; CX 9; Tr. 63:12-64:14.
[179] AB at 19-20.
[180] Complaint ¶ 12(i).
[181] CX 2 at 4; CX 10; Tr. 64:15-67:11.
[182] AB at 19.
[183] AB at 20.

8. Watering (9 C.F.R. § 3.130).[184]

Dr. Shaver explained the noncompliance with the Standards for watering cited in the inspection report, and described the contemporaneous photographs she took of the water receptacles in the woodchuck, goat/sheep, and coyote enclosures.[185]

Respondents state Mrs. Sellner swore they provided "clean receptacles and fresh water to the animals every morning," citing CX 22 at 3, Section 3.130.

Ms. Sellner's affidavit, CX 22 at 3, states "the water receptacle had two very small pieces of hay in the water" and the water receptacles had been cleaned that morning. The allegation of violation and supporting APHIS evidence, including photographs, is that there was much more than two pieces of hay in the water, and refers to build-ups of green material, which casts significant doubt on whether the receptacles could have been cleaned that morning. I find APHIS carried its burden as to Complaint ¶ 12(j).

9. Cleaning (9 C.F.R. § 3.131(j)).[186]

Dr. Shaver explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of the soiled shelter for a coyote, the accumulated hair in the wire frame of the chinchilla enclosure, and accumulated cobwebs and dust in the serval enclosure.[187]

Respondents contend that the enclosures were cleaned "but could not be kept totally clean because of wet weather conditions. (See CX-22, p. 4)."[188]

Mrs. Sellner's cited affidavit refers to animals tracking mud into the enclosures as a reason the enclosures could not be kept totally clean. APHIS's testimony and other evidence, however, demonstrates build-ups

[184] Complaint ¶ 12(j).
[185] CX 2 at 4; CX 11; Tr. 67:12-70:9.
[186] Complaint ¶ 12(l).
[187] CX 2 at 5; CX 12; Tr. 70:10-75:7.
[188] AB at 20.

of other materials that would not be explained by tracked-in mud. APHIS carried its burden as to Complaint ¶ 12(k).

10. Pest control (9 C.F.R. § 3.13l(d)).[189]

Dr. Shaver explained the noncompliance with the Standards for pest control cited in the inspection report, and described the contemporaneous photographs she took of the tiger enclosure, and the enclosure housing sloth and armadillo.[190]

Respondents contend[191] that Complaint has not identified what it means by a large number of flies or whether it has a followed any internal definition of a large number of flies, citing Dr. Shaver, Tr. 139, and notes that Dr. Cooper testified it was a "judgment call," Tr. 414-16.[192] Respondents note that the zoo undertakes fly control, citing Mrs. Sellner, Tr. 658-69. Respondents reference the testimony of Dr. Pries to the effect that flies were not excessive at the zoo and that Horn flies were not a problem and there was only the occasional deer or horse fly, citing Tr. 474-75. Respondents assert that Complaint's photographs, CX 13 at 1-3, show few flies. They state: "The Government has failed to prove a violation even with its moving standard with regard to insect control."[193]

The cited photos alleged by APHIS to show flies are indistinct for that purpose, at best, although, Dr. Shaver identified[194] the black spots visible on the apples in CX 13 at 3, as flies, and those block spots are prominent, and she described what the other two photographs did not show distinctly. Dr. Shaver also referenced a "large number of flies" to be if they were collecting on food or collecting on animals such that the animals were

[189] Complaint ¶ 12(k).
[190] CX 2 at 5; CX 13; Tr. 75:8-77:12.
[191] AB at 20.
[192] Respondents contend, AB at 20, that Dr. Cooper testified that if she looked at a piece of fruit and could not see the surface because it was covered by flies, that would be a large number. Respondents do not note that Dr. Cooper, in fact, specifically testified at Tr. 417 that the surface of a pie e of fruit would not have to be entirely covered for flies for the to be a large number of flies.
[193] AB at 21.
[194] Tr. 76-77.

reflecting discomfort by stomping and shaking their heads.[195] And she testified that she observed flies collecting on food and in various enclosures.[196] APHIS's witnesses recognized that the zoo had undertaken fly control efforts, at least in some instances.[197]

I find that APHIS's witnesses, who are trained and experienced inspectors, reasonably explained what excessive and a large number of flies were. I also find that their testimony demonstrated that there were large numbers of flies at the time of the subject inspection. The fact that Dr. Pries did not observe large numbers of flies at the time he was at the zoo, does not mean that they were not present at the time of this inspection.

B. July 31, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[198]

> 13. On or about July 31, 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 provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. 9 C.F.R. § 3.29(a).
>
> b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in a building housing nonhuman primates contained spiders. 9 C.F.R. § 3.75(e).[199]

[195] Tr. 138. Dr. Cooper testified similarly. Tr. 416.
[196] Tr. 75.
[197] Tr. 417 (Dr. Cooper).
[198] Complaint ¶ 13.
[199] I find herein that Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. 9 C.F.R. § 3.81(c)(2).

d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. 9 C.F.R. § 3.84(a).

e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. 9 C.F.R. § 3.84(d).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. 9 C.F.R. § 3.125(a).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. 9 C.F.R. § 3.125(c).[200]

h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a

[200] I find herein that Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

secondary containment system. 9 C.F.R. § 3.127(d).

i. Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. 9 C.F.R. § 3.13l(d).

l. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

In their Answer, Respondents admitted allegation 13(b), (g), and (h), with explanations and denied the remaining allegations.[201]

Dr. Baker conducted a compliance inspection on this date, documented his observations in his inspection report, CX 26, as well as in numerous photographs, and testified at hearing as to his inspection.[202]

A. Feed for Guinea Pigs (9 C.F.R. § 3.29(a))[203]

Dr. Baker explained the noncompliance with the Standards for guinea pigs cited in the inspection report, and described the contemporaneous photographs.[204]

[201] Answer ¶ 13. Respondents have no hamsters. The Complaint ¶ 13(a) was in error that there were. The parties agreed there was not a need to formally amend the Complaint. Tr. 170-71.
[202] CX 26; CX 27-36. *See* Tr. 167:12-194:14; 196:5-213:17.
[203] Complaint ¶ 13(a).
[204] CX 26 at 1; CX 28; Tr. 170:18-171:3; 171:11-172:9.

Respondents contend[205] that Mrs. Sellner's affidavit, CX 22 at 5, proved that the guinea pigs had simply kicked some bedding into the food receptacle.

The photos reveal a substantial amount of non-food materials in the guinea pigs feeding bowel, including a substantial amount of feces- more than would be expected from kicking being into the dish a short time in the past. APHIS bore its burden of proof with respect to Complaint ¶ 13(a).

B. Food Storage for Non-Human Primates (9 C.F.R. § 3.75(e))[206]

As noted, this violation was admitted.[207]

C. Environmental Enrichment for Non-Human Primates (9 C.F.R. § 3.81)[208]

Dr. Baker explained the noncompliance with the Standards for environmental enrichment for non-human primates cited in the inspection report, and documented in his declaration, specifically with reference to an inadequate plan for enrichment.[209] Dr. Pries testified that Mrs. Sellner prepared the written programs for environmental enrichment, which Dr. Pries signed.[210]

Respondents contend:[211] Mrs. Sellner was following a Primate Enrichment Program,[212] which Dr. Baker was given but never returned; Dr. Pries did not find it necessary to sedate Cynthia to examine her, and, after the inspection, Mrs. Sellner documented her enrichment program every day.[213]

CX 22, the August 5, 2013 report, at 2-3, explains that the

[205] AB at 21.
[206] Complaint ¶ 13(b).
[207] AB at 21.
[208] Complaint ¶ 13(c).
[209] CX 26 at 2-3; CX 37; Tr. 177:7-181:8. *See* Tr. 203:9-25; 204:16-206:9.
[210] Tr. 500:20-501:1.
[211] AB at 21-22.
[212] RX 3.
[213] CX 22 at 6.

environmental plan had not been properly updated and was required to address the psychological problems Dr. Baker observed.[214] CX 22 also states the licensee must document the special attention given to the animal and provide this documentation to the inspector when requested. Essentially, Respondents are arguing that they corrected the violations at issue after the inspection.

As discussed elsewhere corrections after an inspection do not obviate a violation. APHIS's evidence proves the violation.

D. Cleaning for Non-Human Primates (9 C.F.R. § 3.84(a))[215]

Dr. Baker explained the alleged noncompliance with the Standards for non-human primates for cleaning cited in the inspection report, and described his contemporaneous photographs of the enclosure housing a baboon (Obi).[216] CX 26 at 3 describes approximately fifty percent of the floor being covered with packed down feces.

Respondents contend,[217] among other things, that the photographs are blurry and Mr. and Mrs. Sellner testified that the pen would have been cleaned out that day, but for the inspection, as it was every day. None of this effectively countervails credible testimony that fifty percent of the pen was covered by packed down feces. I find APHIS met its burden as to this Complaint ¶ 13(d) allegation.[218]

E. Pest Control for Non-Human Primates (9 C.F.R. § 3.84(d))[219]

Dr. Baker explained the noncompliance with the Standards for pest control for non-human primates cited in the inspection report, and described the contemporaneous photograph he took of the baboon

[214] *See also* CX 37 (declaration by Dr. Baker, among other things discussing these topics).
[215] Complaint ¶ 13(d).
[216] CX 26 at 3; CX 30; Tr. 181:9-23.
[217] AB at 22.
[218] In CX 22 at 2, Mrs. Sellner does state she does not think it was all feces on the floor.
[219] Complaint ¶ 13(d).

enclosure.[220]

Respondents contend[221] that the use of the phrase "large amount of flies" is unfair to the licensee because that phrase can mean whatever the inspector wants it to mean, and while there are flies shown in the photograph that is CX 36 at 1, they do not meet Dr. Cooper's definition. They also note that in CX 22 at 7, Mrs. Sellner states Dr. Baker arrived before the intended morning spraying of the facility, and they note that the zoo has a fly abatement program.

CX 36 at 1 shows what is to the undersigned be an excessive number of flies in the "Education Center" under any definition, and these are not fruit flies. Apparently, the Dr. Cooper definition of "excessive' Respondents are referring to is somewhere in Tr. 414-16, where, among other things, she said it was a "judgment call" and, if on animals, the animals were showing signs of being bothered by them, or if the flies covered the surface of a piece of fruit, which at Tr. 417 she clarified to mean not covering all surface area of the fruit, a point Respondents do not mention. I do not find any inconsistency between a finding of excessive flies in the Education Center with any Dr. Cooper testimony at Tr. 414-17.

Respondents claim this is another instance of where the alleged violation would have been eliminated by actions the Respondents were intending to take later that day. The fact that Respondents were going to spray for flies later that day indicates a perception on their part that there was an excess of flies. The nature of an unannounced inspection is that it is something of a snapshot of conditions at the time it takes place, and violations have to be determined as of that point in time, nor based upon Respondent contentions as to their intents, held even prior to inspections, to correct conditions.

APHIS met its burden of proof as to Complaint ¶ 13(e).

F. Structural Strength (9 C.F.R. § 3.125(a))[222]

Dr. Baker explained the noncompliance with the Standards for

[220] CX 26 at 3; CX 31; Tr. 181:24-182:23.
[221] AB at 22.
[222] Complaint ¶ 13(f).

structural strength and construction and maintenance of animal facilities cited in the inspection report, and described the photographs he took of the kangaroo, coyote, and capybara enclosures.[223]

Respondents contend that the enclosures pose no danger to the animals and the photographs show this, citing CX 32 at 1-3, and, thus, these allegedly minor flaws are not violations.

CX 32 at 3 is intended to be a photograph of excess feces in the capybara shelter, which shows very little of the portion of the shelter shown said to be damaged. Contrary to Respondents' contentions, CX 32 at 1-2 shows rather severely damaged and compromised shelters, not "minor flaws." The narrative description and discussion in CX 26 at 4 fully supports at finding of the violation alleged in Complaint ¶ 13(f).

G. Food Storage (9 C.F.R. § 3.125(c))[224]

Dr. Baker explained the noncompliance with the Standards for food storage cited in the inspection report, and described the contemporaneous photographs he took food storage areas.[225]

Respondents on brief[226] simply refer back to their answer to Complaint 13(b), which is an admission. Thus, I find the violation alleged in Complaint 13(g) is admitted by Respondents.

H. Perimeter Fence (9 C.F.R. § 3.127(d))[227]

Dr. Baker explained the noncompliance with the Standards for perimeter fencing cited in the inspection report (CX 26 at 5), and described the contemporaneous photographs he took (CX 33) of the Respondents' fencing.[228] Respondents admitted that their perimeter fence was damaged.[229] Respondents "admit that a portion of the perimeter fence was

[223] CX 26 at 4; CX 32; Tr. 182:24-184:15.
[224] Complaint ¶ 13(g).
[225] CX 26 at 4; CX 29; Tr. 184:16-23; *see* Tr. 199:25-201:18.
[226] AB at 23.
[227] Complaint ¶ 13(h).
[228] CX 26 at 5; CX 33; Tr. 184:24-187:3; *see* Tr. 210:8-213:3.
[229] Answer ¶ 13(h).

damaged but [state] the height of the fence was always at least eight feet in height, the required height for a perimeter fence. (Sellner, Tr. p. 651)."[230] As discussed herein, subsequent repairs do not obviate violations.

Moreover, APHIS showed that "there were gaps between the panels of the perimeter fence; and . . . there was no perimeter fence around the camel enclosure that could function as a secondary containment system." The cited testimony by Ms. Sellner refers only to a particular panel.

APHIS met its burden of proof as to Complaint ¶ 13(h).

I. Watering (9 C.F.R. § 3.130)[231]

Dr. Baker explained the noncompliance with the Standards for watering cited in the inspection report and described the contemporaneous photographs taken of the water receptacles in the coyote and tiger enclosures.[232]

Respondents contend that the water was potable and came from automatic waterers, citing CX 22 at 9 and Tr. 620 (Mr. Sellner).

CX 26 at 5, proffered in support of this violation, states, for the most part, that the interior surfaces of the water bowls at issue were a green color. There is not an allegation that there was a build-up of algae or any other substance. Respondents' points are well-taken. APHIS did not demonstrate that water that is refreshed by an automatic waterer each time an animal drinks is not potable simply because the interior of a water bowl surface has a tinge of green. APHIS failed to prove the allegation in Complaint ¶ 13(i).

J. Cleaning (9 C.F.R. § 3.13l (a))[233]

Dr. Baker explained the noncompliance with the Standards for cleaning cited in the inspection report, and described the contemporaneous

[230] AB at 12.
[231] Complaint ¶ 13(i).
[232] CX 26 at 5; CX 34; Tr. 187:4-24.
[233] Complaint ¶ 13(j).

photographs he took of the bear · enclosure.[234]

APHIS states on brief:[235] "Although Dr. Pries acknowledged testified that there were housekeeping, maintenance, and cleaning problems, he said that he was only aware of such problems 'way back like 2010 or something'. . . 'but here in the past few years I thought things were looking pretty good.'"[236] It is not clear for what purpose APHIS cites this statement. Dr. Pries's testimony as to the conditions in 2010 or thereabouts are irrelevant to the violations alleged in the Complaint this proceeding. His testimony as to the general conditions in recent years is relevant, but I give it less weight than Dr. Baker's testimony, report, and photographs, as to specific conditions on the day of the APHIS inspection.

On brief,[237] Respondents contend the photograph of the bear enclosure, CX 35 at 1, shows only one spot of defecation and does not show the entire cage. Respondents state Dr. Baker "admitted that in his testimony. Tr. 207." But it is not clear what Respondents mean. All Dr. Baker admits on that transcript page is a lack of memory. Respondents argue that Dr. Baker's definition of excessive feces is where one cannot move freely without stepping on feces, and claim APHIS's evidence does not show this.[238] However, Respondents neglect to mention that Dr. Baker also testified, Tr. 206-07: "[a]nother excessive amount is if it's not taken away in 1 time to prevent the accumulation of pests, excessive flies, rodents, that type of thing." At Tr. 188, Dr. Baker testified as to an excess of feces in the bear enclosure in a pile.

The contemporaneous report, CX 26 at 6, specifically states that feces were present throughout the bear enclosure. I find the photograph in CX 35 at 1 to be very unclear as to where feces might be, and, thus, it neither supports nor contradicts the allegation in Complaint ¶ 13(j). CX 26 at 6 also states that enclosures must be cleaned as often as necessary to promote appropriate husbandry standards. At Tr. 208, Dr. Baker explains that that might require cleaning more than once a day.

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[234] CX 26 at 6; CX 35; Tr. 187:25-188:17; 207:7-24. *See also* CX 37 (declaration by Dr. Baker).
[235] IB at 41.
[236] Tr. 488:22-489:8; 498:23-490:5.
[237] *Id.*
[238] AB at 23-24.

Although the evidence is somewhat confusing as to particulars, I find that APHIS met its burden to show that there were excess feces in the subject enclosures. Respondents' cross examination did not shake Dr. Baker from that observation and conclusion.

K. Pest Control (9 C.F.R. § 3.13l (d))[239]

Dr. Baker explained the noncompliance with the Standards for pest control cited in the inspection report, and described the contemporaneous photographs he took of the education center and the porcupine enclosure.[240]

Respondents, on brief,[241] contend Mrs. Sellner testified she has an effective rodent control program and the dead rodent shown in one of APHIS's exhibits demonstrates that it works, citing Tr. 652. Respondents again assert a lack of definition of "excessive" as applied to flies, and cite the zoo's allegedly extensive anti-fly measures, citing Tr. 657-659. Respondents assert that the photographs in CX 27-35 show a lack, not an excess, of flies.

CX 27-35 are alleged to show excess flies. CX 36 at 1 and 3 are alleged to, and do, and are the exhibits cited in support of this Complaint paragraph. The photographs in CX 29 at 1-4 and CX 36 at 2, certainly show rodent feces, evidence that Respondents' rodent control efforts have not been sufficiently effective.

APHIS met its burden of proof as to Complaint ¶ 13(k).

L. Employees (9 C.F.R. §§ 3.85, 3132)[242]

Dr. Baker cited Respondents for failing to comply with the Standard for employees.[243] Respondents do not employ staff, and instead rely exclusively on the two of their efforts-all while operating an adjacent dairy

[239] Complaint ¶ 13(k).
[240] CX 26 at 6; CX 36; Tr. 188: 18-189:18; 199:17-24.
[241] AB at 24.
[242] Complaint ¶ 13(1).
[243] CX 26 at 6-7.

farm[244] – and on volunteers. Mr. Sellner testified that Respondents have no employees, only "lots of volunteers" and "we're not going to have somebody else hired to come in and do our animals without our supervision because we're very careful on how our animals are taken care of."[245]

Respondents on brief contend:[246]

> There is no basis for this allegation [of failure to meet the Standard for employees] other than speculation. Dr. Gibbens admitted in his testimony that he can't give an opinion as to whether the Zoo has enough volunteers to meet its needs. (Tr. p. 725). He stated that the number of volunteer hours does not show up in any inspection reports by the USDA. (Tr. p. 731). This information has been available to the USDA for years now. (See Affidavit of P. Sellner, CX-22, pp. 10-11). The Government has not met its burden of proof.

Mrs. Sellner's cited affidavit, CX 22 at 10-11, states the zoo has from 6 to 8 volunteers that "help with care of the animals" when the zoo is open in the summer. The animals need care all year round, but Mrs. Sellner seems to implicitly admit that there are no volunteers at other times of the year. Dr. Gibbens specifically testified[247] that two people could not "maintain compliance with the regulations and standards at a facility with 200 animals that includes non-human primates, large carnivores, bears, the type of species that are present at the Cricket Hollow Zoo."[248] He did admit, on the page following, that he had not reviewed information regarding volunteers at the zoo, and could not opine on the efforts of any such volunteers.[249]

That Respondents have not maintained an adequate work force in order to comply with the AWA, the Regulations, and Standards is discussed

[244] Tr. 451:1-21, 627:18-23, 628:9-21, 644:5-18, 645:7-16.
[245] RX 2 at 12 ("I feel I have adequate help at this time."); Tr. 628:9-629:3.
[246] AB at 24.
[247] Tr. 724.
[248] *See*, *e.g.*, Tr. 660 (Mrs. Sellner) for a total number of animals.
[249] Tr. 725.

more fully below. But Complainant has clearly met its burden as to Complaint ¶ 13(1). Evidence includes that Respondents have clearly failed to meet the requirements of the AWA, the Regulations, and Standards. An alternative finding to finding there are insufficient zoo employees, would be to find that Respondents had the capability of meeting these requirements because they had sufficient employees, but consciously chose not to apply them to meet the Standards, or mismanaged employees and, thus, failed to meet the Standards. But the record does not show that Respondents chose not to comply. It shows that they did not comply, and it shows that they have no staff.

As to Respondents' contentions that APHIS has not met its burden of proof because it has not analyzed and presented for the record the number of hours the volunteers may or may not have worked, APHIS is not contending that, even though Respondents met other requirements, Respondents failed to employ a sufficient number of trained and qualified personnel. No matter how many volunteer hours are being put in, apparently on a summer basis only-and it is notable that Respondents did not proffer such evidence themselves-the record is clear that sufficient man-hours are not being expended to properly take care of the animals. The reason for that is not that the Sellners are lazy or have an intent to perform poorly, but because they are trying to tend the animals all by themselves for the most part.[250] In other words, if requirements were otherwise being met, which they clearly were not, there might well be no contention that Respondents failed to employ sufficient personnel.
APHIS carried its burden as to Complaint ¶ 13(1).

C. September 26, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[251]

> 14. On or about September 25, 2013, Respondents

[250] *See* RX 25 at 9 (June 24, 2014 "IDALS Compliance Report" of Doug Anderson, IDALS Compliance Investigator) (stating "I agree with the federal crew's assessment that there is a lack of help that allows this facility to lapse into disrepair and uncleanliness" and referring to the "Herculean task of caring for the numerous animals").
[251] Complaint ¶ 14.

willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies around and within buildings housing primates, and the enclosures housing two macaques, one vervet, three baboons, and two bush babies, (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies, and (iii) evidence of rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. 9 C.F.R. § 3.84(d).

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. 9 C.F.R. § 3.127(c).

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically: (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was sagging and detached from the fence post; (ii) there were gaps between the panels of the

perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and p t-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. 9 C.F.R. § 3.129(b).

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

i. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo, (ii) evidence of spider activity throughout the facility, and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. 9 C.F.R. § 3.131(d).

j. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

In their Answer, Respondents deny these allegations with explanations.

Dr. Cole conducted a compliance inspection on this date and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.[252] She described her occupation and her background, in particular with respect to nonhuman primates.[253] Dr. Cole testified about this inspection.[254]

1. Cleaning for non-human primates (9 C.F.R. § 3.75(c)(3)).

Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of the housing facilities for non-human primates.[255]

On brief, Respondents assert that APHIS did not meet its burden of proof and challenge APHIS's use of the term "build-up" to describe Respondents' facilities.[256] Respondents argue:

> Paragraph 14(a) claims a failure to clean the facility because there is a "build-up" of dust, dirt, debris and grime on the facilities. Dr. Cooper did not precisely define what was meant by the term "build-up" but seemed to indicate that it was a "thickening." (Tr. P. 427). This is a puzzling definition and certainly not one a layperson could understand. She testified that she expected some dirt or debris when she goes on an inspection - she knows a Zoo or other exhibitor is not going to be perfect. (Tr. P. 424). She testified that piles of straw on the floor and cobwebs could happen overnight. (Tr. P. 426). Mrs. Sellner disagreed with Dr. Cooper's assessment of the housekeeping. (See P. Sellner Affidavit CX-22, p. 11). Mrs. Sellner also testified at trial that the primates can make the kind of mess shown in (for example) (CX-40, p. 11) in 12 to 24 hours and she takes a leaf blower to the premises to clean it out daily. (Tr. P. 688). The photographs do not demonstrate a buildup of dirt or debris

[252] CX 39; CX 40-49.
[253] Tr. 237:25-243:25.
[254] Tr. 250:24-297:11.
[255] CX 39 at 1-2; CX 40; Tr. 251:9-258:13; 258:21-265:19.
[256] AB at 25.

> unless that term is defined as any dirt or debris. (See CX-40- CX-47. Douglas Anderson, IDALS inspector, in his report stated that none of the housekeeping issues were "critical or excessive." (RXT-25, p. 5).[257]

Contrary to Respondents' argument, the evidence-including Dr. Cole's inspection report, photographs, and testimony-demonstrate a build-up of dust, dirt, and/or debris throughout the facility. I find that the term "build-up," as used in this case, means a "large amount" or "accumulation"[258] indicating a "lack of cleaning."[259]Although Mr. Anderson stated in his report that the housekeeping issues were not "critical or excessive,"[260] the Regulations do not a require such issues to be "critical or excessive," only that the accumulation be excessive, in order to constitute an AWA violation.[261]

The preponderance of the evidence supports the alleged Complaint 14(a) violation.

2. Environmental enrichment for non-human primates (9 C.F.R. § 3.81).

Dr. Cole explained the noncompliance with the Standards for environmental enrichment for non-human primates cited in the inspection report and described the contemporaneous photographs she took of a macaque named Ana.[262]

Respondents' Answer, ¶ 14(b), denies the allegation, stating that "this animal came to the Zoo with abnormal behavior" and "that she exhibited this behavior every time she came into heat."[263] On brief, Respondents contend:

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[257] AB at 25.
[258] *See* Tr. 426:22-429:10.
[259] Tr. 251:23-24.
[260] RX 25 at 5 ("As for the rest of the facility . . . there were a number of housekeeping issues: cobweb, sharp points (minor), fecal matter in some of the cages, etc. None of it critical or excessive.").
[261] *See* 9 C.F.R. § 3.75(c)(3).
[262] CX 39 at 2; Ex. 41; Tr. 265:20-270:6.
[263] Complaint ¶ 14 (a); Answer ¶ 14(a).

> Paragraph 14(b) is another situation involving an animal that came to the Sellners with behavioral issues and the Sellners were attempting to deal with this. (P. Sellner Tr. Pp. 690-691). She was receiving environmental enhancement and this was being documented by the licensee. (See Affidavit of Mrs. Sellner, CX-22 p. 12, see also RXT-3, pp. 1-2). Dr. Cooper admitted in her testimony that Mrs. Sellner made progress with Obi and Ana. (Tr. P. 421). Dr. Cole stated that Mrs. Sellner had an environmental enrichment plan for the primates. (Tr. P 268). As of January 30, 2014, Ana had a perfect coat. (CX-22, p. 12).[264]

The fact that Ana arrived at Respondents' zoo already exhibiting abnormal behavior does not obviate the need for an environmental enrichment program; the Standards require special attention for non-human primates who "show signs of being in psychological distress through behavior or appearance," regardless of when or where those signs appeared.[265] Although Mrs. Sellner's affidavit states that Respondents "provided new additional enhancement toys" and "documented all of this in the enhancement plan,"[266] that plan is dated November 20, 2013 and was not in effect at the time of the inspection.[267]

The preponderance of the evidence establishes that Respondents did not have an environmental enhancement plan in place for Ana, a non-human primate who showed signs of psychological distress, on the date in question. That Ana later had a "perfect coat" or Dr. Cooper "made progress" with Ana did not eliminate Respondents' duty to "develop, document, and follow an appropriate plan for environment enhancement adequate to promote [Ana's] psychological well-being."[268] I find that APHIS met its burden of proof as to Complaint ¶ 14(b).

3. Pest control for non-human primates (9 C.F.R. § 3.84(d)).

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[264] AB at 25-26.
[265] 9 C.F.R. § 9 C.F.R. 3.8l(c)(2).
[266] CX 22 at 12.
[267] RX 3 at 1-2 (November 20, 2013 Primate Enrichment Program); Tr. 268:7-8.
[268] 9 C.F.R. § 3.81.

Dr. Cole explained the noncompliance with the Standards for pest control for non-human primates cited in the inspection report and described the contemporaneous photographs she took of the spiders and cobwebs in the lemur enclosure and the primate building, as well as the flies and rodents she observed.[269]

Respondents deny the allegation.[270] On brief, Respondents argue:

> Paragraph 14(c) is denied for the reasons previously set forth herein and for the further reason that the fact that there were some flies, a couple of spiders and a mouse does not mean that effective measures were not taken to eliminate them. Dr. Shaver testified that you can take all the right measures to eliminate flies and still have them. (Tr. p. 140). In addition, the inspectors have shown a remarkable lack of knowledge about the differences between a granddaddy long legs (which is an arachnid but does not spin a web) and spiders which do spin webs. Dr. Baker apparently knows there is a difference but doesn't know what it is. (Tr. pp. 230- 231).[271]

The inspection report, supporting photographs, and testimony of Dr. Cole plainly demonstrate the presence of flies, spiders, and rodents throughout Respondents' facility, indicating that, whatever the program in place for pest control, it was not sufficiently effective to pass muster.[272] The photographs show the presence of webs and cobwebs regardless of the fact that they also show non-web-building arachnids. I find that APHIS has carried its burden as to Complaint ¶ 14(c).

4. Drainage (9 C.F.R. § 3.127(c)).

Dr. Cole explained the noncompliance with the Standards for drainage cited in the inspection report and described the contemporaneous

[269] CX 39 at 2-3; CX 42 and CX 49; Tr. 270:7-272:2; 270:3-275:24.
[270] Answer ¶ 14(c).
[271] AB at 26.
[272] *See* 9 C.F.R. § 3.84(d).

photographs she took of the enclosures housing pigs, deer, and bears.[273]

> Respondents deny the allegation.[274] On brief, Respondents contend: Paragraph 14(d) is denied for the reason that the pig had just recently dug in the area referred to, the area was dry that afternoon. (Affidavit of P. Sellner, CX-22, p. 14). The pig had dry areas to walk in and did not use the area in question. The water in the bear area and other pens was all gone by the afternoon. (CX-22, p. 14).[275]

It is unclear whether the reason for the water in the pig exhibit was that the pigs "had just recently dug in the area."[276] The inspection photographs show what appear to be fairly large puddles, and Dr. Cole testified that she witnessed "a very large pool of water that [had] likely been sitting . . . for a while."[277] Nevertheless, the pig exhibit was not the only area with problems; Dr. Cole described drainage issues in four separate enclosures that housed two potbellied pigs, one fallow deer, two Meishan pigs, and two bears.[278] Dr. Cole explained that the presence of standing water—which was present in the all of these enclosures—signifies that the water was not rapidly eliminated.[279] When asked whether recent rainfall could mitigate noncompliance, Dr. Cole stated: "No. They should still have an ability or a way to rapidly eliminate excess water from the animal enclosure."[280]

Moreover, Mrs. Sellner herself stated that there was a drainage problem.[281] In the inspection report, Dr. Cole noted: "There is an area approximately four by four feet in one comer of the enclosure that is wet and muddy with sitting water. The licensee states that this was created by

[273] CX 39 at 3; CX 43; Tr. 270:7-272:2; 270:3-275:24.
[274] Answer ¶ 14(d).
[275] AB at 26.
[276] *Id.*
[277] CX 43; Tr. 278:10-11.
[278] Complaint ¶ 14(d).
[279] Tr. 281:16-21.
[280] Tr. 281:24-25.
[281] *See* CX 39 at 3.

recent rains and that *drainage in this area is a problem*."[282] At hearing, Dr. Cole testified:

> So that means the water was not draining. . . . During the inspection, when I mentioned this to the licensee, to Mrs. Sellner, she stated that the muddy area was created by the recent rains but that drainage in that area is a problem. So, although it had just rained, she let me know that *drainage was often an issue* in that comer.[283]

I find that the preponderance of the evidence supports the alleged violation.[284] APHIS met its burden of proof as to the Complaint, ¶ 14(d) allegation.

5. Perimeter fence (9 C.F.R. § 3.127(d)).

Dr. Cole explained the noncompliance with the Standards for perimeter fencing cited in the inspection report and described the contemporaneous photographs she took of the Respondents' fencing.[285]

Respondents' Answer, ¶ 14(e), denies the allegation, stating that "the APHIS inspectors changed their official view about the barrier around the camel on this date. Prior to this date there was no problem with the barrier."[286] On brief, Respondents argue:

> Paragraph 14(e) is denied and the licensee further swore in her Affidavit that the area has been like this for 10 years at the time of the inspection. (CX-22, p. 14). There is now a newer 11 foot chain link fence here. The camel had been next to the perimeter fence for over a year and a half prior to this citation (when apparently it was not a violation). (CX-22, p. 15).[287]

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[282] CX 39 at 3 (emphasis added).
[283] Tr. 281:5-11 (emphasis added).
[284] 9 C.F.R. § 3.81.
[285] CX 39 at 4; CX 44; Tr. 282:20-286: 13.
[286] Complaint ¶ 14(e); Answer ¶ 14(e).
[287] CX 22 at 15.

In her affidavit, Mrs. Sellner similarly states:

> When I moved the camel into this area originally, he was next to the perimeter fence. He had been in this enclosure for at least a year and a half. No inspector had ever mentioned that he needed to have a secondary fence and could not be against the perimeter fence. We added a new fence line so the camel does not have access to the perimeter fence so this has been corrected.[288]

Mrs. Sellner effectively admits there was no secondary fence at the time of the inspection. The fact that inspectors did not cite Respondents for their fence in the past does not negate that the fence did not comply with Regulations during this inspection. Similarly, Respondents' subsequent correction to the fence does not obviate the violation.[289]

Dr. Cole's testimqny and inspection photographs establish that: (1) the perimeter fence surrounding the big cats, bears, and wolves was in disrepair, detached, and sagging from the fence post and patched with gaps between panels; and (2) in the camel enclosure, the only fence that contained an animal in the facility was an eight-foot perimeter fence. Therefore, I find that APHIS has carried its burden as to Complaint ¶ 14(e).

6. Feeding (9 C.F.R. § 3.129(b)).

Dr. Cole explained the noncompliance with the Standards for feeding cited in the inspection report and described the contemporaneous photographs she took of Respondents' fencing.[290]

Respondents' Answer, ¶ 14(f), denies the allegation, stating that "the only feeder that had grime was the pot-bellied pigs who root around in the mud."[291] On brief, Respondents contend: "Paragraph 14(f) is denied and further state that the feeders did not have a thick buildup. There was a little dirt on them. (CX-22, p. 15). As Dr. Shaver testified, there can be some

[288] *Id.*
[289] *See*, *e.g.*, Pearson, 68 Agric. Dec. 685, 726-27 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).
[290] CX 39 at 4; CX 49; Tr. 286:14-289:21.
[291] Complaint ¶ 14(f); Answer ¶ 14(f).

'stuff' in the bowls - just not buildup. (Tr. p. 71)."[292]

An affidavit submitted by Mrs. Sellner states: "The receptacles may not have been perfect and there may have been a little dirt on the receptacles. We are now trying to rotate the feeders to make sure they are cleaned more often."[293]

Contrary to Respondents' assertions, I find that the feeders did, in fact, have significant buildup; the photographs show that there was more than "a little dirt" on them. Dr. Cole testified that she observed "a thick brown to black buildup within the feeders for a variety of the animals: the coatimundi, the wallaby, the coyotes, and pot-belly pigs."[294] The bucket feeder for the wallaby had some brownish-black material at the bottom,[295] and there was similar build-up on the coyote feeder.[296] The feeder for the coati mundi appeared to have some brownish material on it as well.[297]

The preponderance of the evidence supports the Complaint ¶ 14(f) violation alleged.

7. Watering (9 C.F.R. § 3.130).

Dr. Cole explained the noncompliance with the Standards for watering cited in the inspection report and described the contemporaneous photographs she took of the water receptacles in enclosures housing the capybara, one llama and two sheep.[298]

Respondents' Answer, ¶ 14(g), denies the allegation and further states that an "automatic waterer was installed."[299] On brief, Respondents contend: "With regard to paragraph 14(g) the same response has been given to the lack of potable water is the response of the Respondents. The animals were all given fresh water daily. There is no proof the water was

[292] AB at 27.
[293] CX 22 at 15.
[294] Tr. 286:17-19.
[295] CX 45 at 1-2; Tr. 286:24-287:2.
[296] CX 45 at 3-4; Tr. 287:9-10.
[297] CX 45 at 6-7; Tr. 287:14-18.
[298] CX 39 at 5; CX 46; Tr. 289:22- 290:24.
[299] Complaint ¶ 14(t); Answer ¶ 14(t).

not potable."[300] The photographs in the inspection report show significant build-up of what appears to be green algae in the capybara water receptacle and yellow algae in the water receptacle located in the pen housing one llama and two sheep.[301] This casts significant doubt on whether the animals could have been provided fresh water daily, as Respondents suggest. If fresh water was indeed provided daily, the presence of algae in receptacles should have alerted Respondents that the water needed to be changed more frequently.[302]

The preponderance of the evidence supports the alleged Complaint ¶ 14(g) violation.

8. Waste disposal (9 C.F.R. § 3.125(d)).

Although ¶14(h) of the Complaint cites a violation of 9 C.F.R. § 3.125(d), APHIS did not—either in its briefs or at hearing—establish a connection between Respondents' actions/inactions and that regulation. Therefore, I find that APHIS has not carried its burden as to the alleged violation of 9 C.F.R. § 3.125(d) in Complaint ¶ 14(h). The other allegations of Complaint ¶ 14(h) are treated in the next numbered subsection of this Decision.

9. Cleaning (9 C.F.R. § 3.13/(a)).

Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of multiple enclosures.[303]

Respondents deny the allegation.[304] On brief, they contend:

> With regard to paragraph 14(h) the Respondents deny the allegations that the enclosures and premises weren't clean

[300] AB at 27.
[301] CX 46 at 1-4; Tr. 288:18-289:21.
[302] *See* 9 C.F.R. § 3.130 ("If potable water is not accessible to the animal at all times, it must be provided as often as necessary for the health and comfort of the animal. . . All water receptacles shall be kept clean and sanitary.").
[303] CX 39 at 5; CX 47; Tr. 290:25-294:18.
[304] Answer ¶ 14(h).

> and further state that the enclosures are spot cleaned daily and a skid loader is used to clean the cattle pens when needed. (See Sellner Affidavit CX-22, p. 16). The USDA does not provide any guidance as to what it means by the term "clean." There can be some waste in the pens. (Dr. Shaver Tr. p. 73). See also testimony by Dr. Cole that the standard is not that there can't be any dust or dirt in an animal area. (Tr. p. 255). There is no indication that it is excessive.[305]

Further, Mrs. Sellner states in an affidavit:

> I don't really remember these cages being dirty but we would have spot cleaned them daily or as needed.... I cleaned all of the cobwebs and all the cages in these areas. The rain had blown in some of the enclosures so there was some dust but none of the cages were excessively dirty.[306]

Respondents' argument that USDA provides no guidance "as to what it means by the term 'clean'" is without merit. Section 3.131(a) of the Regulations and Standards—which bears the subheading "Cleaning of enclosures"—provides: "Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors."[307]

Here, the inspection photographs demonstrate that there was an abundance of animal waste in the enclosures for the porcupine, coatmundi, chinchilla, bear, and serval. APHIS has shown that there was significantly more than "some waste"[308] in the pens, which indicates that Respondents had not been cleaning the enclosures as often as necessary.[309] This evidence supports the finding of the Complaint ¶ 14(h) violation as alleged as to cleaning.

10. Housekeeping (9 C.F.R. § 3.131(c)).

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[305] AB at 27.
[306] CX 22 at 16.
[307] 9 C.F.R. § 3.131(a).
[308] AB at 27.
[309] *See* Tr. 294:8-18.

Dr. Cole explained the noncompliance with the Standards for housekeeping cited in the inspection report and described the contemporaneous photographs she took of multiple enclosures.[310]

Respondents' Answer, ¶ 14(h), denies the allegation. On brief, Respondents, as noted previously, contend:

> With regard to paragraph 14(h) the Respondents deny the allegations that the enclosures and premises weren't clean and further state that the enclosures are spot cleaned daily and a skid loader is used to clean the cattle pens when needed. (See Sellner Affidavit CX-22, p. 16). The USDA does not provide any guidance as to what it means by the term "clean." There can be some waste in the pens. (Dr. Shaver Tr. p. 73). See also testimony by Dr. Cole that the standard is not that there can't be any dust or dirt in an animal area. (Tr. p. 255). There is no indication that it is excessive.[311]

At the hearing, Dr. Cole testified that she observed "a lot" of dust, dirt, and debris throughout Respondents' facilities, including some that was "immediately adjacent" to primary enclosures.[312] Although Dr. Cole stated that it is not a requirement that a facility "cannot have *any* dust or any dirt in an animal area,"[313] the photographs of Respondents' facility show a significant amount of it.

Mrs. Sellner stated in her affidavit: "I took all the shelves out and power washed the entire area. I also covered all of the shelves on the walls with plastic curtains which helps keep them clean."[314] Mrs. Sellner does not elaborate on when or how often she took such cleaning measures; nonetheless, the record makes clear that Respondents' premises were not clean at the time of the inspection, in violation of the Standards and Regulations.

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[310] CX 39 at 6; CX 48; Tr. 294:19-297:11.
[311] AB at 27.
[312] Tr. 296:1-24.
[313] Tr. 255:16-21 (emphasis added).
[314] CX 22 at 17.

I find that APHIS met its burden of proof as to the housekeeping violations alleged in Complaint ¶ 14(h).

11. Pest control (9 C.F.R. § 3.131(d)).

Dr. Cole cited noncompliance with the Standards for pest control in the inspection report and took contemporaneous photographs of multiple enclosures.[315]

Respondents deny the allegation but set forth no evidence of a pest-control program.[316] On brief, Respondents contend:

> With regard to paragraph 14(i) the Respondents refer to their efforts to control lies, spiders and other insects. The problem with spiders is puzzling. One inspector admitted under cross examination that a cobweb in a corner might not be a husbandry issue. (Dr. Cooper Tr. p. 431). Furthermore, some of the inspectors for USDA knew there was a difference between a granddaddy longlegs and a spider and some didn't. (Tr. p. 230). There was no testimony from anyone that a spider posed a danger to any animal or was a vector for disease.[317]

While Dr. Cooper did, in fact, testify that "if it's just simply just a cobweb up in the corner it might not" affect an animal's well-being or husbandry, he also went on to state that "if there are other indications of lack of cleaning and poor husbandry then that's what that cobweb indicates to me. . . ."[318] In this case, APHIS has presented far more evidence than "simply just a cobweb up in the corner."[319]

In the inspection report, Dr. Cole noted the presence of flies, cobwebs, and rodent droppings throughout Respondents' zoo:

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[315] CX 39 at 6; CX 49.
[316] *See* Answer ¶ 14(i).
[317] AB at 27-28.
[318] Tr. 431:14-18.
[319] Tr. 431:14-15.

> A large number of flies are present throughout the entire facility. There are flies flying around within the "reptile house", outside facilities and "education center". Flies are present within some of the animal enclosures and can be seen landing on the animals, food and animal waste. Flies are present within both indoor and outdoor enclosures. The animals present in these areas are the ferrets, kinkajou ("reptile house" and "education center"), Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo.
>
> Cobwebs with spiders are present throughout the entire facility. The main areas where the spiders are located are within the "reptile house", outside facilities and within the storage area in the "education center". Some of the animal enclosures have cobwebs within them (serval, coati mundi).
>
> *There is evidence of rodents throughout the facility. There was a dead rat within one of the coyote enclosures.* The licensee removed the rodent during the inspection. Rodent feces is present in several areas including the feed storage room within the "education center".
>
> The presence of pests can lead to health hazards for the animals. A safe and effective program for the control of pests, including flies, spiders and rodents, must be established and maintained.[320]

Moreover, photographs taken during the inspection support Dr. Cole's narrative. They show flies within the kinkajou enclosure in the "reptile house"; a dead rodent within the coyote enclosure;[321] rodent droppings and dust covering the husbandry supplies in the storage area within the "education center"; and multiple cobwebs within the serval enclosure.[322]

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[320] CX 39 at 6 (emphasis added).
[321] Dr. Cole testified that the dead rodent was "likely a rat." Tr. 275:24. Contrary to Respondents' contentions the presence of a dead rat does not indicate an effective rodent control program when there are rodent droppings present.
[322] CX 49.

Dr. Cole described these photographs at the hearing.[323]

Given the large presence of flies, cobwebs, and rodent droppings documented throughout Respondents' facilities, I find that Respondents did not have a safe and effective program for the control of insects and pests. APHIS has carried its burden as to Complaint ¶ 14(i).

12. Employees (9 C.F.R. §§ 3.85, 3.132).

There were no citations for noncompliance with the Standards regarding employees in the inspection report dated September 25, 2013;[324] however, the Complaint alleges that "Respondents failed to employ a sufficient number of trained and qualified personnel" in violation of the AWA on that date.[325] On brief, APHIS argues that "[g]iven the numerous deficiencies with respect to animal husbandry, respondents failed to employ sufficient trained employees."[326]

Respondents deny the allegation contending: "Paragraph 140) is denied for the reasons set forth above including the number of volunteers available and working and the fact that the USDA never incorporated any findings based upon the volunteer hours worked at the facility."[327]

In her affidavit, Mrs. Sellner states that she has "a group of volunteers (approximately 6 to 8) that come in and help with the care of the animals during the summer when [the zoo] [is] open."[328] Mrs. Sellner does not describe the staffing during the other seasons or when the zoo is closed to the public.[329]

At the hearing, there was no testimony regarding the staffing of Respondents' facility on the specific date in question. However, several witnesses testified about the zoo's staffing generally from 2012 through 2015.

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[323] Tr. 273:6-275:6; 275:19-24.
[324] *See* CX 39.
[325] Complaint ¶ 14(j).
[326] RB at 45.
[327] AB at 28.
[328] CX 22 at 10.
[329] *See id.* at 10-11.

Mr. Sellner testified that from 2012 through 2015, Cricket Hollow had no employees but "a lot of volunteers" who provided "help all the time."[330] Mr. Sellner explained that the only "steady personnel that were there regularly" were Mrs. Sellner and himself[331] and that they supervised the volunteers.[332] Mr. Sellner stated that he and his wife had more than 150 animals during the period 2012 through 2015.[333]

Similarly, Dr. Cole testified about her assessment of staffing at Respondents' facilities on May 21, 2014:

> Due to the high number of repeats and the serious noncompliances that we identified, the directs and the repeats, it was evident -- and the number of noncompliances in general, it was evident that there were not enough employees at the facility to carry out the husbandry duties necessary to comply with the regulations and standards.[334]

While Dr. Cole does not specifically address the staffing situation on September 25, 2013, I find that her references to "repeat" noncompliance suggest an ongoing employee issue that would most likely have affected the facilities at that time.

Further, Dr. Robert Gibbens testified about that he would expect a facility the size of Respondents' zoo to have "regular employees":

> It's not specifically detailed in the regulations how many employees they have to have, but they have to have a sufficient number of employees that are trained and experienced to carry out and ensure that the husbandry practice, the regulations and standards are complied with.[335]

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[330] Tr. 638:9-15.
[331] Tr. 638:1-21.
[332] Tr. 638:18-639:1.
[333] Tr. 639:4-12.
[334] Tr. 330:24-331:4.
[335] Tr. 721:12-17.

Additionally, Dr. Gibbens testified:

> I do not believe that two people can maintain compliance with the regulations and standards at a facility with 200 animals that includes non-human primates, large carnivores, bears, the type of species that are present at the Cricket Hollow Zoo.[336]

When asked whether his opinion would change if there are volunteers who assist, Dr. Gibbens explained that regularly scheduled volunteers who are not paid but are trained "would be viewed as employees."[337] However, he could not opine on whether the volunteers in this case were sufficient because he had not "heard how many volunteers there are or what they do."[338]

Given the numerous deficiencies with respect to animal husbandry in this case and the fact that so few employees and volunteers were responsible for more 100 animals, I find that Respondents failed to employ sufficient trained employees as alleged in Complaint ¶ 14(j).

D. December 16, 2013

The Complaint alleges Respondents failed to meet the minimum standards as follows:[339]

> 15. On or about December 16, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:
>
> a. The ceiling of the primate building was in disrepair, and specifically, there was exposed insulation, holes in the ceiling, and a panel that was detached from the ceiling. 9 C.F.R. § 3.75(a).

[336] Tr. 724:12-16.
[337] Tr. 724:19- 23.
[338] Tr. 724:24-725:5.
[339] Complaint ¶ 15.

> b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
>
> c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, 9 C.F.R. § 3.125(a), and specifically, (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing, (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals, and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair.

Dr. Cole conducted a compliance inspection on this date and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.[340]

1. Housing for non-human primates (9 C.F.R. § 3.75(a)).

Dr. Cole explained the noncompliance with the Standards for housing facilities for nonhuman primates cited in the inspection report and described the contemporaneous photographs she took.[341] This evidence supports the finding of the violation as alleged.

Respondents' Answer, ¶ 15(a), denies "that the ceiling was in disrepair in an 'animal area'" but states that "it did get repaired with new steel."[342] As previously emphasized herein, subsequent repairs do not obviate violations.

On brief, Respondents merely contend: "Paragraph 15(a) is denied and it is further stated that the inspector was talking about textured ceiling tile.

[340] CX 53; CX 54-57; Tr. 311:13-315:25.
[341] CX 53 at 2; CX 55; Tr. 311:13-312:14.
[342] Complaint ¶ 15(a); Answer ¶ 15(a).

If there were any holes, they were filled with expandable foam."[343] Respondents' reference to "textured ceiling tile" is unfounded, and Respondents have failed to cite any exhibits or testimony to challenge the alleged violation. To the contrary, the testimony of Dr. Cole and photographic evidence provided by APHIS establish that the ceiling in Respondents' primate building was in obvious disrepair, with multiple holes of various sizes and a sagging panel exposing insulation. Accordingly, I find that APHIS carried its burden as to Complaint 115(a).

2. Watering (9 C.F.R. § 3.130).

Dr. Cole explained the noncompliance with the Standards for watering cited in the inspection report and described the contemporaneous photograph she took of the water receptacle in the enclosure housing the chinchillas.[344] The photograph shows three chinchillas drinking from the same water bottle.[345] Dr. Cole testified at hearing: "The water bottle was empty for the chinchillas, so I asked if the licensee could water the animals, and she did, and when she did, the three chinchillas in the enclosure drank continuously for over a minute."[346]

On brief, Respondents state:

> With regard to paragraph 15(b), it is admitted that the chinchillas did drink when offered water. (See Douglas Anderson report RXT- 25, p. 6). The bottle after it was filled was still two-third full. About an hour later the chinchillas seemed content, body condition fine and demeanor fine. (RXT-25, p. 6). The chinchillas were watered at 4:30 on the previous day. They had played with the water bottle and the water dripped down into a tray below the cage. The chinchillas were playing with the water bottle as well as drinking on the day of the inspection. There now is a crock under the bottle so the water is still accessible to them when they do this.

[343] AB at 28.
[344] CX 53 at 2-3; CX 57; Tr. 315:11-22; *see also* Tr. 592:10-593:16; 594:2-14 (Anderson).
[345] CX 57.
[346] Tr. 315:15-18.

(Affidavit of Pamela Sellner, CX-22, p. 20).[347]

It is worth noting that the "Douglas Anderson report" to which Respondents cite states that "the chinchillas drank for an excessively long time, indicating dehydration."[348] The fact that the chinchillas were dehydrated suggests that potable water was not accessible "at all times" or "as often as necessary."[349]

Further, in contrast to Dr. Cole's observations, Mrs. Sellner states in her affidavit that the chinchillas were "just playing with the bottle"[350] and were not thirsty:

> The 3 chinchillas have a water bottle which they play with. They had played with the water bottle and all of the water had dripped down into a tray under the cage. I filled up the water bottle at the request of the inspector and they started to play with it. The inspector thought the chinchillas were thirsty but they were just playing with the bottle. Now I have placed a crock under the water bottle so when they play with it, the water drips down in the crock and they still have access to the water.[351]

However, the fact that the chinchillas drank when offered water—which Respondents admit352– suggests the animals were thirsty and were not "just playing." Given that the chinchillas had no water at the time of the inspection and showed signs of thirst and dehydration, I find that preponderance of the evidence supports the Complaint ¶ 15(b) alleged violation.

3. Structural Strength (9 CF.R. § 3.125(a)).

Dr. Cole explained the noncompliance with the Standards for structural

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[347] AB at 28.
[348] RX 25 at 6.
[349] 9 C.F.R. § 3.130.
[350] CX 22 at 20.
[351] *Id.*
[352] AB at 28 ("With regard to paragraph 15(b), it is admitted that the chinchillas did drink when offered water.").

strength and construction and maintenance of animal facilities cited in the inspection report and described the contemporaneous photographs she took of the enclosures housing fallow deer, Santa Cruz sheep, watusi, zebu and tigers.[353] Dr. Cole found that "[t]here was a broken fence within the watusi and zebu enclosure, and there were several other enclosures where the fence was curled up at the bottom and the bottom edge had sharp points that extended into the enclosures, and there was a wind break that had been located on the back of the Santa Cruz shelter that was made of wood and had fallen off the shelter."[354]

Respondents' Answer, ¶ 15(c), denies the allegation "except admit[s] that the windbreak (plywood) partially came down."[355] On brief, Respondents contend:

> With regard to paragraph 15(c), it is admitted that the cattle had broken one of the rails of the metal cattle gate but this posed no danger to the animals. The curled chain link had curled only a little at the bottom and it is hard to see how this posed any danger to the animals. (See P. Sellner Affidavit, CX-22, pp. 19-20, see also CX- 56, pp. 1-5 and 7-12) which shows very little curling at the bottom edge of the fence. In any event, this item has been rectified. (CX- 22, p. 20). The Respondents do admit that the plywood had been knocked down but it posed no danger and has been repaired. (CX- 22, p. 20).[356]

The inspection report, supporting photographs, and testimony of Dr. Cole demonstrate that the fences and shelter were not in good repair and posed an injury hazard to the animals.

With regard to the watusi and zebu enclosure, the evidence supports-and Respondents admit-that a metal fence rail was broken and protruding into the enclosure.[357] This indicates that the enclosure was structurally unsound, and the fact that Respondents made subsequent repairs to the

[353] CX 53 at 2; CX 56; Tr. 312:15-315:10.
[354] Tr. 312:18-24.
[355] Complaint ¶ 15(c); Answer ¶ 15(c).
[356] AB at 28-29.
[357] CX 53 at 2; CX 56 at 9-10; Tr. 312:18, 314:17- 22.

fence[358] does not eliminate the fact that the violation occurred.[359] Moreover, Respondents' claim that the broken fence "posed no danger to the animals"[360] is not supported; the metal rail was described as bent in half, with one of its ends encroaching toward the inside of the enclosure near what appears to be the animals' eye or body level.

Photographs of the fallow deer exhibit,[361] Santa Cruz sheep exhibit,[362] and West sheep exhibit[363] each depict a chain-link fence, curled up at the bottom with sharp points extending into the enclosures.[364] Contrary to Respondents' contentions,[365] I find that these fences posed a danger to the animals; an animal could be impaled or have its coat snagged by one of the sharp edges, or it could get a leg caught in the gap between the fence and ground. The fact that multiple fences had started to bend inward suggests they were structurally unsound and therefore inadequate to contain the animals.

Photographs of the tiger exhibit are not as clear.[366] It is not obvious whether the bottom of the fence is actually curled upward, which would expose sharp points, or if the bottom is just covered by snow. However, Respondents admit that there was some curling at the bottom edge of the fence.[367]That the issue "has been rectified" does not obviate the violation.[368]

At hearing, Dr. Cole described the enclosure as follows:

> Again, there's a fence panel extending back from the front

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[358] CX 22 at 19.
[359] *See*, *e.g.*, Pearson, 68 Agric. Dec. 685, 726-27 (U.S.D.A. 2009*)*, *aff'd*, 411 F. App'x 866 (6th Cir. 2011).
[360] AB at 28.
[361] CX 56 at 2.
[362] *Id.* at 3-5.
[363] *Id.* at 8.
[364] CX 53 at 2; CX 56 at 1-8; Tr. 312:19-21.
[365] AB at 28.
[366] CX 56 at 11-12.
[367] AB at 28; CX 22 at 20.
[368] *See*, *e.g.*, Pearson, 68 Agric. Dec. 685, 726-27 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

> of the enclosure, and down at the bottom sort on the right side of the page, down at the bottom the fence is kind of curled up and there are sharp points that extend into the enclosure.[369]

In this instance, I give substantial credibility to the APHIS inspectors and find that part of the chain-link fence surrounding the tiger exhibit was curled up at the bottom, exposing sharp points.

Further, another photograph shows a wind break that had fallen off the Santa Cruz sheep shelter.[370] Dr. Cole testified that although there is "no specific requirement" for a shelter with regard to wind breaks, it must protect the animals from the elements.[371] Dr. Cole's testimony indicates this damaged wind break could not have protected animals from the elements: "It's laying down on the ground just in front of the shelter. There are two wooden panels, and it looks like they're covered with snow, and then a post extending forward from those panels."[372]

Respondents admit "the plywood had been knocked down" but claim "it posed no danger and has been repaired."[373] While the wind break ("plywood") might not have presented an immediate danger, it could not protect the sheep from the elements in its broken state. Plainly, the Santa Cruz sheep enclosure was not maintained in good repair.

Based on the foregoing, I find that APHIS has carried its burden as to Complaint ¶ 15(c).

E. May 21, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[374]

> 16. On or about May 21, 2014, respondents willfully

[369] Tr. 315:6-10.
[370] CX 56 at 6; Tr. 312:22-24.
[371] Tr. 313:23-314:1.
[372] Tr. 314:3-6.
[373] AB at 29.
[374] Complaint ¶ 16.

violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing three wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).

b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. 9 C.F.R. § 3.25(c).

c. Respondents failed to provide potable water to four guinea pigs as required. 9 C.F.R. § 3.30.

d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. 9 C.F.R. § 3.31(a)(2).

e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. 9 C.F.R. § 3.31 (b).

f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, the refrigerator in a building housing nonhuman primates was non-functioning, and the refrigerator in another building housing nonhuman primates was in need of cleaning. 9 C.F.R. § 3.75(e).[375]

[375] I find that Respondents did not incur any violation for having moldy fruit that would not be fed to animals. I also find that the refrigerator was nonfunctioning as a refrigerator was not proved a violation. *See* Dr. Cole, Tr. 330.

h. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. 9 C.F.R. § 3.125(a).

j. Respondents failed to remove animal waste, food waste, and old bedding as required, and specifically, there was a barrel directly behind the lion enclosure, which barrel contained animal and food waste, and/or old bedding, and there were other piles of such waste adjacent to other animal enclosures. 9 C.F.R. § 3.125(d).[376]

k. Respondents failed to provide any shelter from the elements for two Patagonian cavies. 9 C.F.R. § 3.127(b).

1. Respondents failed to provide a suitable method of drainage in the four-homed sheep, fallow deer, and bear enclosures. 9 C.F.R. § 3.127(c).

m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large fetid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. 9 C.F.R. § 3.127(d).

[376] As discussed herein, I find no violation was proved from the presence of a "bum barrel" in some alleged proximity to the lion enclosure.

> n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
>
> o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. 9 C.F.R. § 3.13l(a).
>
> p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. 9 C.F.R. §§ 3.125(d), 3.13l(a), 3.13l(c).
>
> q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing two ferrets, two kinkajous, tigers, and bears; and by a build-up of bird feces on the shelters for bobcats and skunks. 9 C.F.R. § 3.131(d).

Dr. Cole conducted a compliance inspection on this date, and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.[377] Dr. Cole testified about this inspection.[378]

1. Cleaning for dogs (9 C.F.R. § 3.l(c)(J)).[379]

Dr. Cole explained the alleged noncompliance with the Standards for dogs (wolf-hybrids) cited in the inspection report, and described her contemporaneous photographs.[380] Respondents' Answer stated that the inspectors came to the zoo prior to daily chores being done in this area and

[377] CX 69; 69a.
[378] Tr. 316:23- 351:16.
[379] Complaint ¶ 16(a).
[380] CX 69 at 2; CX 69a at 8-10; Tr. 321:9- 22.

clean-up would have been accomplished at that time. There was testimony that the inspections with the USDA would usually take the entire day.[381] On brief,[382] Respondents contend: "The standard testified to by the USDA inspectors at trial was that the animals had to have areas to walk in without stepping in the feces. CX-69A, pp. 8 and 9 clearly shows there are such areas in the wolf enclosure."

CX 69 at 2 discusses a build-up of "old" feces and food, indicating that any daily chores were not addressing the problem. Contrary to Respondents' contention, it is not clear to me that the photographs in CX 69A at 8 and 9 show that the animals have reasonable areas to walk in without stepping on feces and Respondents have not provided a citation that that would be the test of a violation. Those photographs do show that the floor of the cage depicted is dirty.

Thus, APHIS's evidence supports the finding of the Complaint ¶ 16(a) violation as alleged.

2. Standards for guinea pigs (9 C.F.R. §§ 3.25(c), 3.30, 3.3l(a)(2), 3.31(b)).[383]

Dr. Cole explained the alleged noncompliances with the Standards for guinea pigs cited in the inspection report, and described the contemporaneous photographs.[384] On brief,[385] Respondents contend as to Complaint ¶ 16(b): "the complaint appears to be that bedding (hay and straw) was not kept in a sealed container. There is no indication that this had any ill effect on the animals or even could have a bad consequence other than pure speculation. See CX-69A, p. 11 for a view of the plastic barrel with the cover over the bedding."

Contrary to Respondents' contentions, APHIS's allegation was not simply that the bedding container did not have a tight-fitting lid. CX 69 at 2 states that there were flies, a moth, and bird feces on the inside surface of the container, and that the storage system did not ensure that the bedding

[381] Tr. 689 (Mrs. Sellner).
[382] AB at 29.
[383] Complaint ¶ 16(b)-(e).
[384] CX 69 at 2-3; CX69 at 11-16; Tr. 321:23-324:7.
[385] AB at 29.

supply was protected from vermin and other contamination.

On brief,[386] Respondents contend as to Complaint ¶ 16(c):

> [T]he USDA inspector does not state that all four guinea pigs were needing water. According to the inspection report only one of the animals drank vigorously for over one minute. (CX-69, p. 2 3.30 direct NCI. Dr. Cole Tr. p. 322). The inspection report also states that the animals had been water the previous day. (CX-69, p. 2). The bedding in the enclosure was damp an moist indicating that the guinea pigs may have emptied the water from the bottle into their enclosure recently. (See CX-69, p. 3). Only one animal met even the definition given by the APHIS inspectors of a dehydrated animal.

On brief,[387] Respondents contend as to Complaint ¶ 16(d):

> With regard to paragraph 16(d), it is denied because the guinea pigs obviously had recently dumped their water. This was not a long term situation and there is no evidence it was. This would seem to be supported by the fact that only one guinea pig was really thirsty. (CX-69, p. 2).

The APHIS evidence shows that the guinea pigs were without water and at least one of them exhibited sign of dehydration, indicating that it had been without water for some time.[388] This supports the finding of the violation as alleged.

With regard to paragraph 16(e), Respondents contend on brief:[389]

> [T]he pile of dirt (shown in one tidy pile) outside the guinea pigs cage had been swept up the night before by Mrs. Sellner (this was almost opening time at the Zoo-

[386] *Id.* at 29-30.
[387] *Id.* at 30.
[388] *See also* RX 25 at 8 (Report of Doug Anderson, IDALS Compliance Inspector, who attended this inspection).
[389] AB at 30.

> usually Memorial Day) and was going to be swept up that morning (until the process was interrupted by the inspection). (See CX-69A, p. 16. P. Sellner Tr. p. 691).

CX 69 at 3 describes a large amount of dust, dirt, and/or debris on the floor and walkaway, not limited to one pile. The enclosure needed to be kept clean at all times, not only when the zoo would be open. The APHIS's evidence supports the finding of the violations as alleged in Complaint ¶ 16(c), (d), and (e).

3. Standards for non-human primates (9 C.F.R. §§ 3.75(c)(3), 3.75(e)).[390]

Dr. Cole explained the alleged instances of noncompliance with the Standards for nonhuman primates cited in the inspection report and described the contemporaneous photographs.[391]

On brief,[392] Respondents state:

> The Respondents deny paragraph 16(t) because there is no standard set forth for adequate cleaning of these facilities, and there is no disclosure of what steps should have been taken or how often to comply with whatever standard is being applied. One of the areas was in the primate enclosure and there is no indication that the "black grime" on the wall in the red ruffed lemur area was not a scent marking which shouldn't be eliminated according to the testimony of Dr. Cooper. (Tr. p. 442).

Contrary to Respondents' contentions, CX 69 at 3-4 describes large amounts of materials that needed to be cleaned. Among other things, it provides guidance and specifically sets out that "[h]ard surfaces with which non-human primates come into contact must be spot-cleaned daily and indoor primary surfaces must be sanitized at least once every two weeks or more if necessary. . . ." It notes that surfaces scent-marked must be sanitized or replaced at regular intervals as determined by the attending

[390] Complaint ¶ 16(t)-(g).
[391] CX 69 at 3-5; CX 69a at 17-30; Tr. 324:8- 331:9.
[392] AB at 30.

veterinarian. The referenced testimony by Dr. Cooper was that scent markings should not be removed all at one time as that could distress the animal. But there is no evidence that the attending veterinarian had weighed in on removal of any scent markings and no evidence that Respondents were going to clean scent markings on any given schedule to avoid distress to the animal.

APHIS's evidence supports the finding of the violations as alleged in Complaint ¶ 16(f). As to Complaint ¶ 16(g), Respondents contend on brief:[393]

> With regard to paragraph l 6(g), the strawberries mentioned in this alleged violation were going to be discarded. (See testimony of Pamela Sellner Tr. p. 678). The strawberries said to be moldy were still in their original cellophane wrappers and were not contaminating anything. (CX-69A, p. 30). The USDA has not met its burden with regard to this allegation.

I agree that APHIS did not meet its burden of proof with respect to Complaint ¶ 16(g) as to the moldy fruit.

4. Structural Strength (9 C.F.R. § 3.125(a)).[394]

Dr. Cole explained the alleged noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report, and described the contemporaneous photographs she took.[395]

On brief,[396] Respondents contend:

> The Respondents admit that some of the alleged deficiencies were repairs that should have been made but deny that any of the complaints about the metal doors or strength of those doors was legitimate. The inspection

[393] *Id.* at 31.
[394] Complaint ¶ 16(i).
[395] CX 69 at 5; CX 69a at 31-47; Tr. 331:10-337:17.
[396] AB at 31.

> report claims that some of the doors had no locking mechanism. All the doors have pin locks and thresholds so the animal cannot lift the door. (P. Sellner Tr. p. 693). The door on the bear enclosure was not compromised, it is welded all the way around. (P. Sellner Tr. p. 693). See CX-69A, p. 36 for photograph of the door. None of the alleged defects were health or safety issues. The report of Douglas Anderson agrees with this conclusion. (RXT-25, p 8). Tom Sellner testified about the weight of the doors (150 lbs.), the fact that they are smooth on the inside so the animal can't grip the door and the top rail is protected too. (T. Sellner Tr. p. 610).

Respondents' Answer admissions go to Complaint paragraphs other than 16(i). CX 69 at 5 cites certain "guillotine" doors as not having a locking mechanism and relying on weight to keep them closed "according to the licensee." Contrary to Respondents' contention on brief, it is not clear that Mr. Sellner testified that all "guillotine" doors had pins to lock them or just a subset of any such doors. At Tr. 610, where Mr. Sellner discusses the weight and smoothness of certain doors, he also refers to pin locks, but it is unclear whether his testimony is that all doors have them. The inspectors can hardly be faulted for relying on what the "licensee" told them as to whether the doors had locking mechanisms, which as evidence would be a party admission. Nevertheless, the record is unclear as to whether all guillotine doors have locking mechanisms or not, and according to Mr. Sellner, at least one does. Therefore, the "benefit of the doubt" goes to Respondents, and I rule that APHIS has not carried its burden as to whether guillotine doors did not have locking mechanisms.

Mr. Sellner testified at Tr. 693, however, that the door on the bear enclosure was "welded all the way around" after "this noncompliance." As discussed elsewhere, post-violation repairs do not obviate that there was a violation.

Mr. Anderson's report, RX 25 at 8, states that "[t]here were some fence repair and shelter issues" but "*in my opinion*, do not pose much of a risk to the animals as far as adverse health or suffering. At the same time, they

need to be fixed to meet the code."[397] The USDA inspectors have greater training and expertise as to applicable animal husbandry and regulation standards than does Mr. Anderson. I give greater weight to their observations and opinions as to whether the "issues" pose significant risks to the animals as to health or suffering.

APHIS met the burden for the violations as alleged in Complaint ¶ 16(i), except as to the guillotine doors.

5. Waste disposal (9 C.F.R. § 3.125(d).[398]

Dr. Cole explained the alleged noncompliance with the Standards for waste disposal cited in the inspection report and described the contemporaneous photographs she took.[399]

On brief,[400] Respondents contend as to Complaint ¶ 16(j):

> The bum barrel, which is common in the countryside was where it always was-outside the Zoo and not close enough to the lion's enclosure to cause a problem. The waste that is in it is burned as necessary. (P. Sellner Tr. p. 694). CX-69A, p. 48 clearly shows ashes in that barrel. The pile of waste referred to was raked out of the enclosure the day before and was awaiting transportation to be spread out on the farm fields (which was of course not happening because of this inspection). (P. Sellner Tr. pp. 694-695). All the waste outside Dandy Lion's enclosure (CX-69A, p. 51) and that shown entries no. 69 a pp. 52, 53 and 54 would have been picked up. These are not violations.

The CX 69A at 48 photograph of the "bum barrel" appears to show only ashes, and the evidence is not clear that the barrel was so close to the lions as to be a concern.[401] It is unclear from the record what violation was

[397] RX 25 at 8 (emphasis added).
[398] Complaint ¶ 16(j).
[399] CX 69 at 5-6; CX 69a at 48-55; Tr. 337:18-339:16.
[400] AB at 32.
[401] *See* Tr. 694 (Mr. Sellner).

alleged as to the burn barrel.[402] APHIS has not carried its burden as to the burn barrel.

CX 69 at 6 states that the licensee stated that some of the piles had "been there for a long time."[403] Mr. Sellner's cited testimony, Tr. 694-95, cited in the above quoted portion of Respondents' brief, does not, in fact, state that the piles were of debris raked out of enclosure the previous day, nor does it indicate when such material would have been collected and spread on the farm fields, much less that the inspection was interfering with that alleged process.

This evidence supports the finding of the violations as alleged in Complaint ¶ 16(j), except as to any violation as to the burn barrel.

6. Shelter (9 C.F.R. § 3.127(a)).[404]

As APHIS's opening brief states,[405] Dr. Cole explained the alleged noncompliance with the Standards for shelter from sunlight cited in the inspection report and described the contemporaneous photograph she took of the Patagonian cavy enclosure.[406] On brief,[407] Respondents state APHIS did not meet its burden of proof because it did not present any evidence, but do not assert any alleged inaccuracy in APHIS's opening brief as to the evidence it presented as to the Complaint paragraph. I find none, and the cited APHIS evidence supports the finding of the violations as alleged in Complaint ¶ 16(k).

7. Drainage (9 C.F.R. § 3.127(c)).[408]

Dr. Cole explained the alleged noncompliance with the Standards for drainage cited in the inspection report and described the contemporaneous

[402] At Tr. 339, Dr. Cole testified that she did not expect to see a "burn barrel" near the lion cage, but I do not find that this supports a finding of violation.
[403] *See* Tr. 338-39 (Dr. Cole confirming that is what she was told).
[404] Complaint ¶ 16(k).
[405] IB at 49.
[406] CX 69 at 6; CX 69a at 56; Tr. 339:17-340:5.
[407] AB at 32.
[408] Complaint ¶ 16(l).

photographs she took of multiple enclosures.[409] On brief,[410] Respondents contend:

> With regard to 16(1), there is no indication that there is improper drainage. Instead there were leaks in the automatic waterers that were repaired. There is no indication the problem with "drainage" continued after the repairs.

Respondents' points are well taken. The alleged violation was improper drainage, but the problem was actually leaky waterers. CX 69a at 57-64 appears to show small puddles and some mud in the bear, four-homed sheep, and fallow deer enclosures. Dr. Cole's testimony does not indicate that that there was a problem with drainage.[411] It is unclear from the record that Respondents failed to provide a suitable method of drainage to rapidly eliminate excess water; therefore, a "drainage" violation has not been demonstrated. There may have been equipment in need of repair, but that is not a matter of "improper" drainage.

APHIS did not prove the violation alleged in Complaint ¶ 16(1).

8. Perimeter fence (9 C.F.R. § 3.127(d)).[412]

Dr. Cole explained the alleged noncompliance with the Standards for perimeter fencing cited in the inspection report, and described the contemporaneous photographs she took of the Respondents' fencing.[413] Respondents contend on brief:[414]

> Paragraph 16(m) is disputed and also stated to be a de minimus allegation of violations. The fence was solid and complied with USDA regulations. (It was 11 feet tall and solid all the way around up to eight feet in height. (P. Sellner Tr. p. 651)). A variance was also obtained for a

[409] CX 69 at 6; CX 69a at 57--64; Tr. 340:6-342:9.
[410] AB at 32.
[411] Tr. 340:6-342:9.
[412] Complaint ¶ 16(n).
[413] CX 69 at 6; CX 69a at 57-64; Tr. 340:9-342:9.
[414] AB at 32.

portion of the fence. (P. Sellner Tr. p. 653).

As Mr. Sellner testified, the variance was granted after the failed inspection and he also testified that that portion of the fence has been the way it was for 15 years with being found in noncompliance. On those grounds I find this violation to be *de minimis*.

However, aside from that portion of the fence, the allegation was not that the fence was not sufficiently tall, but that it was in bad repair, among other things. The evidence supports the finding of the violations as alleged in Complaint ¶ 16(m), except for the portion of the fence for which a variance was later obtained.

9. Watering (9 C.F.R. § 3.130)).[415]

Dr. Cole explained the alleged noncompliance with the Standards for watering cited in the inspection report and described the contemporaneous photographs she took.[416] On brief,[417] Respondents contend:

> With regard to paragraph 16(n), the degus are basically food for the reptiles. They were watered the day before. The complaints about the water in the galvanized steel containers has been addressed previously and some animals get their water bowls dirty and add debris to them. (P. Sellner Tr. pp. 651-652).

Whether or not the degus were "basically food for the reptiles," the evidence is clear that they were deprived of sufficient water. CX 69 at 7 recites far more than feed such as would fall from an animal's mouth in the water provided for the various animals, including "debris and/or feces" and "bedding."

This evidence supports the finding of the violations as alleged in Complaint ¶ 16(n).

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[415] Complaint ¶ 16(n).
[416] CX 69 at 7-8; CX 69a at 68-70; Tr. 343:9-345:39.
[417] AB at 32-33.

10. Cleaning (9 C.F.R. § 3.13l (a)).[418]

Dr. Cole explained the alleged noncompliance with the Standards for cleaning cited in the inspection report, and described the contemporaneous photographs she took of multiple enclosures.[419] On brief,[420] Respondents contend:

> With regard to paragraph 16(o), there is little detail about what a buildup is. The Sellners have testified that they daily clean the pens for excreta and food waste. (Tom Sellner Tr. p. 607). The key question is whether there is excessive food waste and feces in these enclosures and the photographs supplied (CX-69A, p. 71) which purports to show a buildup of waste shows a tiny portion of a large enclosure and (CX-69A, p. 72) shows a small portion of the bear enclosure--do not support this allegation. (There are other photographs in the CX-69A series that take the same approach- extreme closeups of small areas in large enclosures.[)]

Even if the cited photographs were misleading, and given the other evidence, I do not find that they are, there is more evidence than simply these photographs as to excessive food waste and feces in various animal enclosures. There are contemporaneous written reports of Dr. Cole and her live testimony.[421] I find her to be highly credible as to cleanliness with no motive or intent to present misleading photographs. Mr. Sellner did testify, Tr. 607, that the pens are cleaned daily, but the weight of the evidence is that the cleaning is not sufficient to meet the applicable standards.

The evidence supports the finding of the violations as alleged in Complaint ¶ 16(o).

11.Housekeeping (9 C.F.R. § 3.131(c)).[422]

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[418] Complaint ¶ 16(o).
[419] CX 69 at 8; CX 69a at 71-94; Tr. 345:12-346:10; 347:1-351:13.
[420] AB at 33.
[421] *See also* RX 25 at 8, which is the report of Mr. Anderson of IDALS as to dirty conditions at the Zoo as of the May 21, 2014 inspection.
[422] Complaint ¶ 16(p).

Dr. Cole explained the alleged noncompliance with the Standards for housekeeping cited in the inspection report, and described the contemporaneous photographs she took of multiple enclosures.[423] On brief,[424] Respondents cite their response to Complaint ¶ 16(o) and (j) as their response to ¶ 16(p).

I make the same finding as made with respect to those cited paragraphs. The evidence supports the finding of the violations as alleged in Complaint 116(p).

12. Pest control (9 C.F.R. § 3.13l (d)).[425]

Dr. Cole cited noncompliance with the Standards for pest control in the inspection report.[426]

On brief, Respondents state:[427]

> With regard to pest control allegations in paragraph 16(q), the Respondents believe they have addressed these allegations in previous responses to the allegations that they don't have pest control. They have pest control in spades. When the allegations get down to a single moth as an example of bad husbandry then obviously there would be no way for even the finest zoo that ever existed to meet this standard. See testimony of Dr. Cole that she saw a moth at the facility. (Tr. p. 323).

The alleged violations involve a failure of pest control because of an excessive number of flies in the housing for various animals and a build-up of bird feces on the shelters for bobcats and skunks. And moths are not listed among the pests that are of concern.[428] "Pest control in Spades" would not include a build-up of bird feces on bobcat and skunk enclosures.

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[423] CX 69 at 8; CX 69a at 77-94; Tr. 346:11-17; 347:1-351:13.
[424] AB at 33.
[425] Complaint ¶ 16(q).
[426] CX 69 at 8-9; CX 69a at 83-84; Tr. 346: 18-25; 349:11-18.
[427] AB at 33.
[428] *See* CX 69 at 9.

The weight of the evidence supports the finding that Respondents have failed to maintain an effective program of pest control. Thus, the violation allegations of Complaint ¶ 16(q) were proven.

F. August 5, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[429]

> 17. On or about August 5, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:
>
> a. Respondents failed to clean· enclosures housing two wolf hybrids as required. 9 C.F.R.§ 3.1(c)(3).
>
> b. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. 9 C.F.R. § 3.10.
>
> c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that respondents attributed to flies. 9 C.F.R. § 3.1 1(d).
>
> d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. 9 C.F.R. § 3.75(a).
>
> e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

[429] Complaint ¶ 17.

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. 9 C.F.R. § 3.84(d).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. 9 C.F.R. § 3.127(c).

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. 9 C.F.R. § 3.13 l(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. C.F.R. § 3.131(d).

Dr. Shaver and Dr. Cole conducted a team inspection on this date, and documented their observations in a contemporaneous inspection report, as

well as in numerous photographs.[430]

1. Paragraph 17(a).

On brief,[431] Respondents contend:

> Paragraph 17(a) is denied because the Sellers do a thorough job of spot cleaning each day as evidenced by their testimony and by the report of Douglas Anderson who stated there was no evidence of conditions that would cause adverse health or suffering to the animals at the facility. (RXT-25, p. 9).

As discussed previously as to other violation allegations, the daily spot cleaning to which the Sellners testified is apparently inadequate to meet the applicable standards as the evidenced by the results, as demonstrated by the evidence presented by APHIS. As also discussed previously I weigh USDA inspectors' observations and views more heavily than those of Mr. Anderson, who does not have their veterinary training and expertise or expertise and experience as to the USDA requirements. Mr. Anderson, RX 25 at 9, recognizes that "inadequacies" and "issues" were found during the USDA inspection, he simply opines that conditions did not exist "that would cause adverse health or suffering. . . ."

This evidence supports the finding of the violations as alleged in Complaint ¶ 17(a).

2. Paragraph 17(b).

On brief,[432] Respondents contend:

> With regard to paragraph 17(b), the Respondents deny that this was a violation and again their testimony that water was supplied fresh each day is confirmed by the statement of Douglas Anderson in his report that the water

[430] CX 71; CX 71a; Tr. 82:20-107:16 (Dr. Shaver); 244:1-25; 245:1-246:23 (Dr. Cole).
[431] AB at 33-34.
[432] AB at 34.

> was clear indicating fresh water. (RXT- 25, p. 9). The issue with the bowls being stained or exhibiting a green tinge has been addressed earlier.

The allegation is that Respondents "failed to provide potable water." Mr. Anderson indicates that apparently clean water, because it is "for the most part . . . clear" is being put into "less-than-clean" receptacles, which does not mean potable water was being provided. CX 71 at 2 cites a "build-up of green material, dirt and/or debris," not simply algae. For the reasons cited previously, I give greater weight to the USDA inspectors than to Mr. Anderson.

The weight of the evidence supports the finding of this Complaint ¶ 17(b) violation.

3. Paragraph 17(c).

On brief,[433] Respondents contend:

> Paragraph 17(c) is denied for a number of reasons including the fact that no photograph of the "excessive flies" either in the dog's enclosure or in the wolf hybrid enclosure (see CX-71(a)) even though the inspector was taking photographs of other areas with flies. In addition, the efforts taken by the Sellners to deal with flies has been testified to by numerous witnesses and Dr. Pries testified that flies were not bad at the facility. (Tr. pp. 474-475).

That photographs were taken of flies in one area but not another does not tend to show there were no flies in the area for which there are no photographs. Dr. Pries testified that there were house flies at the facility, but that there were not excessive flies. As to the time of specific inspections, I give greater weight to the opinions of the USDA inspectors as to whether there were excessive flies than the generalized testimony of Dr. Pries.

The weight of the evidence supports the finding of the alleged

[433] *Id.*

Complaint ¶ 17(c) violation.

4. Paragraph 17(d).

On brief,[434] Respondents contend:

> With regard to paragraph 17(d) the Respondents deny that the two broken boards were a health hazard or danger to the baboons. CX- 71(a), pp. 18 and 19 show the boards which do not have sharp edges an. d the boards have a number of massive boulders in front of them to prevent any movement or further breakage of the boards.

See CX 71 at 2 for the report on this alleged violation.

"Massive boulders" is an exaggeration. The photos show large rocks. The report states issues of structural soundness and that the facility should be kept in good repair. The evidence shows a lack of structural soundness and a lack of good repair. The evidence supports a finding of the alleged Complaint ¶ 17(d) violation.

5. Paragraph 17(e).

Respondents admitted this alleged violation.

6. Paragraph 17(f).

Respondents contend:[435]

> Paragraph 17(t) with regard to "pests" is denied based upon the testimony of the witnesses and the failure of the USDA to establish any meaningful standard other than a purely subjective approach to this matter.

See CX 71 at 3. Excessive flies have been a recurring issue.

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[434] *Id.*
[435] AB at 35.

I find that the USDA standard on elimination of pests is not purely subjective and the weight of the evidence is that Respondents have ongoing problems with excessive flies and conditions that could prompt problems with other pests. APHIS proved the allegations of Complaint ¶ 17(t).

7. Paragraph 17(g).

Respondents contend:[436]

> Paragraph 17(g) is admitted to the extent that the fence is curled up but it is denied to the extent that the description is of sharp points on the curled part. Closely examining the photographs supplied there is no indication of sharp points in these photographs. (See CX-71(a), pp. 25 and 26).

The evidence supports a finding of a violation as stated. The points at issue are at the bottom of a chain link fence. They are not covered. There is no evidence that they have been filed off in order to be smooth or anything of that nature. In the normal course of things, they would be expected to be sharp and there is no evidence other than non-definitive photographs to the contrary.

APHIS proved the allegations of Complaint ¶ 17(g).

8. Paragraph 17(h).

Respondents contend:[437]

> Paragraph 17(h) is denied because drainage was not the issue-it appears according to the photographs that the pipe supplying fresh water to the hog sipper had been recently used by the animals with some water surrounding the concrete pads the hogs would step on to reach the hog sipper. (See CX-71(a), pp. 20 and 21).

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[436] *Id.*
[437] AB at 35.

The allegation is supported by the weight of the evidence. The photographs show standing water. There is no allegation of a malfunctioning watering pipe. Drainage is necessary to remove water from whatever source it collects. APHIS proved the allegations of Complaint ¶ 17(h).

9. Paragraph 17(i).

Respondents contend:[438]

> Paragraph 17(i) is denied because fresh water was always available to the animals (through automatic waterers). The staining of the bowls was the only issue and there is no indication (testing or otherwise) that the water was not potable. See report of Douglas Anderson, (RXT-25, p. 9).

See CX 71 at 4, which does not refer exclusively to algae. Mr. Douglas's report does not say the water was potable. It says the water was "for the most part" clear, "indicating fresh water being put into less-than-clean receptacles." The report also states it is "very easy for water bowls to turn green, especially in the sun." But, the latter is not a statement that algae is a water bowl is not a problem, but rather may be a reason for zoo personnel to check on and clean out the bowls frequently. Less-than-clean receptacles are not evidence of potable water, regardless of the quality of the water before it was poured into them. The fact that fresh water would be available through automatic waterers, cannot justify providing the animals with unsatisfactory water bowls. The record indicates that unlike the situation described in CX 26 at 5, there was more than a mere tinge of green in the water bowls at issue here. In this instance the presence of automatic waters does not obviate the alleged violation.

The weight of the evidence supports the finding of the alleged violation in Complaint ¶ 17(i).

10.Paragraph 170(j).

[438] *Id.*

Respondents contend:[439]

> Paragraph 17(j) is denied because the Sellners testified that they cleaned in the morning and afternoon and always did spot cleaning every day. The use of the term "as required" is vague and misleading according to the standards referred to by the inspectors who testified they were not looking for a pristine environment but did not want excessive problems either.

As noted elsewhere, the cleaning the Sellners did was inadequate whatever the frequency.

The alleged violation is not that cleaning was too infrequent, but that "Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required." "As required" is not vague. There is no basis whatsoever presented for finding that it is "misleading." The cleaning that is required is that sufficient to remove excreta and debris from the stated primary enclosures.

The weight of the evidence supports the finding of the alleged violation of Complaint ¶ 17(j).

11. Paragraph 17(k).

Respondents contend:[440]

> Paragraph 17(k) with regard to the "excessive amount of flies" is denied by the Respondents and they incorporate their responses and evidence cited earlier.

As has been found with respect to similar alleged violations, the evidence supports the finding that, as evidenced by an excessive amount of flies, Respondents failed to establish an effective program of pest control. The weight of the evidence supports the finding of the alleged violation of Complaint 17(k).

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[439] *Id.*
[440] AB at 35.

G. October 7, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[441]

> 18. On or about October 7, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:
>
> a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. 9 C.F.R. § 3.125(a).
>
> b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. 9 C.F.R. § 3.125(a).
>
> c. Respondents failed to provide thirty sheep with wholesome food, and specifically, respondents maintained a food dispenser for public use that contained old, caked, and discolored food. 9 C.F.R. § 3.129(a).

Dr. Shaver and Dr. Cole conducted a team inspection on this date and documented their observations in a contemporaneous inspection report, CX 72, as well as in numerous photographs.[442]

[441] This is the first of the two paragraphs numbered 18 in the Complaint.
[442] CX 72; CX 72a; Tr. 248:15-249:3; 249:4-250:5 (Dr. Cole).

1. Structural Strength (9 C.F.R. § 3.125(a)).[443]

Respondents admitted the alleged violations in ¶¶ 18(a) and 18(b) of the Complaint, but as to 18a also state the enclosures were later repaired.[444] As discussed elsewhere herein, later repairs do not obviate the fact that there were violations-in these instances admitted violations. Complaint first ¶¶ 18(a) and l 8(b) were, thus, admitted by Respondents.

2. Feeding (9 C.F.R. § 3.129(a)).[445]

Dr. Cole explained the noncompliance with the Standards for feeding cited in the inspection report, and described the contemporaneous photographs she took of the food provided by Respondents.[446] Respondents contend APHIS did not prove a violation because "[t]he testimony of Dr. Shaver was that she couldn't tell if the food was "molding" or if it was just a sticking problem. (Tr. p. 116)." However, the alleged violation is not that the food at issue was "molding" but that it "contained old, caked, and discolored food." Dr. Shaver's testimony at Tr. 116 and the other cited evidence presented by APHIS carries its burden of proof as to a finding of the violations as alleged in the Complaint first ¶ 18(c), and I so find.

H. March 4, 2015

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[447]

> 18. On or about March 4, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:
>
> a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, the.re was waste build-up on the wall above the perch, in a crack

[443] Complaint first ¶¶ 18(a) and (b).
[444] AB at 36.
[445] Complaint first ¶ 18(c).
[446] CX 72 at 2; CX 72a at 2-4; Tr. 116:11-117:6 (Dr. Shaver).
[447] This is the second of the two paragraphs numbered 18 in the Complaint.

between the wall and the perch, and in holes within the perch. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. 9 C.F.R. § 3.13l(a).

Respondents admitted the alleged second ¶ 18(a) violation of 9 C.F.R. § 3.75(c)(3).[448] Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of the degu enclosure.[449]

As to Complaint second ¶ 18(b), Respondents contend "[t]he photographs (CX-75(A)) which supposedly support this contention are of such poor quality that they don't show anything that would support this contention other than the fact that these degus do have bedding in their enclosure."[450] But the inspection report and Dr. Cole's testimony are sufficient to carry APHIS's burden of proof, regardless of any alleged poor quality of photographs. This evidence supports the finding of the violations as alleged in Complaint, second ¶ 18(b).

I. May 27, 2015

The Complaint alleges that Respondents failed to meet the minimum standards as follows:[451]

19. On or about October 7, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. The "reptile" room, housing multiple non-human primates, was in disrepair, and specifically, there

448 Answer ¶ 18(a); AB at 36.
449 CX 75 at 1; CX 75a; Tr. 353:10-355:14.
450 AB at 36.
451 Complaint ¶ 19.

were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals' primary enclosures. 9 C.F.R. § 3.75(a).

b. The "reptile" room, housing multiple non-human primates, was not kept free of debris, discarded materials and clutter. 9 C.F.R. § 3.75(b).

c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. 9 C.F.R. §§ 3.75(c)(2), 3.75(c)(3).

d. Respondents failed to provide adequate ventilation in the building housing two bush babies. 9 C.F.R. § 3.76(b).

e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed nonhuman primate (Obi), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).

f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on the overhead fixtures and electrical outlets, and the presence of rodent feces. 9 C.F.R. § 3.84(c).

g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. 9 C.F.R. § 3.84(d).

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous,

fennec foxes, and African crested porcupines. 9 C.F.R. § 3.126(b).

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. 9 C.F.R. § 3.127(b).

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food. 9 C.F.R. § 3.127(c).

k. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the "reptile" room. 9 C.F.R. § 3.131(d).

Dr. Cole testified extensively about her inspection on May 27, 2015, the inspection report that she wrote, and the many contemporaneous

photographs that she took of the deficiencies that she found.[452]

1. Complaint ¶ 19(a).

As to Complaint ¶ 19(a), Respondents state:

> [T]he "spongy material" referred to in this section apparently was just the normal texturing of this type of ceiling tile. See testimony of Dr. Cole who stated she thought it was part of the ceiling tile-just like the courtroom this hearing took place in. (Tr. p. 359, see photograph CX-76(a) p. l).

But the allegation in Complaint ¶ 19(a) is of "soiled and damaged ceiling tiles, with exposed spongy material," and the Inspection Report, CX 76 at 1, describes white tiles with "light brown stains throughout their surfaces" and states several had "holes into the tile material, exposing spongy type material underneath the surface" and "blackened" crevices. The fact that the spongy material was part of the tile—the inside part, which should remain inside the tile, and not exposed—supports the allegation, and the other evidence presented by APHIS is consistent and likewise supports the allegations.

This evidence supports the finding of the violations as alleged in Complaint ¶ 19(a).

2. Complaint ¶ 19(b).

Respondents contend:[453]

> Paragraph 19(b) is denied and it is further stated that the reference to discarded materials and clutter has nothing to do with the health of the animals. What Dr. Cole claims is debris includes plastic buckets, portable radiator, a weed wacker, a dustpan and other objects that clearly are not "debris" or discarded. (See CX-76(A), pp. 1-14). Just

[452] CX 76; Tr. 356:19-383:2.
[453] AB at 37.

> for good measure, some of the photographs are of the same objects—sometimes in extreme close-up.

See CX 76 at 1. This report clearly states a build-up of dirt, dust, grime, and/or debris other than discarded materials and clutter. It is not clear that the report characterizes "plastic buckets, portable radiator, a weed wacker, [and] a dustpan" as debris. Those items appear to be referred to as "an accumulation of miscellaneous objects" stored in the education house that were not necessary to activities there. Respondents may think "discarded materials and clutter has nothing to do with the health of the animals." But as stated in the allegation of violation, they are prohibited by 9 C.F.R. § 3.75(b).

The evidence presented by Complaint proves the violations as alleged in Complaint ¶ 19(b).

3. Complaint ¶ 19(c).

Respondents contend:[454]

> Paragraph 19(c) is denied and it is further stated that the primates can make the kind of "mess" in the walkways within 12 to 24 hours according to the uncontested testimony of Mrs. Sellner who further stated that she would clean this area with a leaf blower daily.

See CX 76 at 1-2. The report does not limit the violation allegation to anything that could or did accumulate within twelve to twenty-four hours or that could possibly be cleaned with a leaf blower.

The weight of the evidence supports the finding of the violation as alleged in Complaint ¶ 19(c).

4. Complaint ¶¶ 19(d) and (h).

Respondents contend:[455]

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[454] AB at 37.
[455] *Id.*

> Paragraph 19(d) is denied and it is further stated that the "foul odor" was the smell of an African porcupine. Mrs. Sellner testified that the odor of this animal is unforgettable and the smell was not ammonia. See testimony of (P. Sellner, Tr. pp. 654-655). The inspector stated that they had no way to measure ammonia in the air and she did not know if African porcupines have a distinct smell. (Dr. Cooper, Tr. p 448).

As to Complaint ¶ 19(h), Respondents refer back to their discussion of ¶ 19(d).[456] *See* CX 76 at 2-3. Consistent with the alleged violation, the problem identified was a lack of ventilation as evidenced in part by strong foul odors, an apt description of the odor produced by an African Porcupine based upon Ms. Sellner's testimony. A better identification of the source of the foul odor does not obviate the violation of the insufficient ventilation.

APHIS proved the alleged Complaint ¶¶ 19(d) and (h) violations.

5. Complaint ¶ 19(e).

Respondents contend:[457]

> Paragraph 19(e) is denied and it is further stated that Obi was receiving food enrichment (as the inspection report indicates CX- 76, p. 2) and Obi is specifically mentioned in RXT-3 "Primate Enrichment Program" p. 2. He had certain toys to entertain himself and was a juvenile at the time of this report.

See CX 76 at 2. Obi was observed by the USDA inspectors to exhibit abnormal behaviors associated with psychological distress. The report states that documentation provided shows that all primates receive some food enrichment, but there was no documentation that Obi received and special food enrichment and "[t]he licensee confirmed that 'Obi' had not

[456] AB at 38.
[457] *Id.* at 37.

received any special attention or enrichment due to the abnormal behaviors." It further states that the "current environmental enhancement plan does not specifically address the psychological distress associated with the abnormal behaviors exhibited by 'Obi.'" The RX 3 "Primate Enrichment Program," p. 2, does not indicate otherwise.

APHIS's evidence demonstrated the alleged Complaint ¶ 19(e) violation. The evidence cited by Respondents is not to the contrary. The evidence shows an animal in distress, not receiving appropriate treatment.

6. Complaint ¶ 19(f).

Respondents contend:[458]

> Paragraph 19(t) is denied. The USDA, since it did not find flies, is now resorting to "fly specks" or areas where flies may have landed to attempt to show noncompliance. There are rodents on the farm and facility but as was indicated earlier, there is a rodent extermination program in effect.

The inspectors did find flies.[459] The allegation in ¶ 19(t) is a failure to maintain cleanliness as evidenced by such things as dirt, dust, and/or debris, and by fly speaks "on the overhead fixtures and electrical outlets, and the presence of rodent feces." The issue here is not any rodent, or fly, extermination program but a lack of cleanliness, which the evidence demonstrates was the case.

7. Complaint ¶ 19(g).

Respondents contend:[460]

> Paragraph 19(g) is denied for all the reasons set forth herein earlier and for the further reason that the citation contradicts the allegation that an effective fly control

[458] *Id.* at 38.
[459] *See* CX 76 at 3.
[460] AB at 38.

> program was not effective when it talks about the large number of "dead flies" in the building housing the baboons. (See CX-76, p. 3).

The evidence (*see* CX 76 at 3) is that there was an excessive number of alive and dead flies at the building housing the baboons. The report states that the licensee stated she had recently sprayed for flies and had not yet cleaned up the dead ones. Spraying for flies and having numerous flies does not demonstrate an effective pest control program, and in fact tends to prove the opposite. The alleged allegation of Complaint ¶ 19(g) was demonstrated by a preponderance of the evidence.

8. Complaint ¶ 19(i).

Respondents admit.[461]

9. Complaint ¶ 19(j).

Respondents deny on the ground that there had been substantial rains before the inspection and the ground was draining but not dry at the time of the inspection.[462]

The allegation is that:

> [T]he enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food."

The response that it had rained a lot recently and the ground was draining but not dry is an insufficient response to the above allegation that is demonstrated by record evidence. As CX 76 at 4 states, a suitable method must be provided to rapidly eliminate excess water from within the enclosures. Drainage this slow was insufficient. The evidence

[461] AB at 38.
[462] *Id.*

demonstrates the alleged Complaint ¶ 19(j) violation.

10. Complaint ¶ 19(k).

Respondents state this allegation that they failed to kept animal enclosures clean, is denied for the reasons set forth in the testimony of the Sellners but provide no citation to that testimony or description of it.[463]

I assume that the referenced testimony is that the Sellners clean every day. As discussed elsewhere herein, "cleaning" every day is insufficient if that cleaning does not result in sufficiently clean enclosures and the evidence is that the enclosures were not sufficiently clean.[464]

The evidence demonstrates the alleged Complaint ¶ 9(k) violation.

11. Complaint ¶ 19(l).

Respondents deny this allegation based on the testimony set forth above and the previous arguments made herein.[465] For reasons similar to those stated elsewhere, I find that the allegations are supported by the record.[466] The record evidence shows excessive insects and insufficient efforts to control for the conditions that cause problems with pests.

The evidence demonstrates the alleged Complaint ¶ 19(1) violation.

V. Respondents' Overarching Contentions

A. Mr. and Mrs. Sellner's Undisputed Hard Work and Lack of Intent to Harm Animals Is Not a Defense to AWA Violations, and an Insufficient Workforce to Meet AWA Requirements at the Zoo, as Shown in the Record, Is an AWA Violation.

The Complaint does not allege, APHIS did not contend, and I do not find that Respondents do not work hard or that they have ill motives

[463] *Id.*
[464] *See* CX 76 at 4.
[465] AB at 38.
[466] *See* CX 76 at 4.

towards, or lack affection for, the animals in their custody.[467] Respondents complain that APHIS "condemn[s] them as scofflaws. . . ." A scofflaw is someone who flouts the law,[468] and the record does not show that APHIS has accused Respondents of intentionally openly disregarding the law. Respondents have been demonstrated to have willfully violated the AWA, which is something different.

The record is undisputed that Mr. and Mrs. Sellner work hard. Among other things, they operate a dairy farm adjacent to the zoo. But a demonstrated good, even extraordinary, work ethic is not a defense to AWA violations.[469]

The zoo has no paid employees other than the Sellners.[470] Mr. Anderson, the IDALS Compliance Investigator, June 24, 2014 report[471] refers to the "Herculean task of caring for the numerous animals" and states "I agree with the federal crew's assessment that there is a lack of help that allows this facility to lapse into disrepair and uncleanliness."

I conclude the record, given the numerous and repeated cited deficiencies, demonstrates by a preponderance of the evidence that the size of the facility and number of animals maintained are beyond the ability of the Sellners to manage alone (even with "volunteers").[472] The AWA

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[467] Respondents' Brief at 3-4 (Mr. and Mrs. Sellner had "the animals' best interests at heart," APHIS "condemn[s] them as scofflaws," Mrs. Sellner "cares about the animals and works hard," Mr. Sellner construct[ed] habitats" and "the animals are all named.").

[468] *Scofflaw Definition*, OXFORDDICTIONARIES.COM, https://en.oxforddictionaries.com/definition/scofflaw (last visited May 2, 2018).

[469] *See* Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1098-99 (U.S.D.A. 2007) (citing 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).

[470] Tr. 628:96-629:3 (Mr. Sellner).

[471] RX 25 at 8. It is noteworthy that Respondents cite Mr. Anderson's opinions expressed in this report for various purposes. *See, e.g.*, AB at 31. He does not have the training and expertise as to animal husbandry and USDA regulation standards that the USDA inspectors do, but his observations and opinions are entitled to some weight, especially where not contradicted by those USDA inspectors.

[472] *See* AB at 9. Respondents in addressing Complaint ¶ 16(b) state "the APHIS inspectors have never bothered to go to the records that would show the number

requires that exhibitors employ a sufficient number of sufficiently trained persons to adequately care for the animals.[473] As noted in footnote 22, Respondents increased the number of animals at the facility from 2013 to 2015 from 160 to 193.[474] Given that Respondents were failing APHIS inspections, often for such violations as lack of cleanliness and maintenance, the acquisition of additional animals without additional workforce, is unreasonable and not a step in the direction of meeting USDA requirements.

As APHIS points out,[475] the current case has similarities with *Mt. Wachusett Animal Forest Corp.*, 44 Agric. Dec. 158, 160-61 (U.S.D.A. 1984),[476] which found:

> [A] sad situation-the two ladies who are the owners are obviously animal lovers and would not intentionally do anything to harm the animals or the public. The bona fides of their intentions are not questioned. The evidence adduced at the hearing tends to indicate that they may have had a different approach to zoo keeping than is routinely accepted and recognized.
> * * *
> The amount of work and the enormity of the task, plus lack of trained personnel, and funds, have all been contributing factors in the areas of "deficiencies" found by the inspectors. The safety and well being of the animals, the owners themselves, and the public have all been taken into consideration in ordering a revocation of

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of volunteers the Zoo has and provide some objective measure that this number is not sufficient." But neither did Respondents attempt to show through such records that the number of volunteers was somehow objectively sufficient, when APHIS's evidence was that the zoo was insufficiently maintained.

[473] *See* 9 C.F.R. § 3.132; Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 156 (U.S.D.A. 2013); Zoocats, Inc., 68 Agric. Dec. 737, 747 (U.S.D.A. 2009); Parr, 59 Agric. Dec. 601, 618-19 (U.S.D.A. 2000); Shepherd, 57 Agric. Dec. 242, 287 (U.S.D.A. 1998).

[474] Answer ¶ 5; CX 1; CX 14.

[475] AB at 5.

[476] This is an unappealed ALJ decision and therefore not cannot be relied upon as precedent.

> the respondents' license.
> * * *
> At the oral hearing, the complainant recognized that " * * * this case involves two people who sincerely love exotic animals but who, quite simply and quite sadly, are not capable of maintaining a zoo in compliance with the Animal Welfare Act." (Tr. 14).

That Respondents did not intend to harm their animals does not preclude the finding that they violated the AWA and the Regulations.[477] The intent to cause harm is not necessary for an act to be willful under the AWA.[478] A respondent's affection for animals has been held to be irrelevant.[479] I find that Respondents' affection and good will toward their animals does not excuse them from AWA violations.

B. Respondents' Contentions that Public Complaints Were the Source of the APHIS Complaint Herein

Respondents contend that APHIS instituted the current proceeding because it "has been compelled by outside complaints filed by individuals and/or entities with their own agenda."[480] Given the ADLF's attempted intervention in this case, which both APHIS and Respondents opposed,[481] there is no question that Respondents have attracted the attention of outsiders. However, there is no evidence that such outsiders did or could have any improper influence on APHIS's bringing of the complaint herein. The record is that APHIS has long had legitimate concerns about these Respondent licensees and pursued those concerns as a part of its role in enforcing AWA. Given the record in this case, these concerns were certainly not unexpected without being affected by any undue influence from outsiders.

The record is that APHIS was not "compelled" by anyone outside of APHIS to do anything. Among other things, APHIS witness Dr. Gibbens

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[477] *See* Lang, 57 Agric. Dec. 59, 81-82 (U.S.D.A. 1998).
[478] *See* Davenport, 57 Agric. Dec. 189, 219 (U.S.D.A. 1998).
[479] *See* Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1100 (U.S.D.A. 2007).
[480] AB at 2.
[481] Nothing ADLF stated in its filings has been considered in this Decision.

explained that APHIS issued two warning letters, entered into two stipulated settlements, and suspended Respondents' AWA license (84-C-0084) before commencing this proceeding.[482] He further explained the steps that lead to the herein Complaint in Tr. 527:12-529:15. As Dr. Gibbens testified, the Complaint was the inexorable next step, given Respondents' repeated and continuing noncompliance after APHIS's previous enforcement efforts.[483]

Respondents suggested that public complaints alone prompted more frequent inspections of Respondents' facility.[484] Dr. Gibbens explained that that the increase in the number of compliance inspections was also because of the "direct non-compliances" that APHIS inspectors observed and documented.[485] Mr. Anderson of IDALS, in fact, recommended "continuing the frequent joint inspections" as a way of addressing the "numerous housekeeping and maintenance issues."[486] I do not understand Respondents to argue that IDALS has been influenced to hold inspections based upon public complaints alone.

As to Respondents' contentions that APHIS inspectors have "a general attitude" that "they were going to find matters to cite even when there is no evidence of a violation or questionable evidence,"[487] Respondents presented and cited no evidence in support. Such as claim is undercut by (1) the documentary, photographic, and testimonial evidence in this case, and (2) the fact the APHIS inspectors have on at least a few occasions, found no noncompliances at Respondents' facility.[488] The record does not

[482] Tr. 521:15-527:11; CX 63-66.
[483] Tr. 727:15- 728:1.
[484] AB at 39.
[485] Tr., 727:15-728:1; 545:22-546:10.
[486] RX 25 at 8.
[487] AB at 38-39.
[488] *See* CX 62 (focused inspection on January 22, 2014); CX 70 (focused inspection on May 28, 2014); CX 73-73a (focused inspection on November 6, 2014); Respondents' Brief at 11 (stating that four inspections between 2008 and 2014 "show no noncompliances," citing RX 27). The last page of RX 27 appears to be page 7 of an inspection report dated September 27, 2013, signed by Dr. Heather Cole. RX 27 at 4. It is not from an inspection report of an inspection where no noncompliances were found. It is from the inspection report for an inspection conducted on September 25, 2013. The full inspection report documents multiple deficiencies and is in evidence. CX 39.

support findings that Respondents were treated in an unfair or unduly discriminatory manner. As Dr. Gibbens testified:[489] "[A] facility with direct noncompliance and a lot of non-compliances is in our highest inspection frequency in the risk-based inspection system." The record provides no support for a contention that increase frequency of inspections of Respondents was unwarranted or that those inspections were carried out with undue fervor.

C. Respondents' Contentions Concerning Subsequent Correction of Noncompliance

It is well-settled subsequent corrections do not obviate violations.[490]

> Tri-State and Mr. Candy's corrections of their violations do not eliminate the fact that the violations occurred, and the Administrator is not barred from instituting a proceeding for violations of the Animal Welfare Act and the Regulations after the violations have been corrected.

Dr. Gibbens explained that a licensee's inability to identify and correct problems, without waiting for APHIS to point them out, is also an

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Respondents also challenge Dr. Gibbens's testimony that "the facility has been out of compliance since the early 2000s" as "demonstrably not true." Respondents' Brief at 11. Although Dr. Gibbens was not asked what he meant, his appears to be a reasonable opinion in light of APHIS's having documented repeated noncompliance over many inspections over many years. *See* Shepherd, 57 Agric. Dec. 242, 287 (U.S.D.A. 1998) ("I disagree with the ALJ's conclusion in his sanction discussion that the record does not support APHIS's determination that Respondent is a 'habitual violator') . . . Respondent has committed repeated violations over many inspections; therefore, the record supports a determination that Respondent is a 'habitual violator.'") (internal quotation marks omitted).

[489] Tr. 546.

[490] Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (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).

improper drain of APHIS resources:[491]

> Q With respect to corrections following citations by the Animal and Plant Health Inspection Service, how does a regular practice of correcting only after APHIS has cited a facility play into the agency's ability to enforce the Animal Welfare Act?
>
> A It greatly hinders our ability to enforce the Animal Welfare Act. We show up to a facility unannounced, and you can tell by the number of facilities versus the number of inspections that it's between one and two inspections a year, so one or two inspections a year we show up unannounced and we see what we see. It's a snapshot of what that facility looks like on any given day, and so for 364 days out of the year, 363—sorry, my math was off—we're not there telling them what they need to fix, and so, if they're not proactively assessing their own facilities, maintaining compliance, then 1 they're going to be out of compliance a good bit of the time.
>
> Q And what is the effect of having facilities, licensed facilities that repeat the same kinds of violations over time, and how does that affect the program?
>
> A Well, we have the resources to do on average one to two inspections of a facility per year. Now the last two years we have averaged six inspections of the Sellner[s'] facility, so this uses up a lot of our resources. We have limited resources to enforce the federal law at 8,000 facilities, so it takes our resources away from other inspections, other facilities. A facility like the Sellner[s'] that should operate essentially in compliance would normally be inspected once or twice a year.

For the reasons cited by Dr. Gibbens, Mr. Anderson's, of IDALS, recommendation that ongoing failures by Respondents' to be in

[491] Tr. 726:11- 727:14.

compliance with USDA requirements—which Mr. Anderson expected to continue, at least from time to time, at least unless and until Respondents obtained more workers to help clean and maintain the facility—of "continuing the frequent joint inspections"[492] is untenable. It is simply not the role of APHIS inspectors, and not within APHIS's resources, to ensure that a licensee is in compliance through frequent inspections and identification to it of violations and how to correct them. As Dr. Gibbens testified, APHIS simply does not have the resources to operate under this model.

Respondents argue[493] that "[t]he fact is that the Sellners addressed the concerns of the USDA inspectors" and "the Court must look at this with regard to the good faith of the Sellners." This a mark in the Sellners' favor. But the facts show that objectively they did not run their facility in a way would be expected to keep them in compliance with AWA requirements.

D. Respondents' Contentions that the Regulations and Standards Are Vague and Impermissibly Subjective

Respondents contend that the Regulations and Standards are impermissibly vague and subjective.[494]

Respondents apparently conflate the Regulations with the Standards. The Regulations are at 9 C.F.R. Part 2; the species-specific Standards are at 9 C.F.R. Part 3.

Respondents appear to focus mainly on one of the Regulations governing handling, 9 C.F.R. § 2.131(b)(l), which requires all animals to be handled "as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort."[495] (The Complaint in this case alleges three handling violations. Two of them are violations of Section 2.131(b)(1).)[496] According to Respondents, Section 2.131(b)(1), and specifically the phrase "as . . . carefully as possible," is impermissibly

[492] RX 25 at 8.
[493] AB at 39.
[494] *Id.* at 5-11.
[495] *Id.* at 5-10.
[496] Complaint ¶ 11.

vague and its enforcement violates due process.[497]

This argument has been raised and rejected by the Judicial Officer.[498]

In any event, requirements that areas be kept clean and clutter free, that fences and other facilities dividing areas be kept in good repair, and that animals receive sufficient potable water, shade, and recreation are not obscure concepts requiring extensive definitions before requirements are rendered not impermissibly vague. Yet Respondents repeatedly failed to meet such fundamental requirements of protecting animals and the public. The record shows that Respondents did not fail to meet these requirements because they did not understand them. Respondents' extensive interactions with APHIS would have been an education in AWA requirements by itself, although licensees are required to develop an understanding of AWA requirements apart from interactions with APHIS.

The requirements were not met because Respondents simply did not do what was necessary to meet them, including the hiring of sufficient appropriate staff. But whatever the reason, the requirements were violated.

E. Respondents' Contentions that APHIS Demanded Perfection but Did Not Offer Advice

Respondents assert that APHIS expected their facilities to be perfect but did not offer meaningful instructions or advice.[499]

First, the documentary, photographic, video, and testimonial evidence introduced in this case proves almost all of the violations alleged in the Complaint. In no case were Respondents cited for failure to achieve "perfection." Dr. Gibbens addressed this contention, stating "the standards of the Animal Welfare Act do not represent nor do we expect perfection. These are the minimum standards that must be met by regulated facilities in order to be in compliance."[500] The Regulations and Standards are designed to establish minimum requirements "for humane handling, care,

[497] AB at 9.
[498] Greenly, 72 Agric. Dec. 603, 618-19 (U.S.D.A. 2013), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).
[499] AB at 2-3, 5.
[500] Tr. 520:1-521:9.

treatment, and transportation," as mandated by Congress.[501] Compliance with minimum standards is required at all times,[502] but perfection is not required by the Regulations and Standards, and such a requirement of perfection was not required by the inspections or by APHIS in bringing this Complaint.[503]

Moreover, the evidentiary record shows the agency and its inspectors, in fact, continually sought to educate and inform Respondents so that they would achieve compliance with the minimum standards. The inspection reports that the inspectors prepared were detailed and explicit about the problems found[504] The warning letters and stipulated settlements likewise fully described the compliance problems.[505] APHIS responded to Respondents' inspection appeals and requests in writing.[506]

Dr. Gibbens also described the multiple resources available to Respondents.[507]

It is settled that it is not APHIS's responsibility to act as a quality control or compliance consultant for licensees, or to provide step-by-step instructions about animal husbandry.[508]

F. Respondents' Contentions that While a Fine May Be Appropriate, Their License Should Not Be Revoked

As remedies in this case, APHIS seeks an order that respondents cease and desist from future violations, revoking AWA license 84-C-0084, and assessing a joint and several civil penalty of $10,000.[509]

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[501] 7 U.S.C. §§ 2142, 2143.
[502] Volpe Vito, Inc., 56 Agric. Dec. 269, 272-73 (U.S.D.A. 1997).
[503] *See* CX 18; Tr. 521:2-9.
[504] *See* CX 2.; CX 26; CX 39; CX 53; CX 59; CX 67-69; CX 71; CX 72; CX 74; CX 75; CX 76.
[505] *See* CX 63-66.
[506] *See* CX 15-18; CX 38; CX 50; CX 58; CX 77.
[507] Tr. 543:24-544:15; 733:732:18- 734:9 (describing APHIS's online publications, including fact sheets, tech notes, inspection guides, and policies).
[508] *See* Davenport, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998).
[509] APHIS Proposed Findings of Fact and Conclusions at 37; RB at 2.

Respondents contend:[510] "A fine in some amount may be warranted, but the license of the Sellners who have been exhibiting for close to 25 years now should not be revoked based upon the evidence presented to the Court in this proceeding."

Penalties for AWA violations are governed by 7 U.S.C. § 2149(b). $10,000 is the maximum civil monetary penalty set for any single violation of the AWA. That statutory provision provides that

> 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.[511]

Although the violations demonstrated by the record are not the most egregious possible, and do not demonstrate any ill-feeling toward or lack of emotional caring about the animals involved or about the safety of the public, the violations have been substantial in number and recurring in the sense of new violations being found in frequent new inspections rather than the exact same uncorrected violations being found inspection to inspection. The record shows a facility that is not at all consistently meeting the minimum AWA requirements, even though it has received significant attention from APHIS inspectors. Moreover, Respondents have not obtained more help in order to meet the USDA requirements, even as they have continued to obtain additional animals. A fine of $10,000 is hardly excessive under the AWA standards and more than a fine is warranted in these circumstances. Revocation is necessary under the circumstances shown in this record.

Findings of Fact

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

2. Cricket Hollow Zoo, Inc. [CHZI] is an Iowa corporation whose

[510] AB at 40.
[511] 7 U.S.C. § 2149(b).

agent for service of process is Respondent Pamela J. Sellner, 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the Complaint, CHZI was an exhibitor, as that term is defined in the AWA and the Regulations, did not hold an AWA license and, together with the other Respondents, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 1.

3. Pamela J. Sellner is an individual doing business as Cricket Hollow Zoo, and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the Complaint, Mrs. Sellner was an exhibitor as that term is defined in the AWA and the Regulations and, together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 2.

4. Thomas J. Sellner is an individual doing business as Cricket Hollow Zoo, and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, Mr. Sellner was an exhibitor as that term is defined in the AWA and the Regulations and, together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 3.

5. Pamela J. Sellner Tom J. Sellner [Sellner Partnership] is an Iowa general partnership whose partners are Mr. Sellner and Mrs. Sellner and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, the Sellner Partnership was an exhibitor, as that term is defined in the AWA and the Regulations, and held AWA license 42-C-0084, and together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 4; CX1, CX 14.

6. In 2013, the Sellner Partnership represented to APHIS that it had custody of 160 animals; in 2014, the Sellner Partnership represented to APHIS that it had custody of 170 animals; and in 2015, the Sellner Partnership represented to APHIS that it had custody of 193 animals. Answer ¶ 5; CX1, CX 14.

7. On December 15, 2004, and May 26, 2011, APHIS sent Official Warnings to Mrs. Sellner, Mr. Sellner, and the Sellner Partnership, advising them of multiple instances of noncompliance with the Regulations and the Standards. Answer ¶ 7; CX 63; CX 65.

8. In April 2007, Mrs. Sellner, Mr. Sellner, and the Sellner Partnership entered into a stipulated settlement with APHIS with respect to alleged violations stemming from inspections in 2005 and 2006. Answer ¶ 8; CX 64. The fact of this stipulation is not relied upon for anything in this decision other than that Respondents had knowledge of certain AWA requirements. It is not probative of repeated violations by them or any bad faith.

9. In July 2013, Mrs. Sellner, Mr. Sellner, and the Sellner Partnership entered into a stipulated settlement with APHIS with respect to alleged violations stemming from inspections during 2011, 2012, and 2013. Answer ¶ 8; CX 66. The fact of this stipulation is not relied upon for anything in this decision other than that Respondents had knowledge of certain AWA requirements. It is not probative of repeated violations by them or any bad faith.

10. On or about June 10, 2015, APHIS suspended AWA license 42-C-0084 for twenty-one days, pursuant to section 2149(a) of the AWA. Answer ¶ 8.

11. On January 9, 2014, APHIS Veterinary Medical Officer [VMO] Heather Cole attempted to conduct a compliance inspection at Respondents' facility, but no one was available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (essentially admitted); CX 59.

12. On May 12, 2014, Dr. Cole attempted to conduct a compliance inspection at Respondents' facility, but no one was available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (admitted that access was not provided, citing lightening); CX 68.

13. On February 19, 2015, Dr. Cole attempted to conduct a compliance inspection at Respondents' facility, but no one was

available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (admitted); CX 74.

14. On the following occasions, APHIS inspectors documented noncompliance with the Regulations governing attending veterinarians and adequate veterinary care:

    a. June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail, thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. *See* discussion, *infra*. Answer ¶ 10a; CX 2; CX 3; CX 15-23; CX 25 at 2.

    b. October 26, 2013. Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. Answer ¶ 10b; CX 53.

    c. December 16, 2013. The hooves of three goats were excessively long. CX 53; CX 54.

    d. May 21, 2014. The record does not demonstrate a female coyote had an injury to its foot prior to May 21, 2014, the day of the inspection, severe enough to require reporting to a veterinarian.

    e. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. CX 69; CX 69a at 2.

    f. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail and on its backbone, and Respondents failed to have the animal seen by a veterinarian. CX 69; CX 69a at 3-5

    g. May 21, 2014. The hooves of a Barbados sheep were

excessively long. CX 69; CX 69a at 6-7.

h. August 5, 2014. A female Old English Sheepdog (Macey) had large red sores behind both ears, and was observed to be shaking her head and scratching those areas. Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. CX 71; CX 71a at 1-4.

i. August 25, 2014 — October 7, 2014. On August 25, 2014, a tiger (Casper) was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for him at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents have not had Casper seen by a veterinarian, and Casper had received no veterinary care, except Respondents' administration of a dewormer in September 2014. Answer ¶ 10(i); CX 72; CX 72a at 1; CX 72b.

15. On or about the following dates, APHIS inspectors documented noncompliance with the Regulations governing the handling of animals:

a. July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort; (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public; and (3) failed to have any employee or attendant present while the public had public contact with Respondents' animals,

including, *inter alia*, a camel, goats, sheep, and other hoofstock. CX 26; CX 27; CX 37.

b. October 26, 2013. Respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the Respondents. CX 53. Whether or not the cold was the cause of the death of the piglets, having the pig outside at that time of year when it might give birth was inappropriate.

c. October 26, 2013. Respondents exposed one adult female Meishan pig, and four Meishan piglets, to cold temperatures, which exposure could have been detrimental to the animals' health and well-being. CX 53.

16. On June 12, 2013, APHIS inspectors Drs. Natalie Cooper and Margaret Shaver documented noncompliance with the Standards, as follows:

a. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. CX 2; CX 4.

b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. Answer ¶ 12(b) (admitted; *see also* AB at 12 and 17);[512] CX 2; CX 5.

c. Respondents failed to properly store supplies of food, specifically, the refrigerator in Respondents' primate building was in need of cleaning and contained contaminated, fly-infested fruit. CX 2; CX 6.[513]

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[512] While Respondents admit this allegation, they note that "this matter was remedied by washing the bags after the inspection. (CX 22, p. 1)." AB at 17. Subsequent corrections do not obviate violations.

[513] Respondents contend, AB at 18, the "flies" referenced in Complaint ¶ 12(c) were fruit flies that are not a vector for disease as other flies are. *See* Pries, Tr.

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. Complaint ¶ 12(d); CX 2; CX 7, at 1-2.[514]

e. The chain referenced in Complaint ¶ 12(e) that secured the gate of the enclosure housing two macaques was rusted (CX 2; CX 7 at 3), but this does not rise to the level of an AWA violation because there was no showing that the amount of rust affected its structural integrity. *See* Sellner, Tr. 680-81; CX 7 at 3 (showing relatively moderate rust).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in di repair, with bowed wire panels and separated wire. Complaint ¶ 12(f); CX 2; CX 8 at 1, 3, 5-6.

g. Respondents failed to maintain animal enclosures structurally

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504 (he is not concerned about fruit flies) and Shaver, Tr. 144 (fruit flies are not the vector for disease other flies are). Respondents also note, *id.*:

> Mrs. Sellner stated in her Affidavit that the leaves on the lettuce was turning brown so she disposed of the outer leaves. The lettuce itself was to be feed to the reptiles which are not Zoo animals. She also had done what a previous inspector told her and put up a sign that the food needed to be washed before feeding and she was still written up. (Sellner Affidavit CX-22, p. 2 of 21).

Vector for disease or not, a fly infestation is evidence of a lack of cleanliness, which is otherwise. supported, too, which appears to be APHIS's overriding point as to these ¶ 12(c) allegations. I find that Respondents' contentions as to the lettuce are supported and unrebutted, and thus are not a part of the above finding, which is otherwise supported by the record.

[514] Respondents contended the bulge in the fence was not shown to be a structural issue, citing CX 7 at 1-2, *see* Affidavit of Mrs. Sellner; CX 22 at 2. I find the photograph and the opinion of the inspector to be sufficient support for the finding that the structure was compromised.

sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. CX 2; CX 8 at 2 4, 7.

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, Respondents' enclosures for lions and cougars lacked adequate shade for all of the animals. CX 2; CX 9.

i. Respondents failed to provide a suitable method of drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. CX 2; CX 10.

j. Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary for their health and comfort, and with consideration for their age and condition. CX 2; CX 11.

k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian cavies, as required. CX 2; CX 12.

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. CX 2; CX 13.

17.On July 31, 2013, APHIS inspector Dr. Jeffrey Baker documented noncompliance with the Standards, as follows:

a. Respondents failed to provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. CX 26; CX 28.

b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things,

the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in a building housing nonhuman primates contained spiders. Answer ¶ 13(b) (admitting most of the Complaint ¶ 13(b) allegations except those pertaining to moldy fruit);[515] CX 26; CX 29.

c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. *See* discussion, *infra*. CX 26; CX 37.

d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. CX 26; CX 30.

e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. CX 26.

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. CX

[515] APHIS alleged an AWA violation because moldy fruit was found in a refrigerator in the food storage area. Respondents defended that the moldy fruit was wrapped in plastic and was going to be removed from the Zoo, and would not be fed to animals. *See* AB at 12. I find Respondents' defense credible and find no violation with respect to the moldy fruit, even though it was unquestionably in the food storage area. *See* Cole, Tr. 172:23 to 173:4 ("[T]here's a reference to the licensee saying that she washed the fruit before it was fed and disposed of all fruit that was bad. . . .The food storage area has to be clean."). There was much evidence to show that the food storage area was unclean aside from the presence of any blemished or rotted fruit. The fact that there was blemished and/or rotten fruit among useable fruit present, where collectively the fruit was going to undergo selection and processing before being feed to animals, would not standing alone-which it does not in this instance-make an area unclean. The implication was that spoiled fruit was going to be, improperly, fed to the animals, and Ms. Sellner's credible testimony, and thus the record, is to the contrary.

26; CX 32.

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. Answer ¶ 13(g) (admitting, except for alleged moldy fruit violations)[516] CX 26; CX 29.

h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system. Answer ¶ 13(h) (admitted in part);[517] CX 26; CX 33.

i. APHIS failed to prove Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. ex 26; ex 34.

j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. C_X 26; CX 35.

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[516] As previously noted, Respondents denied some of the allegations with regard to "moldy" fruit or other produce either frozen, enclosed in plastic or about to be sorted to determine its nutritional quality. (See, for example, testimony of Dr. Baker, Tr. pp. 199-202)." AB at 12. I find that APHIS did not demonstrate that moldy fruit was actually going to be fed to the animals.

[517] Respondents "admit that a portion of the perimeter fence was damaged but [state] the height of the fence was always at least eight feet in height, the required height for a perimeter fence. (Sellner Tr. p. 651)." AB at 12. As discussed herein, subsequent repairs do not obviate violations. Moreover, APHIS showed that "there were gaps between the panels of the perimeter fence; and... there was no perimeter fence around the camel enclosure that could function as a secondary containment system." The cited testimony by Ms. Sellner refers only to a particular panel.

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. CX 26; CX 36.

l. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 26.

18. On September 25, 2013, Dr. Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. CX39; CX 40.

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. ex 39; CX41.

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies around and within buildings housing primates, and the enclosures housing two macaques, one vervet, three baboons, and two bush babies; (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies; and (iii) evidence of rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. CX 39; CX 42.

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. CX 39; CX 43.

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as

a secondary containment system, specifically (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was sagging and detached from the fence post; (ii) there were gaps between the panels of the perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. CX 39; CX 44.

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and pot-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. CX 39; CX 45.

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. CX 39; CX 46.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. CX 39; CX 47.

i. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo; (ii) evidence of spider activity throughout the facility; and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. CX 39; CX 48 at 4; CX 49.

j. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 39; CX 47; CX 48.

19. On December 16, 2013, Dr. Cole documented noncompliance with the Standards, as follows:

a. The ceiling of the primate building was in disrepair, and specifically, there were holes in the ceiling. CX 53; CX 55.

b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. CX 53; CX 57.

c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically: (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing; (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals; and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair. CX 53; CX 56.

20. On May 21, 2014, Dr. Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to clean enclosures housing three wolf hybrids as required. CX 69; CX 69a at 8-10.

b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. CX 69; CX 69a at 11-13.

c. Respondents failed to provide potable water to four guinea pigs as required. CX 69; CX 69a at 14.

d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. CX 69; CX 69a at 15.

e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. CX 69; CX 69a at 16.

f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. CX 69; CX 69a at 17-26.

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically the refrigerator in a building housing nonhuman primates was in need of cleaning.[518] CX69; CX 69a at 27-30.

h. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 69.

i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. CX 69; CX 69a at 31-47.

j. Respondents failed to remove animal waste, food waste, and old bedding as required. CX 69; CX 69a at 48-55.[519]

k. Respondents failed to provide any shelter from the elements for two Patagonian cavies. CX 69; CX 69a at 56.

l. It was not proven by APHIS that Respondents failed to provide a suitable method of drainage in the four-horned sheep, fallow deer,

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[518] APHIS showed that the refrigerator in the building housing nonhuman primates contained moldy fruit, but consistent with other findings herein, I find that APHIS did not establish that moldy fruit would have actually been fed to animals. See Baker, Tr. 172:14 to 173:4, 175:14-24 discussing photograph that is CX29, p. 5; Cole, Tr. 325:25 to 326:4. Also, APHIS alleged that the refrigerator at a primate building was "nonfunctioning." In their Answer, ¶ 16(g) Respondents stated that this refrigerator was being used for dry storage, thus, was not intended to be functioning. Dr. Cole, Tr. 330, appears to admit that the fact that the refrigerator was not functioning as a refrigerator did not cause any food to spoil, and, thus, was not the cause of any violation, and I so find.

[519] As discussed above, I find that APHIS did not prove that a "burn barrel" in some proximity to the lion enclosure amounted to a violation.

and bear enclosures. CX 69; CX 69a at 57-64.

m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large felid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. CX 69; CX 69a at 65-67.

n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. CX 69; CX 69a at 68-70.

o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. CX 69; CX 69a at 71-94.

p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. CX 69; CX 69a at 71-94.

q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive number of flies in the enclosures housing two ferrets, two kinkajous, tigers, and bears; and by a build-up of bird feces on the shelters for bobcats and skunks. CX 69; CX 69a at 83-84.

21. On August 5, 2014, Drs. Cole and Shaver documented noncompliance with the Standards, as follows:

a. Respondents failed to clean enclosures housing two wolf hybrids as required. CX 71; CX 71a at 42-43.

b. Respondents failed to provide potable water to two dogs as often

as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. CX 71; CX71a at 12.

c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that Respondents attributed to flies. CX 71.

d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. CX 71; CX 71a at 18-19.

e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. Answer ¶ 17(e); CX 71.

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. CX 71.

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. CX 71; CX 71a at 25-26, 46-47.

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. CX 71; CX 71a at 20-21, 32-35.

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. CX 71; CX 71a at 13-14.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. CX 71; CX 71a at 5-11, 16, 23-24, 27-31, 36-41, 44-45.

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. CX71; CX 71a at 15, 17, 22,

22. On October 7, 2014, Drs. Shaver and Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. Answer ¶ 18(a) (admitted, but noting later repair); CX 72; CX 72a at 5-14; AB at 12.

b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. Answer ¶ 18(b); CX 72; CX 72a at 5-14.

c. Respondents failed to provide thirty sheep with wholesome food, and specifically, Respondents maintained a food dispenser for public use that contained old, caked, and discolored food. CX 72; CX 72a at 5-14 at 2-4.

23. On March 4, 2015, Dr. Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, there was waste build-up on the wall above the perch, in a crack between the wall and the perch, and in

holes within the perch. Answer at Second ¶ 18(a) (admitted; *see* AB at 12); CX 75.

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. CX 75; CX 75a.

24. On May 27, 2015, Dr. Cole documented noncompliance with the Standards, as follows:

a. The "reptile" room, housing multiple non-human primates, was in disrepair, and specifically, there were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals' primary enclosures. CX 76; CX 76a at 1-3.

b. The "reptile" room, housing multiple non-human primates, was not kept free of debris, discarded materials and clutter. CX 76; CX 76a at 5-14.

c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. CX 76; CX 76a at 5-14, 16.

d. Respondents failed to provide adequate ventilation in the building housing two bush babies. CX 76.

e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed nonhuman primate (Obi), who was exhibiting abnormal behaviors. CX 76; CX 76a at 45-46.

f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on the overhead fixtures and electrical outlets, and the presence of rodent feces. CX 76; CX 76a at 16-33.

g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. CX 76; CX 76a.

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous, fennec foxes, and African crested porcupines. CX 76.

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. CX 76; CX 76a at 47-49.

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food. CX 76; CX 76a at 47-91.

k. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). CX 76; CX 76a at 15, 92-106.

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the "reptile" room. CX 76; CX 76a at 107-109.

Conclusions of Law

ANIMAL WELFARE ACT

1. On January 9, 2014, May 12, 2014, and February 19, 2015, at Manchester, Iowa, Respondents willfully violated the AWA and the Regulations governing access for inspections (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126).

2. 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 se ices, 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. June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2).

   b. October 26, 2013. Respondents failed to provide adequate veterinary care to animals, and failed to establish and maintain programs of adequate veterinary care that included the availability of appropriate facilities, equipment, and personnel, and specifically, Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. 9 C.F.R. §§ 2.40(a), 2.40(b)(l). This is a violation regardless of whether the cold was the cause of the piglet's death.

   c. December 16, 2013. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of three goats were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(bX2), 2.40(b)(3).

d. May 21, 2014. Respondents did not violate the AWA by failing to communicate to the attending veterinarian that a female coyote had been bitten by another coyote three weeks earlier (on May 1, 2014), because the record does not demonstrate the severity of that injury apart from a similar injury to that same animal on the same leg on the May 21, 2014 date of the relevant inspection. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

e. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

f. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail and on its backbone, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

g. May 21, 2014. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of a Barbados sheep were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

h. August 5, 2014. Respondents failed to provide adequate veterinary medical care to a female Old English Sheepdog (Macey) who had large red sores behind both ears, and Macey was observed to be shaking her head and scratching those areas. Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. 9 C.F.R.§§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

i. August 25, 2014 – October 7, 2014. Respondents failed to provide

adequate veterinary medical care to a tiger (Casper). On August 25, 2014, Casper was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for Casper at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents had not had Casper seen by a veterinarian, and Casper had received no veterinary care, save Respondents' administration of a dewormer in September 2014. 9 C.F.R. §§ 2.40(a), 2.40(b)(l), 2.40(b)(2), 2.40(b)(3).

3. On or about the following dates, Respondents willfully violated the Regulations governing the handling of animals:

   a. July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public, and (3) failed to have any employee or attendant present while the public had public contact with Respondents' animals, including, *inter alia*, a camel, goats, sheep, and other hoofstock. 9 C.F.R. §§ 2.131(b)(l), 2.131(c)(l), 2.131(d)(2).

   b. October 26, 2013. Respondents failed to handle Meishan pigs as carefully as possible, in a manner that does not cause excessive cooling, physical harm, or unnecessary discomfort, and specifically, Respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the Respondents. 9 C.F.R. § 2.131(b)(l).

   c. October 26, 2013. Respondents failed to take appropriate

measures to alleviate the impact of climatic conditions that presented a threat to the health and well-being of one adult female Meishan pig, and four Meishan piglets, and, specifically, Respondents exposed all five animals to cold temperatures, which exposure could have been detrimental to the animals' health and well-being. 9 C.F.R. § 2.131(e).

4. On or about June 12, 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 provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. 9 C.F.R. § 3.10.

b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

c. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, the refrigerator in Respondents' primate building was in need of cleaning. 9 C.F.R. § 3.75(e). Respondents did not incur violations by possession of moldy fruit that would not have been fed to animals.

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. 9 C.F.R. § 3.80(a)(2)(iii).

e. Respondents did not fail to maintain enclosures for nonhuman primates in good repair. Specifically, the chain that secured the gate of the enclosure housing two macaques was rusted but was not shown to have been structurally compromised. 9 C.F.R. § 3.80(a)(2)(iii).

f. Respondents failed to maintain animal enclosures structurally

sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in disrepair, with bowed wire panels and separated wire. 9 C.F.R. § 3.125(a).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, Respondents' enclosures for lions and cougars lacked adequate shade for all of the animals. 9 C.F.R. § 3.127(a).

i. Respondents failed to provide a suitable method of drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. 9 C.F.R. § 3.127(c).

j. APHIS did not prove Complaint ¶ 13(j) that Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian cavies, as required. 9 C.F.R. § 3.131(a).

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. 9 C.F.R. § 3.131(d).

5. On or about July 31, 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 provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. 9 C.F.R. § 3.29(a).

b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in a building housing nonhuman primates contained spiders. 9 C.F.R. § 3.75(e). Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. 9 C.F.R. § 3.8l(c)(2).

d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. 9 C.F.R. § 3.84(a).

e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. 9 C.F.R. § 3.84(d).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. 9 C.F.R. § 3.125(a).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. 9 C.F.R. § 3.125(c).

h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons

from having contact with the animals, and that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

i. Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. 9 C.F.R. § 3.131(d).

l. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

6. On or about September 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 clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies aroun_d and within buildings housing primates, and the enclosures housing two macaques, one vervet,.three baboons, and

two bush babies; (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies; and (iii) evidence of rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. 9 C.F.R. § 3.84(d).

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. 9 C.F.R. § 3.127(c).

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was sagging and detached from the fence post; (ii) there were gaps between the panels of the perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and pot-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. 9 C.F.R. § 3.129(b).

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.13l(c).

i. Respondents failed to establish and maintain an effective program

of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo; (ii) evidence of spider activity throughout the facility; and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. 9 C.F.R. § 3.13 l(d).

j. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

7. On or about December 16, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. The ceiling of the primate building was in disrepair, and specifically, there were holes in the ceiling. 9 C.F.R. § 3.75(a).

b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, 9 C.F.R. § 3.125(a), and specifically, (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing; (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals; and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair.

8. On or about May 21, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing three wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).

b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. 9 C.F.R. § 3:25(c).

c. Respondents failed to provide potable water to four guinea pigs as required. 9 C.F.R. § 3.30.

d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. 9 C.F.R. § 3.31(a)(2),

e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. 9 C.F.R. § 3.31(b).

f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and the refrigerator in a building housing nonhuman primates was in need of cleaning. 9 C.F.R. § 3.75(e). Respondents did not incur any violation for having moldy fruit that would not be fed to animals, or for the use of a nonfunctioning refrigerator for food storage that did not result in spoilage. *See* Dr. Cole, Tr. 330.

h. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. 9 C.F.R. § 3.125(a).

j. Respondents failed to remove animal waste, food waste, and old bedding as required, and specifically. 9 C.F.R. § 3.125(d). As discussed above. I find no violation proved as to a "burn barrel" alleged to be in close proximity to the lion enclosure.

k. Respondents failed to provide any shelter from the elements for two Patagonian cavies. 9 C.F.R. § 3.127(b).

l. It was not proven by APHIS that Respondents failed to provide a suitable method of drainage in the four-homed sheep, fallow deer, and bear enclosures. 9 C.F.R. § 3.127(c).

m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large felid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. 9 C.F.R. § 3.127(d).

n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. 9 C.F.R. § 3.131(a).

p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing two ferrets, two kinkajous, tigers, and

bears; and by a build-up of bird feces on the shelters for bobcats and skunks. C.F.R. § 3.13l(d).

9. On or about August 5, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing two wolf hybrids as required. 9 C.F.R. § 3.l(c)(3).

b. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. 9 C.F.R. § 3.10.

c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that Respondents attributed to flies. 9 C.F.R. § 3.11(d).

d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. 9 C.F.R. § 3.75(a).

e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. 9 C.F.R. § 3.84(d).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. 9 C.F.R. § 3.127(c).

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. C.F.R. § 3.131(d).

10. On or about October 7, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. 9 C.F.R. § 3.125(a).

b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. 9 C.F.R. § 3.125(a).

c. Respondents failed to provide thirty sheep with wholesome food, and specifically, Respondents maintained a food dispenser for

public use that contained old, caked, and discolored food. 9 C.F.R. § 3.129(a).

11. On or about March 4, 2015, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, there was waste build-up on the wall above the perch, in a crack between the wall and the perch, and in holes within the perch. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. 9 C.F.R. § 3.131(a).

12. On or about May 27, 2015, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. The "reptile" room, housing multiple non-human primates, was in disrepair, and specifically, there were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals' primary enclosures. 9 C.F.R. § 3.75(a).

b. The "reptile" room, housing multiple non-human primates, was not kept free of debris, discarded materials, and clutter. 9 C.F.R. § 3.75(b).

c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. 9 C.F.R. §§ 3.75(c)(2), 3.75(c)(3).

d. Respondents failed to provide adequate ventilation in the building housing two bush babies. 9 C.F.R. § 3.76(b).

e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed

nonhuman primate (Obi), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.8l(c)(2).

f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on the overhead fixtures and electrical outlets, and the presence of rodent feces. 9 C.F.R. § 3.84(c).

g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. 9 C.F.R. § 3.84(d).

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous, fennec foxes, and African crested porcupines. 9 C.F.R. § 3.126(b).

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. 9 C.F.R. § 3.127(b).

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or med in order to access food. 9 C.F.R. § 3.127(c).

k. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). 9 C.F.R. §§ 3.125(d), 3.13l(a), 3.131(c).

l. Respondents failed to establish and maintain an effective program

of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the "reptile" room. 9 C.F.R. § 3.131(d).

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the AWA and the Regulations and Standards issued thereunder.

2. AWA license number 42-C-0084 is hereby revoked.

3. Respondents are jointly and severally assessed a civil penalty of $10,000, to be paid in full no later than 120 days after the effective date of this order, by check (or checks) made payable to USDA/APHIS and remitted by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000.

4. Each check shall include a docket number for this proceeding, 15-0152.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to Section 1.145 of the Rules of Practice.[520]

Copies of this Decision and Order shall be served upon the parties.

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[520] 7 C.F.R. § 1.145.

ANIMAL WELFARE ACT

In re: SIDNEY JAY YOST, an individual & AMAZING ANIMAL PRODUCTIONS, INC., a California corporation.
Docket Nos. 12-0294; 12-0295.
Decision and Order.
Filed December 14, 2017.

AWA.

Colleen A. Carroll, Esq., for APHIS.
James D. White, Esq., for Respondents.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

1. The parties worked to distill their differences to a very few, in this case brought under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq*., in part to avoid unnecessary expense and energy expenditure. The Respondents, Sidney Jay Yost and Amazing Animal Productions, Inc., agreed to accept revocation of Animal Welfare Act license number 93-C-0590 and a generic cease and desist order. The parties did not agree on the civil money penalties amount that Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. will be required to pay.

2. I, Administrative Law Judge Jill S. Clifton, decide that for their violations of the Animal Welfare Act and the Regulations (including Standards) issued thereunder, Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. shall pay (a joint and several obligation) civil penalties totaling $30,000, payable in equal monthly installments beginning by March 28 (Wed) 2018. I conclude there is good cause for five years, through March 27, 2023, to liquidate the debt. Payments may of course be made earlier than when due without penalty. Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are ordered to cease and desist from violating the Animal Welfare Act and the Regulations (including Standards) issued thereunder. Animal Welfare Act license number 93-C-0590 is revoked (revocation is a permanent remedy), and Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are permanently disqualified from having Animal Welfare Act licenses.

Mixed Findings of Fact and Conclusions

3. The written record, compiled from March 16, 2012, when the Complaint was filed, to October 19, 2016, leads me to the following Mixed Findings of Fact and Conclusions, which do not require testimony. The Corrections of Complaint, affecting 5 paragraphs of the Complaint, paragraphs 7, 9, 12, 16, and 20, were ACCEPTED, and the Complaint corrected accordingly, on December 16, 2014.

4. Respondent Amazing Animal Productions, Inc. is a California corporation [sometimes herein "AAP" or the "corporate Respondent"]. Amazing Animal Productions, Inc. participated in activities regulated under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq*., such as exhibiting. Amazing Animal Productions, Inc. appears to have been incorporated in 2003. An individual, Respondent Sidney Jay Yost, also known as Sidney J. Yost and Sid Yost, controlled Amazing Animal Productions, Inc. The USDA Animal Welfare Act license 93-C-0590 was NOT issued to the corporate Respondent, but to the individual.

5. Respondent Sidney Jay Yost, also known as Sidney J. Yost and Sid Yost [sometimes herein "Mr. Yost"], is an individual who had a license under the Animal Welfare Act from the Secretary of Agriculture, license 93-C-0590, which has been invalid since August 2014, when Mr. Yost chose not to renew his USDA AWA license.

6. Sidney Jay Yost willingly accepts license revocation and a generic cease and desist order ("since he no longer holds a USDA License and has no need for and no intention to apply again for a license"). Resp'ts' Submission filed October 19, 2016 at 4.

7. Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. request in Respondents' Submission filed October 19, 2016 that the civil penalty to be imposed against them be no more than $2,800:

$ 100.00
2,500.00
100.00
100.00

$ 2,800.00
========

8. APHIS requested, in addition to the license revocation and the cease and desist order against Respondents, "an order assessing the respondents a joint and several civil penalty of $30,000." APHIS argues, in APHIS's submission filed September 13, 2016,

> Pursuant to 7 U.S.C. § 2149(b), each violation and each day during which a violation continues shall be a separate offense. The evidence in this case shows that Mr. Yost committed no fewer than 72 violations, and that respondent AAP committed no fewer than 1440 violations. The maximum civil penalty that could be assessed under the Act for Mr. Yost's violations is $657,500, and the maximum civil penalty that could be assessed under the Act for respondent AAP's violations is $13,222,500. Assessment of the recommended civil penalty is authorized under the AWA and appropriate under the circumstances (and would be appropriate for just the handling violations alone), considering the size of respondents' business, the gravity of the violations, and the level of respondents' good faith.

APHIS Submission at 18-19. APHIS supports its position further, in APHIS's submission filed September 13, 2016, p. 19 (signature page).

9. "Willfulness" within the meaning of the Administrative Procedure Act in 5 U.S.C. § 558(c), as would authorize revocation of an Animal Welfare Act license, has been defined: "A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements." *Bauck*, 68 Agric. Dec. 853, 859-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

An appeal of this case would likely lie in the Fifth Circuit, where "willfulness" as used in 5 U.S.C. § 558(c) (Administrative Procedure Act) has been found to mean that "a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory

requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981). That Fifth Circuit definition of willfulness comes from a Perishable Agricultural Commodities Act [PACA] case rather than an Animal Welfare Act case. PACA cases and AWA cases are both administrative, civil proceedings, and both require interpretation of 5 U.S.C. § 558(c) (Administrative Procedure Act).

10. Throughout the remainder of this section, "Mixed Findings of Fact and Conclusions," I refer to the Respondents, Sidney Jay Yost and Amazing Animal Productions, Inc., as the "Respondents."

11. For this Decision and Order, for which I have heard no testimony, I apply four factors enumerated in 7 U.S.C. § 2149(b) as follows. Respondents had a small to moderately-sized business; the violations that resulted in injury to a two-year old child and euthanization of Nova the dog/wolf hybrid were grave; I presume Respondents acted in good faith; and I have not taken into account any history of previous violations, if any there be. I conclude the maximum civil penalty is $3,750 for each violation, except for violations alleged in paragraph 22 of the Complaint, for which the maximum civil penalty is $10,000 [$3,750 through May 6, 2010; $10,000 beginning May 7, 2010]. 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(ii).

12. Paragraph 4 of the Complaint. Amazing Animal Productions, Inc. participated in activities regulated under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq*., such as exhibiting. An individual, Respondent Sidney Jay Yost, also known as Sidney J. Yost and Sid Yost, controlled Amazing Animal Productions, Inc. The USDA Animal Welfare Act license 93-C-0590 was NOT issued to the corporate Respondent, but to the individual Respondent. On information and belief, USDA would not have issued another Animal Welfare Act license to Respondent Amazing Animal Productions, Inc., while licensee Respondent Sidney Jay Yost, also known as Sidney J. Yost and Sid Yost, controlled the locations used by Amazing Animal Productions, Inc. and the exhibiting done by Respondent Amazing Animal Productions, Inc. I conclude that the alleged violation of 9 C.F.R. § 2.1(a) was NOT PROVED, but that Respondent Amazing Animal Productions, Inc. is liable under the Animal Welfare Act for failures to comply.

13. Paragraph 5 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals", specifically 9 C.F.R. § 2.131(c)(1), on or about February 29, 2008, at Burbank, California. APHIS's allegations are contained in paragraph 5 of the Complaint, with the date changed to February 29, 2008 to remove any dispute. APHIS Submission Filed September 13, 2016 at 7. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that Respondents failed to handle a lion during public exhibition so there was minimal risk of harm to the lion and to the public, with sufficient distance and/or barriers between the lion and the general viewing public so as to assure the safety of animals and the public. This was the exhibition of a lion at a taping of "The Tonight Show," before a live audience. Respondents maintain, among other things, that the lion cub was 125 pounds, seven-and-a-half months old, that the "mere leash" was a very strong chain, the type used by responsible trainers industry wide, with a large ring by which the 280 pound handler (Sid Yost) could readily restrain a 125 pound cub. Further, state the Respondents, two other world class trainers were with Yost, Joe Camp and Steven Martin, and the ring is, by design, large enough for another man to grab the ring with Yost. Respondents add that the cub was very docile and easily handled, and had been raised by Respondents from a baby, and exhibited no stress. Respondents claim this allegation is time-barred; I disagree. Five years, not four, is the limiting period. Respondents' arguments as to how they had the lion under control are persuasive, but the Regulation specifies distance and barriers, which were absent. There is no evidence of harm to the public or the lion. I conclude that a $750.00 civil penalty suffices for this noncompliance.

14. Paragraph 6 of the Complaint. Respondents failed to comply with numerous Standards as required under 9 C.F.R. § 2.100(a), during an inspection on or about March 18, 2008, at site 003. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. APHIS's allegations are contained in paragraph 6 of the Complaint, including (a) through (i). I conclude that a $2,000.00 civil penalty suffices for these noncompliances.

15.Paragraph 7 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. §§ 2.131(b)(1), (c)(1), on or about September 2008, November 3, 2008, and December 18, 2008, at Devore Heights, California; and on January 10, 2009, at Los Angeles, California. APHIS's allegations are contained in paragraph 7 of the Complaint, as Corrected (November 19, 2014 & Ruling December 16, 2014). Resp'ts' Answer filed January 13, 2015. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that the Respondents failed to handle animals (including, among other things, exotic felids, wolves, and nonhuman primates) as carefully as possible in a manner that did not cause stress, physical harm, or unnecessary discomfort, and failed to handle large felids during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, the public was allowed to have direct contact with, among other things, exotic felids, wolves, and nonhuman primates. These were photo shoots for which Respondents obtained Release of Liability; Respondents do not regard these members of the public to be members of the public, and I understand Respondents' confusion in trying to distinguish "the public" from "general viewing public" and trying to create "volunteers" who would be neither, but what Respondents were doing is prohibited by this Regulation. There is no evidence of harm to the public or the animals, including exotic felids, wolves, and nonhuman primates. I conclude that a $3,750.00 civil penalty suffices for this noncompliance.

16.Paragraph 8 of the Complaint. Paragraph 8 of the Complaint alleges failures to comply with the Regulation concerning "Handling of animals," originally specifying 9 C.F.R. § 2.131(b)(2). Respondents have consistently and vehemently denied any and all allegations of abuse. APHIS amended Paragraph 8, changing the Regulatory section to 9 C.F.R. § 2.131(b)(1), which does not contain the word abuse. APHIS Submission Filed September 13, 2016 at 8, 11. APHIS's amendment permits me to rule on the allegations of Paragraph 8 without taking testimony, based on the parties' written submissions. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. § 2.131(b)(1), between approximately January 11, 2009 and March 2009.

This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that the Respondents failed to handle animals as carefully as possible in a manner that did not cause trauma, stress, physical harm, or unnecessary discomfort; and specifically, used a wooden cane and the potential application of physical force to handle animals. Respondents' Stipulations as to Facts, filed July 14, 2015, is instructive, including the following paragraphs 43 through 52:

> 43. That Respondent Yost offers the following as additional fact stipulations and as offers of proof regarding the proper use of a cane and the potential application of physical force to protect a person or another animal from serious harm.
>
> 44. That a student/trainee is not considered by Yost and should not be considered as a matter of law as a member of the public.
>
> 45. That Respondent Yost taught his student/trainees about possible multiple uses of a wooden cane with certain animals. Respondent Yost taught that the cane could be properly and safely used while handling some animals (*e. g.* lions, tigers and bears), when serving as an extension of the trainer's arm and could, as such, be used to retrieve a dropped object, to scratch and pet an animal, to more safely offer a piece of food to the animal on the end of the cane, to make a noise to obtain an animal's attention by tapping the end of the cane on the ground, or to make a louder noise also to obtain an animal's attention by rapping it harder on another object, such as a table, tree trunk or a wall; and, when necessary to protect a person or another animal from harm by using the cane to push an animal away or to hold and waive in front of an animal as a "display" of potential force together with a loud and forceful voice command like "NO" or "DOWN".
>
> 46. Respondent Yost also taught his student/trainees that dog/wolf hybrids, were particularly and generally timid

animals, and that the use of a cane around such animals as not generally appropriate; rather a rolled up newspaper might be similarly used with such animals rather than a cane.

47. Respondent Yost also taught students that a cane may be useful in an emergency situation to apply a strike across the nose with a moderate rap, but only when absolutely necessary to protect a person or another animal from serious harm.

48. Several of Yost's students purchased their own canes and on some occasions brought them to classes.

49. Respondent Yost taught that the nose of an animal was a more appropriate place for delivery of an emergency strike, rather than the animal's head or the body, because, in those circumstances a rap across the nose is very likely to get the animal's attention, but is less likely to do any serious damage, whereas a rap on the head or body could seriously harm the animal.

50. The training that Yost provided his students of these training principles was in full display for several students as a result of two incidents which occurred during training classes in early 2009.

51. In one such incident, Yost tripped and fell to the ground during an exercise session with a tiger; the tiger moved to jump on Yost; but another trainer intervened, placing himself as a blocking barrier to protect Yost; the other trainer raised his arms with a cane in one hand and waived a cane in front of an animal as a "display" of potential force while implementing a loud and forceful "NO" voice command. The animal responded appropriately to the protective conduct by the other trainer, came to a full stop; assumed a normal and non threatening posture and disposition as Yost regained his feet and the class resumed with a very useful lesson

having been applied in a real life situation.

52. In the second such incident, Yost protected a student/ trainee (name), from serious potential harm when a young tiger, during a class, had become focused on a food bag which she had around her waist. Yost noticed the animal's behavior (crouching, creeping forward with eyes and attention fully focused on Ms. (name) and the food bag on her waist) and immediately grabbed a cane and delivered an emergency strike across the animal's nose which caused the animal to change his focus, change posture and change its behavior which eliminated the threat to Ms. (name). The class then resumed with a very useful lesson having been applied in a real life situation.

From Respondents' Stipulations as to Facts, paragraphs 43 through 52, I conclude that Respondents' handling methods exposed the animals to too many situations where the use of a wooden cane and the threat of the use of it were too commonplace. I conclude that a $3,000.00 civil penalty suffices for this noncompliance.

17. Paragraph 9 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. §§ 2.131(b)(1), (c)(1), in approximately February 2009, at Wrightwood, California. APHIS's allegations are contained in paragraph 9 of the Complaint, as Corrected (November 19, 2014 & Ruling December 16, 2014). Resp'ts' Answer filed January 13, 2015. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that Respondents failed to handle animals (a mountain lion) as carefully as possible in a manner that did not cause stress, physical harm, or unnecessary discomfort, and failed to handle a mountain lion during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, the public was allowed to have direct contact with a mountain lion during public exhibition. The mountain lion was a young cub that weighed about twenty-five pounds. The owners of a restaurant had hired Respondents for a publicity exhibition of the

mountain lion cub at their restaurant. Respondents recall one of the restaurant owners being the only member of the "public" who had contact with the mountain lion cub and dispute the characterization of that person as a member of the public. There is no evidence of harm to the public or the mountain lion. I agree with APHIS that the restaurant owner IS a member of the public, and I conclude that a $750.00 civil penalty suffices for this noncompliance.

18. Paragraph 10 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. § 2.131(b)(1) on or about March 13, 2009, in Colorado. APHIS's allegations are contained in paragraph 10 of the Complaint. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that Respondents failed to handle animals, especially a mountain lion cub and wolves and a tiger, as carefully as possible in a manner that did not cause trauma, stress, physical harm, or unnecessary discomfort. Respondents' Opposition, among other things, states that there was no one other than the handlers at the roadside stop area when the handlers took the animals out, and that when passers-by stopped, the animals were loaded back into the vans. There is no evidence of harm to the public or the mountain lion cub or wolves or tiger. I conclude that a **$1,500.00** civil penalty suffices for this noncompliance.

19. Paragraph 11 of the Complaint. Paragraph 11 of the Complaint alleges a veterinary care violation, that the Respondents violated 9 C.F.R. §§ 2.40(a) and 9 C.F.R. § 2.40(b)(2) on or about March 25, 2009, through April 4, 2009, at Utica, Illinois, by failing to have animals vaccinated against rabies. The animals WERE vaccinated. Respondent's Submission filed October 19, 2016, Ex. C. The animals WERE current for rabies vaccinations. Respondents' failure was not having the Rabies Vaccination Certificates (shown in Exhibit C) available at the time and place required, which is a record-keeping violation. APHIS's allegations in Paragraph 11 were NOT PROVED.

20. Paragraph 12 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. §§ 2.131(b)(1), (c)(1), on April 4, 2009, at the Grand Bear Lodge in Utica, Illinois. APHIS's allegations are contained in paragraph 12 of the

Complaint, as Corrected (October 27, 2014 & Ruling December 16, 2014). Resp'ts' Answer filed January 13, 2015. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that Respondents failed to handle animals, especially Nova the dog/wolf hybrid, as carefully as possible in a manner that did not cause trauma, stress, physical harm, or unnecessary discomfort; and failed to handle Nova the dog/wolf hybrid during public exhibition so there was minimal risk of harm to Nova the dog/wolf hybrid and to the public, with sufficient distance and/or barriers between Nova the dog/wolf hybrid and the general viewing public so as to assure the safety of animals and the public. Nova the dog/wolf hybrid bit a child, a toddler, a two-year old, who was bit on her head, neck and face. Mr. Yost takes responsibility and attributed the incident to many factors, including the failure of the Grand Bear Lodge to set up properly, the failure of the "curtain barrier", and described what went wrong in Respondent's Submission filed October 19, 2016 at 21-22. Respondents are nevertheless responsible, as they acknowledge, and the Respondents explain that the civil lawsuit was settled with sufficient insurance and a fair settlement. Respondent's Submission filed October 19, 2016 at 21-22. Respondents' intent was to exhibit Nova, roughly a two-year old dog/wolf hybrid, on stage, before an audience. The child and her mother were on the audience's side of a curtain, apparently going to a restroom, while the dog/wolf hybrid was on the backstage side of the curtain, being led by the trainer (Matt) to its temporary holding cage. The child brushed up against the curtain that separated the stage entrance and the exit area from the common walkway. The dog/wolf hybrid saw the curtain move, and grabbed the child as she brushed up against the curtain from the other side. Initially, Nova grabbed onto the child's shirt, and Matt immediately pulled back on the lead. The child fell back into Nova, and that's when Nova bit her. The child was rushed to the Illinois Valley Community Hospital, Peru, IL. Nova the dog/wolf hybrid was euthanized and tested for rabies, which test proved negative. I conclude that a **$7,500.00** civil penalty suffices for this noncompliance: $3,750.00 for failure to protect Nova as required by 9 C.F.R. § 2.131(b)(1); and $3,750.00 for failure to protect a two-year old child and Nova as required by 9 C.F.R. § 2.131(c)(1). I have purposely chosen only April 4, 2009, not the other dates alleged.

21. Paragraph 13 of the Complaint. Respondents failed to comply with

Regulation 9 C.F.R. § 2.75(b), on or about April 9, 2009, at Utica, Illinois, by failing to maintain accurate and complete records of the acquisition and disposition of six animals, as required. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. I conclude that a **$2,000.00** civil penalty suffices for this noncompliance.

22. Paragraph 14 of the Complaint. Respondents failed to comply with Regulation 9 C.F.R. § 2.78(a)(1), on or about April 9, 2009, at Utica, Illinois, by transporting two domestic dogs, two hybrid wolves, and one nonhuman primate without any accompanying health certificates, as required. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. I conclude that a **$2,000.00** civil penalty suffices for this noncompliance.

23. Paragraph 15 of the Complaint. I conclude that no additional site was established; rather, an outdoor momentary stopover occurred, adjacent to the indoor restroom used by a driver, and that the alleged violation of 9 C.F.R. § 2.8 was NOT PROVED.

24. Paragraph 16 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. § 2.131(b)(1), (c)(1), on or about June 10, 2009, at Site 003 and at off-site locations. APHIS's allegations are contained in paragraph 16 of the Complaint, as Corrected (November 19, 2014 & Ruling December 16, 2014). Resp'ts' Answer filed January 13, 2015. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that the Respondents failed to handle animals (large felids) as carefully as possible in a manner that did not cause stress, physical harm, or unnecessary discomfort, and failed to handle large felids during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, the public was allowed to have direct contact with a mountain lion on a chain leash. There is no evidence of harm to the public or the mountain lion. I conclude that a **$2,500.00** civil penalty suffices for this noncompliance.

25. Paragraph 17 of the Complaint. Respondents failed to comply with numerous Standards as required under 9 C.F.R. § 2.100(a), during an inspection on or about June 10, 2009, at site 003. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. APHIS's allegations are contained in paragraph 17 of the Complaint, including (a) through (d). I conclude that a **$1,250.00** civil penalty suffices for these noncompliances.

26. Paragraph 18 of the Complaint. Paragraph 18 of the Complaint alleges a veterinary care violation, that Respondents violated 9 C.F.R. § 2.40(b)(2) on or about October 21, 2009, at site 002, by failing to groom the coat of a Great Pyrenees dog adequately. I took into account Respondent's Submission filed October 19, 2016. I conclude that a **$50.00** civil penalty suffices for this noncompliance.

27. Paragraph 19 of the Complaint. Respondents failed to comply with Regulations 9 C.F.R. §§ 2.75(a), 2.75(b), on or about October 21, 2009, at site 002, by failing to maintain accurate and complete records of the acquisition and disposition of dogs (wolf hybrids), ferrets, a nonhuman primate, and a fox, as required. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. I took into account Respondent's Submission filed October 19, 2016. I conclude that a **$1,500.00** civil penalty suffices for this noncompliance, which, because it happened at the primary site, was quickly remedied.

28. Paragraph 20 of the Complaint. Respondents failed to comply with the Regulation concerning "Handling of animals," specifically 9 C.F.R. §§ 2.131(b)(1), (c)(1), on or about October 21, 2009, at Site 002 and at off-site locations. APHIS's allegations are contained in paragraph 20 of the Complaint, as Corrected (November 19, 2014 & Ruling December 16, 2014). Resp'ts' Answer filed January 13, 2015. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. My description of this violation is that Respondents failed to handle animals (large felids) as carefully as possible in a manner that did not cause stress, physical harm, or unnecessary discomfort, and failed to handle large felids

during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, the public was allowed to have direct contact with the felids. The supporting documentation is about advertising on the internet. There is no evidence of harm to the public or the felids. I conclude that a **$500.00** civil penalty suffices for this noncompliance, considering the source of the "evidence."

29. Paragraph 21 of the Complaint. Respondents failed to comply with numerous Standards as required under 9 C.F.R. § 2.100(a), during an inspection on or about October 21, 2009, at site 002. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. APHIS's allegations are contained in paragraph 21 of the Complaint, including (a) through (e). Respondents' explanations are significant and persuasive. Respondent's Submission filed October 19, 2016. I conclude that a **$750.00** civil penalty suffices for these noncompliances.

30. Paragraph 22 of the Complaint. Respondents failed to comply with Standards as required under 9 C.F.R. § 2.100(a), during an inspection on or about August 24, 2010. This is a willful violation within the meaning of this administrative, civil proceeding under the Animal Welfare Act, as willful is explained in Paragraph 9. APHIS's allegations are contained in paragraph 22 of the Complaint, including (a) and (b). I conclude that a **$200.00** civil penalty suffices for these noncompliances.

ORDER

31. Animal Welfare Act license number 93-C-0590 is **revoked** (revocation is a permanent remedy). Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are each permanently disqualified from having an Animal Welfare Act license.

32. The following **cease and desist** provisions of this Order (paragraph 33) shall be effective on the day after this Decision becomes final. [*See* paragraph 35.]

33. Respondents Sidney Jay Yost and Amazing Animal Productions, Inc.,

their agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder.

34. Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. shall pay civil penalties totaling **$30,000.00** (a joint and several obligation), payable in equal monthly installments beginning by March 28 (Wed) 2018. I conclude there is good cause for five years, through March 27, 2023, to liquidate the debt. Payments may of course be made earlier than when due without penalty. Payments shall be made by certified check(s), cashier's check(s), or money order(s), made **payable to the order of USDA APHIS** and sent to

USDA APHIS Miscellaneous
PO Box 979043
St Louis MO 63197-9000

Each certified check, cashier's check, or money order shall include a docket number of this proceeding, **12-0294**.

Finality

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

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

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: JERRY BEATY, an individual; MIKE DUKES, an individual; and BILL GARLAND, an individual.
Docket Nos. 17-0056, 17-0057, 17-0058.
Decision and Order.
Filed July 13, 2017.

HPA – Administrative procedure – Answer, failure to file timely – Default decision, basis to set aside – Hospitalization – Entering, meaning of – Mailbox rule – Timeliness.

Colleen A. Carroll, Esq., and Susan C. Golabek, Esq., for APHIS.
Respondent Mike Dukes, pro se.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO MIKE DUKES

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 28, 2016. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges: (1) on or about August 31, 2016, Mike Dukes entered a horse known as Line of Cash, while Line of Cash was sore, for showing in class 136 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B); and (2) on August 31, 2016, Mr. Dukes entered Line of Cash, while Line of Cash was bearing a

prohibited substance, for showing in class 136 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(7).[1]

On March 21, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Dukes with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 6, 2017.[2] Mr. Dukes failed to file an answer within twenty days after the Hearing Clerk served Mr. Dukes with the Complaint, as required by 7 C.F.R. § 1.136(a).

On April 19, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Mike Dukes by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Mike Dukes by Reason of Default [Proposed Default Decision]. On April 24, 2017, Mr. Dukes filed a response to the Administrator's Motion for Default Decision and Proposed Default Decision.

On May 30, 2017, in accordance with 7 C.F.R. § 1.139, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed a Default Decision and Order as to Mike Dukes [Default Decision]: (1) concluding Mr. Dukes violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Dukes a $4,400 civil penalty; and (3) disqualifying Mr. Dukes for two years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[3]

On June 13, 2017, Mr. Dukes filed a letter [Appeal Petition] in which he appealed the Chief ALJ's Default Decision to the Judicial Officer. On July 5, 2017, the Administrator filed Complainant's Response to Petition for Appeal Filed by Mike Dukes. On July 7, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

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[1] Compl. ¶¶ 16-17 at the fourth unnumbered page.
[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX 3446.
[3] Chief ALJ's Default Decision at 6.

DECISION

Statement of the Case

Mr. Dukes failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Dukes are adopted as findings of fact. I issue this Decision and Order as to Mike Dukes pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Dukes is an individual whose business mailing address is 74 Evans Road, Winchester, Tennessee 37398. At all times material to this proceeding, Mr. Dukes was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature, circumstances, and extent of the prohibited conduct are that Mr. Dukes entered a horse (Line of Cash) in a horse show while the horse was "sore" (as that term is defined in the Horse Protection Act and the Regulations) and bearing a prohibited substance. The extent and gravity of Mr. Dukes's prohibited conduct is great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[4]

[4] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. REP. NO. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive

3. Mr. Dukes is culpable for the violations set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[5]

4. On November 27, 2012, the Animal and Plant Health Inspection Service issued an Official Warning (TN 130086) to Mr. Dukes with respect to his having entered a horse (I Be Stoned) in a horse show on August 2, 2012, which horse the Animal and Plant Health Inspection Service found was sore.

Conclusions of Law

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

2. On or about August 31, 2016, Mr. Dukes entered a horse (Line of Cash), while Line of Cash was sore, for showing in class 136 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

3. On or about August 31, 2016, Mr. Dukes entered a horse (Line of Cash), while Line of Cash was bearing a prohibited substance, for showing in class 136 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(7).

MR. DUKES'S APPEAL PETITION

Mr. Dukes raises three issues in his Appeal Petition. First, Mr. Dukes asserts his answer to the Complaint is dated April 6, 2017, and he mailed his answer on April 7, 2017.

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advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[5] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (U.S.D.A. 1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

The Hearing Clerk, by certified mail, served Mr. Dukes with the Complaint on March 21, 2017.[6] The Rules of Practice require that an answer must be filed with the Hearing Clerk within twenty days after service of the complaint.[7] Therefore, Mr. Dukes was required to file his answer with the Hearing Clerk no later than April 10, 2017, and record does not contain an answer filed by Mr. Dukes with the Hearing Clerk on or before April 10, 2017.

The Rules of Practice provide that a document is deemed to be filed at the time the document reaches the Hearing Clerk.[8] Thus, Mr. Dukes's dating his answer April 6, 2017, is not relevant to the timeliness of Mr. Dukes's answer.[9] Moreover, the mailbox rule is not applicable to proceedings conducted under the Rules of Practice.[10] Thus, the date

[6] *See supra* note 2.
[7] 7 C.F.R. § 1.136(a).
[8] 7 C.F.R. § 1.147(g).
[9] Stanley, 65 Agric. Dec. 822, 832 (U.S.D.A. 2006) (stating the respondent's dating his answer February 2, 2006, does not establish the date the respondent filed his answer with the Hearing Clerk); Noell, 58 Agric. Dec. 130, 140 n.2 (U.S.D.A. 1999) (stating the date typed on a pleading by a party filing the pleading does not establish the date the pleading is filed with the Hearing Clerk; instead, the date a pleading is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).
[10] Agri-Sales, Inc., 2014 WL 4311071 *5 (U.S.D.A. 2014) (stating the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings conducted under the Rules of Practice), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 86 (U.S.D.A. 2009) (stating the argument that the mailbox rule applies to proceedings conducted under the Rules of Practice has been consistently rejected by the Judicial Officer); Knapp, 64 Agric. Dec. 253, 302 (U.S.D.A. 2005) (stating the mailbox rule does not apply in proceedings conducted under the Rules of Practice); Reinhart, 59 Agric. Dec. 721, 742 (U.S.D.A. 2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); Peterson, 57 Agric. Dec. 1304, 1310 n.3 (U.S.D.A. 1998) (stating the applicants' act of mailing their appeal petition does not constitute filing with the Hearing Clerk).

Mr. Dukes mailed his answer to the Hearing Clerk also is not relevant to the timeliness of his answer.

Second, Mr. Dukes asserts his wife was in the hospital "during this time" and he "was not at home most of the time." I infer Mr. Dukes contends his wife's hospitalization and his resulting absence from his home interfered with Mr. Dukes's ability to file a timely answer to the Complaint.

While Mr. Dukes's wife's hospitalization is unfortunate, hospitalization of a spouse is not a basis for setting aside an administrative law judge's default decision, even if a spouse's hospitalization causes the respondent long absences from the respondent's home.[11] Therefore, I reject Mr. Dukes's contention that his wife's hospitalization constitutes a sufficient basis for setting aside the Chief ALJ's Default Decision.

Third, Mr. Dukes asserts his only involvement with the entry of Line of Cash was that he led Line of Cash "up to inspection."

"Entering," within the meaning of the Horse Protection Act, is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process usually begins with the payment of the fee for entering a horse in a horse show or horse exhibition and includes the submission of a horse for

[11] *See* Arends, 70 Agric. Dec. 839, 857 (U.S.D.A. 2011) (stating, generally, physical incapacity is not a basis for setting aside an administrative law judge's default decision); Williams, 64 Agric. Dec. 1673, 1678 (U.S.D.A. 2005) (Order Den. Pet. to Reconsider as to Deborah Ann Milette) (stating, generally, physical and mental incapacity are not bases for setting aside an administrative law judge's default decision); Aron, 58 Agric. Dec. 451, 462 (U.S.D.A. 1999) (stating the respondent's automobile accident and loss of memory are not bases for setting aside the administrative law judge's default decision); Noell, 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating the respondent's age, ill health, and hospitalization are not bases for setting aside the administrative law judge's default decision), *appeal dismissed sub nom. The Chimp Farm, Inc., v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); Everhart, 56 Agric. Dec. 1400, 1417 (U.S.D.A. 1997) (holding the respondent's disability forms no basis for setting aside the administrative law judge's default decision).

pre-show inspection.[12] Therefore, I reject Mr. Dukes's contention that he did not enter Line of Cash in the horse show in Shelbyville, Tennessee, as alleged in paragraphs 16 and 17 of the Complaint, because he only led Line of Cash "up to inspection."

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Dukes is assessed a $4,400 civil penalty. Mr. Dukes shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

[12] Stepp, 57 Agric. Dec. 297, 309 (U.S.D.A. 1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the Designated Qualified Person or Animal and Plant Health Inspection Service veterinarian), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (1999); Burks, 53 Agric. Dec. 322, 334 (U.S.D.A. 1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); Callaway, 52 Agric. Dec. 272, 293 (U.S.D.A. 1993) (stating entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); Watlington, 52 Agric. Dec. 1172, 1183 (U.S.D.A. 1993) (stating that entry is a process that gives a status of being entered to a horse and it includes filling out forms and presenting the horse for inspection); Crowe, 52 Agric. Dec. 1132, 1146-47 (U.S.D.A. 1993) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee); Elliott (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (U.S.D.A. 1992) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by Designated Qualified Persons or United States Department of Agriculture veterinarians), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Mr. Dukes's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty (60) days after service of this Order on Mr. Dukes. Mr. Dukes shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0057.

2. Mr. Dukes is disqualified for two years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Dukes shall become effective on the 60th day after service of this Order on Mr. Dukes.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Dukes has the right to seek judicial review of the Order in this Decision and Order as to Mike Dukes in the court of appeals of the United States for the circuit in which Mr. Dukes resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Dukes must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[13] The date of this Order is July 13, 2017.

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In re: DANNY BURKS, an individual; HAYDEN BURKS, an individual; and SONNY McCARTER, an individual.
Docket Nos. 17-0027, 17-0028, 17-0029.
Decision and Order.
Filed July 18, 2017.

HPA – Administrative law judge, authority of – Administrative procedure – Answer, failure to file timely – Complaint, definition of – Complaint allegations, deemed admissions of – Default decision – Due process – Entering, definition of – Scar rule – Service – Sore.

[13] 15 U.S.C. § 1825(b)(2), (c).

Colleen A. Carroll, Esq., and Lauren Axley, Esq., for APHIS.
L. Thomas Austin, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO HAYDEN BURKS

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 28, 2016. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about August 27, 2016, Hayden Burks entered a horse known as Cuttin' in Line, while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

On January 7, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Burks with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 3, 2017.[2] On January 25, 2017, Mr. Burks filed a motion requesting an extension of time within which to file an answer to the Complaint, and on January 27, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] granted Mr. Burks's motion and extended to March 9, 2017, the time for filing Mr. Burks's answer to the Complaint.[3]

[1] Compl. ¶ 11 at the third unnumbered page.
[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX 5594.
[3] Order Granting Respondent's Motion to Extend Time to Answer Complaint.

Mr. Burks failed to file an answer to the Complaint on or before March 9, 2017, and on March 13, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Respondent Hayden Burks by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Respondent Hayden Burks by Reason of Default [Proposed Default Decision]. On March 27, 2017, Mr. Burks filed an Answer.

On May 30, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order as to Respondent Hayden Burks [Default Decision]: (1) concluding Mr. Burks violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Burks a $2,200 civil penalty; and (3) disqualifying Mr. Burks for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[4]

On June 23, 2017, Mr. Burks filed a Petition for Appeal in which he appealed the Chief ALJ's Default Decision to the Judicial Officer. On July 11, 2017, the Administrator filed a response to Mr. Burks's Petition for Appeal. On July 12, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Burks failed to file a timely answer to the Complaint. The Rules of Practice provide that the failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Hayden Burks are adopted as findings of

[4] Chief ALJ's Default Decision at 5.

fact. I issue this Decision and Order as to Hayden Burks pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Burks is an individual whose business mailing address is 109 Parker Circle, Shelbyville, Tennessee 37160. At all times material to this proceeding, Mr. Burks was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature, circumstances, and extent of the prohibited conduct are that Mr. Burks entered a horse (Cuttin' in Line) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Burks's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[5]

3. Mr. Burks is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[6]

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[5] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. REP. NO. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[6] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No.

4. On November 16, 2012, the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued an Official Warning (TN 130059) to Mr. Burks with respect to his having shown a horse (A Shady Character) in a horse show on August 28, 2012, which horse APHIS found was sore.

Conclusions of Law

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

2. On or about August 27, 2016, Mr. Burks entered a horse (Cuttin' in Line), while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

Mr. Burks's Petition for Appeal

Mr. Burks raises seven issues in his Petition for Appeal. First, Mr. Burks asserts he was "never properly served" (Pet. for Appeal ¶ 1).

The record reveals that the Hearing Clerk, by certified mail, served Mr. Burks with the Complaint.[7] The Rules of Practice provide that copies of documents required or authorized to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, an employee of the United States Department of Agriculture, a United States Marshal, or a Deputy United States Marshal.[8] A complaint is a document required or authorized by the Rules of Practice to be filed with the Hearing Clerk,[9] and any complaint initially served on a person to make that person a party respondent shall be deemed to be received by that person on the date of delivery by certified mail.[10] Therefore, I reject Mr. Burks's contention that he was "never properly served." Moreover, I note that, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer to the Complaint, thereby confirming that Mr. Burks received the Complaint.

96-9472 (11th Cir. Aug. 15, 1997).
[7] *See supra* note 2.
[8] 7 C.F.R. § 1.147(b).
[9] 7 C.F.R. § 1.133(b).
[10] 7 C.F.R. § 1.147(c)(1).

Second, Mr. Burks asserts he filed an answer to the Complaint before the Chief ALJ filed the Default Decision (Pet. for Appeal ¶ 2).

The record reveals that Mr. Burks filed an answer in response to the Complaint on March 27, 2017 and that the Chief ALJ filed the Default Decision on May 30, 2017. Therefore, I agree with Mr. Burks' assertion that he filed the Answer to the Complaint prior to the date the Chief ALJ filed the Default Decision.

Third, Mr. Burks contends the Chief ALJ violated Mr. Burks' due process and equal protection rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint (Pet. for Appeal ¶ 3).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.[11] Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint;[12] viz., Mr. Burks was required to file an answer to the Complaint no later than January 27, 2017. However, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer, and on January 27, 2017, the Chief ALJ granted Mr. Burks's request and extended the time for filing Mr. Burks's answer to the Complaint to March 9, 2017.[13]

Mr. Burks did not file a timely answer but, instead, filed his Answer to the Complaint on March 27, 2017, eighteen days after he was required to file his answer. Under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing.[14] Thus, the default provisions of the Rules of Practice apply, and a late-filed answer does not preclude an administrative law judge's subsequent issuance of a default decision. Application of the default provisions of the Rules of Practice does not deprive a respondent of due process.[15] Therefore, I reject

[11] *See supra* note 2.
[12] 7 C.F.R. § 1.136(a).
[13] *See supra* note 3.
[14] 7 C.F.R. §§ 1.136(c), .139.
[15] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was

Mr. Burks's contention that the Chief ALJ violated Mr. Burks's due process rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint.

Mr. Burks failed to explain or offer any support for his contention that the Chief ALJ's entry of the Default Decision violated Mr. Burks's equal protection rights, and, without some minimal explanation of Mr. Burks's contention, I am unable to address Mr. Burks's contention that the Chief ALJ denied Mr. Burks equal protection of the law.

Fourth, Mr. Burks contests the Chief ALJ's findings of fact and conclusion of law (Pet. for Appeal ¶¶ 4-5).

Under the Rules of Practice, the failure to file a timely answer is deemed an admission of the allegations in the complaint. As discussed in this Decision and Order as to Hayden Burks, *supra*, Mr. Burks failed to file a timely answer to the Complaint and is deemed to have admitted the allegations in the Complaint. Mr. Burks's denial of the allegations in the Complaint, which he has been deemed to have admitted, comes far too late to be considered.

Fifth, Mr. Burks asserts that he and Mr. Danny Burks did not both enter Cuttin' in Line in a horse show as alleged in the Complaint (Pet. for Appeal ¶¶ 6-7). I infer Mr. Burks contends that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

The Administrator alleges that both Mr. Hayden Burks and Mr. Danny Burks entered a horse (Cuttin' in Line), while Cuttin' in Line was sore, for

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

showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[16] "Entering," within the meaning of the Horse Protection Act, is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited.[17] Any person who participates in, or completes any part of, the entry process is liable for the Horse Protection Act violation should the horse be found to be sore.[18] Thus, multiple persons can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore. Therefore, I reject Mr. Burks's unsupported contention that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

[16] Mr. Danny Burks (Compl. ¶ 10 at the third unnumbered page); Mr. Hayden Burks (Compl. ¶ 11 at the third unnumbered page).

[17] Stepp, 57 Agric. Dec. 297, 309 (U.S.D.A. 1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the Designated Qualified Person or APHIS veterinarian), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (1999); Burks, 53 Agric. Dec. 322, 334 (U.S.D.A. 1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); Callaway, 52 Agric. Dec. 272, 293 (U.S.D.A. 1993) (stating entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited); Watlington, 52 Agric. Dec. 1172, 1183 (U.S.D.A. 1993) (stating that entry is a process that gives a status of being entered to a horse and it includes filling out forms and presenting the horse for inspection); Crowe, 52 Agric. Dec. 1132, 1146-47 (U.S.D.A. 1993) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee); Elliott, 51 Agric. Dec. 334, 344 (U.S.D.A. 1992) (Decision as to William Dwaine Elliott) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by Designated Qualified Persons or United States Department of Agriculture veterinarians), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

[18] Black, 66 Agric. Dec. 1217, 1239 (U.S.D.A. 2007), *aff'd sub nom.* Derickson v. U.S. Dep't of Agric., 546 F.3d 335 (6th Cir. 2008); Stewart, 60 Agric. Dec. 570, 605 (U.S.D.A. 2001), *aff'd,* 64 F. App'x 941 (6th Cir. 2003).

Sixth, Mr. Burks asserts "this was a scar rule violation" and contends "the scar rule is not a sore horse" (Pet. for Appeal ¶ 8).

Mr. Burks provides no support for his assertion that this proceeding concerns "a scar rule violation." Moreover, a horse is sore if it meets the statutory definition of a "sore" horse,[19] and, contrary to Mr. Burks's contention, a horse is considered to be "sore" if the horse fails to meet the criteria in the scar rule:

> **§ 11.3 Scar rule.**
>
> The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the [Horse Protection] Act. The scar rule criteria are as follows:
>
> (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3 (footnote omitted).

Seventh, Mr. Burks "challenge[s] the authority of the Administrative Judge and the procedure of the administrative office" (Pet. for Appeal ¶

[19] 15 U.S.C. § 1821(3).

9). I infer Mr. Burks contends the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act. The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture, to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557.[20] Administrative disciplinary proceedings instituted under the Horse Protection Act are proceedings subject to 5 U.S.C. §§ 556 and 557. Therefore, I reject Mr. Burks's contention that the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Burks is assessed a $2,200 civil penalty. Mr. Burks shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Burks's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty (60) days after service of this Order on Mr. Burks. Mr. Burks shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0028.

2. Mr. Burks is disqualified for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification

[20] 7 C.F.R. § 2.27(a)(1).

of Mr. Burks shall become effective on the sixtieth (60th) day after service of this Order on Mr. Burks.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Burks has the right to seek judicial review of the Order in this Decision and Order as to Hayden Burks in the court of appeals of the United States for the circuit in which Mr. Burks resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Burks must file a notice of appeal in such court within thirty (30) days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[21] The date of this Order is July 18, 2017.

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In re: DANNY BURKS, an individual; HAYDEN BURKS, an individual; SONNY McCARTER, an individual.
Docket Nos. 17-0027; 17-0028; 17-0029.
Decision and Order.
Filed July 19, 2017.

HPA – Administrative law judges, authority of – Administrative procedure – Answer, failure to timely file – Default decision – Due process – "Entering," definition of – Rules of Practice – Scar rule – Service – Sore.

Colleen A. Carroll, Esq., and Lauren Axley, Esq., for APHIS.
Richard L. Dugger, Esq., for Respondent Danny Burks.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO DANNY BURKS

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 28, 2016. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831)

[21] 15 U.S.C. § 1825(b)(2), (c).

[Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about August 27, 2016, Danny Burks entered a horse known as Cuttin' in Line, while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

On January 7, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Burks with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 3, 2017.[2] On January 25, 2017, Mr. Burks filed a motion requesting an extension of time within which to file an answer to the Complaint, and on January 27, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] granted Mr. Burks's motion and extended to March 9, 2017, the time for filing Mr. Burks's answer to the Complaint.[3]

Mr. Burks failed to file an answer to the Complaint on or before March 9, 2017, and on March 13, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Respondent Danny Burks by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Respondent Danny Burks by Reason of Default [Proposed Default Decision]. On March 27, 2017, Mr. Burks filed an Answer.

On May 30, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order as to Respondent Danny Burks [Default Decision]: (1) concluding Mr. Burks violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Burks a $2,200 civil penalty; and (3) disqualifying Mr. Burks for five years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction

[1] Compl. ¶ 10 at the third unnumbered page.
[2] United States Postal Service Domestic Return Receipt for article number XXXXXXXXXXXXXXXX 5587.
[3] Order Granting Respondents' Motion to Extend Time to Answer Complaint.

and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[4]

On June 23, 2017, Mr. Burks filed a Petition for Appeal in which he appealed the Chief ALJ's Default Decision to the Judicial Officer. On July 11, 2017, the Administrator filed a response to Mr. Burks's Petition for Appeal. On July 12, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Burks failed to file a timely answer to the Complaint. The Rules of Practice provide that the failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Danny Burks are adopted as findings of fact. I issue this Decision and Order as to Danny Burks pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Burks is an individual whose business mailing address is 109 Parker Circle, Shelbyville, Tennessee 37160. At all times material to this proceeding, Mr. Burks was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature, circumstances, and extent of the prohibited conduct are that Mr. Burks entered a horse (Cuttin' in Line) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Burks's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the

[4] Chief ALJ's Default Decision at 5-6.

purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[5]

3. Mr. Burks is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[6]

4. Mr. Burks has previously been found to have violated the Horse Protection Act. *Burks*, 53 Agric. Dec. 322 (U.S.D.A. 1994) (finding that Mr. Burks violated 15 U.S.C. § 1824(2)(B) by entering a sore horse (Mountain on Fire) in a horse show; assessing Mr. Burks a $200 civil penalty; and disqualifying Mr. Burks for one year from showing, exhibiting, or entering any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction).

Conclusions of Law

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

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[5] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

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2. On or about August 27, 2016, Mr. Burks entered a horse (Cuttin' in Line), while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

Mr. Burks's Petition for Appeal

Mr. Burks raises seven issues in his Petition for Appeal. First, Mr. Burks asserts he was "never properly served" (Pet. for Appeal ¶ 1).

The Rules of Practice provide that copies of documents required or authorized to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, an employee of the United States Department of Agriculture, a United States Marshal, or a Deputy United States Marshal.[7] A complaint is a document required or authorized by the Rules of Practice to be filed with the Hearing Clerk,[8] and any complaint initially served on a person to make that person a party respondent shall be deemed to be received by that person on the date of delivery by certified mail.[9] The record reveals that the Hearing Clerk, by certified mail, served Mr. Burks with the Complaint.[10] Therefore, I reject Mr. Burks's contention that he was "never properly served." Moreover, I note that, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer to the Complaint, thereby confirming that Mr. Burks received the Complaint.

Second, Mr. Burks asserts he filed an answer to the Complaint before the Chief ALJ filed the Default Decision (Pet. for Appeal ¶ 2).

The record reveals that Mr. Burks filed an Answer in response to the Complaint on March 27, 2017, and that the Chief ALJ filed the Default Decision on May 30, 2017. Therefore, I agree with Mr. Burks's assertion that he filed the Answer to the Complaint prior to the date the Chief ALJ filed the Default Decision.

[7] 7 C.F.R. § 1.147(b).
[8] 7 C.F.R. § 1.133(b).
[9] 7 C.F.R. § 1.147(c)(1).
[10] *See supra* note 2.

Third, Mr. Burks contends the Chief ALJ violated Mr. Burks's due process and equal protection rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint (Pet. for Appeal ¶ 3).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.[11] Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint;[12] viz., Mr. Burks was required to file an answer to the Complaint no later than January 27, 2017. However, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer, and on January 27, 2017, the Chief ALJ granted Mr. Burks's request and extended the time for filing Mr. Burks's answer to the Complaint to March 9, 2017.[13]

Mr. Burks did not file a timely answer but, instead, filed his Answer to the Complaint on March 27, 2017, eighteen days after he was required to file his answer. Under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing.[14] Thus, the default provisions of the Rules of Practice apply, and a late-filed answer does not preclude an administrative law judge's subsequent issuance of a default decision. Application of the default provisions of the Rules of Practice does not deprive a respondent of due process.[15] Therefore, I reject Mr. Burks's contention that the Chief ALJ violated Mr. Burks's due

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[12] 7 C.F.R. § 1.136(a).
[13] *See supra* note 3.
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[15] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); Kirk v. INS, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

process rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint.

Mr. Burks failed to explain or offer any support for his contention that the Chief ALJ's entry of the Default Decision violated Mr. Burks's equal protection rights, and, without some minimal explanation of Mr. Burks's contention, I am unable to address Mr. Burks's contention that the Chief ALJ denied Mr. Burks equal protection of the law.

Fourth, Mr. Burks contests the Chief ALJ's findings of fact and conclusion of law (Pet. for Appeal ¶¶ 4-5).

Under the Rules of Practice, the failure to file a timely answer is deemed an admission of the allegations in the complaint. As discussed in this Decision and Order as to Danny Burks, *supra*, Mr. Burks failed to file a timely answer to the Complaint and is deemed to have admitted the allegations in the Complaint. Mr. Burks's denial of the allegations in the Complaint, which he has been deemed to have admitted, comes far too late to be considered.

Fifth, Mr. Burks asserts that he and Mr. Hayden Burks did not both enter Cuttin' in Line in a horse show as alleged in the Complaint (Pet. for Appeal ¶¶ 6-7). I infer Mr. Burks contends that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

The Administrator alleges that both Mr. Danny Burks and Mr. Hayden Burks entered a horse (Cuttin' in Line), while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[16] "Entering," within the meaning of the Horse Protection Act, is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited.[17] Any person who participates in, or completes any

[16] Mr. Danny Burks (Compl. ¶ 10 at the third unnumbered page); Mr. Hayden Burks (Compl. ¶ 11 at the third unnumbered page).

[17] Stepp, 57 Agric. Dec. 297, 309 (U.S.D.A. 1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the Designated Qualified Person or Animal and Plant Health Inspection Service veterinarian),

part of, the entry process is liable for the Horse Protection Act violation should the horse be found to be sore.[18] Thus, multiple persons can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore. Therefore, I reject Mr. Burks's unsupported contention that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

Sixth, Mr. Burks asserts "this was a scar rule violation" and contends "the scar rule is not a sore horse" (Pet. for Appeal ¶ 8).

Mr. Burks provides no support for his assertion that this proceeding concerns "a scar rule violation." Moreover, a horse is sore if it meets the statutory definition of a "sore" horse,[19] and, contrary to Mr. Burks's contention, a horse is considered to be "sore" if the horse fails to meet the criteria in the scar rule:

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aff'd, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (1999); Burks, 53 Agric. Dec. 322, 334 (U.S.D.A. 1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); Callaway, 52 Agric. Dec. 272, 293 (U.S.D.A. 1993) (stating entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited); Watlington, 52 Agric. Dec. 1172, 1183 (U.S.D.A. 1993) (stating that entry is a process that gives a status of being entered to a horse and it includes filling out forms and presenting the horse for inspection); Crowe, 52 Agric. Dec. 1132, 1146-47 (U.S.D.A. 1993) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee); Elliott (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (U.S.D.A. 1992) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by Designated Qualified Persons or United States Department of Agriculture veterinarians), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

[18] Black, 66 Agric. Dec. 1217, 1239 (U.S.D.A. 2007), *aff'd sub nom. Derickson v. U.S. Dep't of Agric.*, 546 F.3d 335 (6th Cir. 2008); Stewart, 60 Agric. Dec. 570, 605 (U.S.D.A. 2001), *aff'd,* 64 F. App'x 941 (6th Cir. 2003).

[19] 15 U.S.C. § 1821(3).

§ 11.3 Scar rule.

> The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the [Horse Protection] Act. The scar rule criteria are as follows:
>
> (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3 (footnote omitted).

Seventh, Mr. Burks "challenge[s] the authority of the Administrative Judge and the procedure of the administrative office" (Pet. for Appeal ¶ 9). I infer Mr. Burks contends the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act. The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture, to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557.[20] Administrative disciplinary proceedings instituted under the Horse Protection Act are proceedings subject to

[20] 7 C.F.R. § 2.27(a)(1).

5 U.S.C. §§ 556 and 557. Therefore, I reject Mr. Burks's contention that the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Burks is assessed a $2,200 civil penalty. Mr. Burks shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Burks's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within 60 days after service of this Order on Mr. Burks. Mr. Burks shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0027.

2. Mr. Burks is disqualified for five years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Burks shall become effective on the 60th day after service of this Order on Mr. Burks.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Burks has the right to seek judicial review of the Order in this Decision and Order as to Danny Burks in the court of appeals of the United States for the circuit in which Mr. Burks resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Burks must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send

a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[21]

The date of this Order is July 19, 2017.

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In re: AMY BLACKBURN, an individual; KEITH BLACKBURN, an individual; and AL MORGAN, an individual.
Docket Nos. 17-0093, 17-0094, 17-0095.
Decision and Order.
Filed July 31, 2017.

HPA – Administrative procedure – Answer, failure to file timely – Complaint allegations, deemed admissions of – Excusable neglect – Federal Rules of Civil Procedure – Hearing Clerk's service letter – Presumption of regularity – Public officers, official acts of – Warning letters.

Colleen A. Carroll, Esq., and Tracy M. McGowan, Esq., for APHIS.
Robin Webb, Esq., for Respondents.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO KEITH BLACKBURN

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about August 26, 2016, Keith Blackburn entered a horse known as Mastercard of Jazz, while Mastercard

[21] 15 U.S.C. § 1825(b)(2), (c).

of Jazz was sore, for showing in class 58 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

On February 2, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Blackburn with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 26, 2017.[2] Mr. Blackburn failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 24, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order by Reason of Default [Proposed Default Decision]. On March 1, 2017, Mr. Blackburn filed an Answer to Complaint, and on March 20, 2017, Mr. Blackburn filed a Motion to Accept Answer of Respondent.

Mr. Blackburn failed to file a response to the Administrator's Motion for Default Decision, and, on May 30, 2017, in accordance with 7 C.F.R. § 1.139, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed a Default Decision and Order Denying Motion to Accept Late Answer of Respondent Keith Blackburn [Default Decision] in which the Chief ALJ: (1) denied Mr. Blackburn's Motion to Accept Answer of Respondent; (2) concluded Mr. Blackburn violated the Horse Protection Act, as alleged in the Complaint; (3) assessed Mr. Blackburn a $2,200 civil penalty; and (4) disqualified Mr. Blackburn for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[3]

On June 30, 2017, Mr. Blackburn appealed the Chief ALJ's Default Decision to the Judicial Officer.[4] On July 11, 2017, the Administrator filed

[1] Compl. ¶ 17 at the fourth unnumbered page.
[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX 0820.
[3] Chief ALJ's Default Decision at 6-7.
[4] Appeal to Judicial Officer/and/or Motion to Reconsider to Vacate and Set Aside Judgment [Appeal Petition].

a response to Mr. Blackburn's Appeal Petition, and on July 14, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Blackburn failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Blackburn are adopted as findings of fact. I issue this Decision and Order as to Keith Blackburn pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Blackburn is an individual whose business mailing address is 477 Oakland Road, Rutledge, Tennessee 37861. At all times material to this proceeding, Mr. Blackburn was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of the prohibited conduct are that Mr. Blackburn entered a horse (Mastercard of Jazz) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Blackburn's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[5]

[5] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a

3. Mr. Blackburn is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[6]

4. The Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], has issued multiple warning letters to Mr. Blackburn.

5. On November 15, 2012, APHIS issued an Official Warning (TN 130051) to Mr. Blackburn with respect to his having shown a horse (The Sportster) in a horse show on August 24, 2012, which horse APHIS found was sore.

6. On June 18, 2013, APHIS issued an Official Warning (KY 10064) to Mr. Blackburn with respect to his having shown a horse (Unreal) in a horse show on April 23, 2010, which horse APHIS found was sore.

7. On February 3, 2015, APHIS issued an Official Warning (TN 130448) to Mr. Blackburn with respect to his having shown a horse (Lady Antebellum) in a horse show on June 21, 2013, which horse APHIS found was bearing prohibited equipment (metal plates).

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champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[6] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

8. On July 14, 2016, APHIS issued an Official Warning (TN 160113) to Mr. Blackburn with respect to his having entered a horse (John Gruden) in a horse show on September 2, 2015, which horse APHIS found was sore.

Conclusions of Law

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

2. On or about August 26, 2016, Mr. Blackburn entered a horse (Mastercard of Jazz), while Mastercard of Jazz was sore, for showing in class 58 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

Mr. Blackburn's Appeal Petition

Mr. Blackburn raises six issues in his Appeal Petition. First, Mr. Blackburn contends the Chief ALJ erroneously held in an order dated April 18, 2017 that she does not have jurisdiction to rule on a motion to vacate or set aside a default decision after the default decision is issued (Appeal Pet. ¶ II at 2).

The record does not contain an order by the Chief ALJ dated April 18, 2017. Therefore, Mr. Blackburn's contention that the Chief ALJ's order dated April 18, 2017 is error has no merit.

Second, Mr. Blackburn contends that the United States Department of Agriculture's determination that Mastercard of Jazz was "sore," as that term is defined in the Horse Protection Act, on August 26, 2016, is the product of the United States Department of Agriculture's "inherently flawed inspection process" (Appeal Pet. ¶ III at 3).

Mr. Blackburn failed to file a timely answer to the Complaint, and, in accordance with the Rules of Practice, Mr. Blackburn is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint.[7] Therefore, Mr. Blackburn is deemed, for the purposes of this proceeding, to have admitted that, on or about August 26, 2016, Mastercard of Jazz was sore. Mr. Blackburn's challenge in his Appeal

[7] 7 C.F.R. § 1.136(c).

Petition to the determination that Mastercard of Jazz was sore comes far too late to be considered.

Third, Mr. Blackburn contends that the Hearing Clerk's use of the word "may" in the following sentence in the Hearing Clerk's January 26, 2017 service letter, which accompanied the Complaint, was not clear and was prejudicial to Mr. Blackburn: "Failure to file a timely answer or filing an answer which does not deny the allegations of the Complaint may constitute an admission of those allegations and waive your right to an oral hearing." (Appeal Pet. ¶ III at 3).

The record does not support Mr. Blackburn's contention that the Hearing Clerk's January 26, 2017 service letter was unclear or that the alleged lack of clarity in the Hearing Clerk's letter caused Mr. Blackburn to file a late-filed answer to the Complaint. The Rules of Practice, a copy of which accompanied the Hearing Clerk's January 26, 2017 service letter, state the time within which an answer must be filed and the consequences of failing to file a timely answer.[8] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance with the Rules of Practice and that failure to file a timely answer shall constitute an admission of all the material allegations of the Complaint.[9]

Fourth, Mr. Blackburn asserts APHIS bombarded him with meaningless warning letters to desensitize him, to confuse him, and to cause him to ignore any future-filed complaint (Appeal Pet. ¶ III at 4).

APHIS issued four warning letters to Mr. Blackburn during the period November 15, 2012, through July 14, 2016. The record does not contain any support for Mr. Blackburn's contention that APHIS issued these warning letters to desensitize Mr. Blackburn, to confuse Mr. Blackburn, or to cause Mr. Blackburn to ignore the Complaint filed by the Administrator on January 10, 2017. A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume that APHIS officials sent the warning letters to Mr. Blackburn for the purpose of warning Mr. Blackburn that APHIS believes that he had violated the Horse Protection Act and not for the

[8] 7 C.F.R. §§ 1.136(a), (c); .139.
[9] Compl. at the fourth unnumbered page.

purpose of desensitizing him, confusing him, or causing him to ignore the Complaint.[10]

[10] *See* 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. Chemical 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, his 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 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

Fifth, Mr. Blackburn contends the Chief ALJ's Default Decision should be set aside because the Federal Rules of Civil Procedure "would apply in this instance" and Mr. Blackburn's failure to file a timely answer was due to excusable neglect (Appeal Pet. ¶ III at 4-5).

The Federal Rules of Civil Procedure govern procedure in the United States district courts[11] and are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Horse Protection Act and the Rules of Practice.[12] Unlike the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

Sixth, Mr. Blackburn contends the Chief ALJ's Default Decision should be set aside because the Rules of Practice do not provide due process and have not been updated since 1977 (Appeal Pet. ¶¶ III-IV at 4-6).

The default provisions of the Rules of Practice have long been held to provide respondents due process.[13] Moreover, contrary to Mr. Blackburn's

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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).

[11] FED. R. CIV. P. 1.

[12] Heartland Kennels, Inc., 61 Agric. Dec. 492, 535 (U.S.D.A. 2002); Mitchell, 60 Agric. Dec. 91, 123 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000).

[13] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). *See also* Father & Sons Lumber & Bldg. Supplies, Inc. v. NLRB, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); Kirk v. INS, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

assertion, the Rules of Practice have been amended five times since 1977.[14]

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Blackburn is assessed a $2,200 civil penalty. Mr. Blackburn shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Blackburn's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within 60 days after service of this Order on Mr. Blackburn. Mr. Blackburn shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0094.

2. Mr. Blackburn is disqualified for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Blackburn shall become effective on the 60th day after service of this Order on Mr. Blackburn.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Blackburn has the right to seek judicial review of the Order in this Decision and Order as to Keith Blackburn in the court of appeals of the United States for the circuit in which Mr. Blackburn resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Blackburn must file a notice of appeal in such

[14] *See* 53 Fed. Reg. 7177 (Mar. 7, 1988); 55 Fed. Reg. 30673 (July 27, 1990); 60 Fed. Reg. 8455 (Feb. 14, 1995); 61 Fed. Reg. 11503 (Mar. 21, 1996); 68 Fed. Reg. 6340 (Feb. 7, 2003).

court within 30 days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[1] The date of this Order is July 31, 2017.

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In re: TRISTA BROWN, an individual; JORDAN CAUDILL, an individual; and KELLY PEAVY, an individual.
Docket Nos. 17-0023, 17-0024, 17-0025.
Decision and Order.
Filed August 2, 2017.

HPA – Administrative procedure – Answer, failure to file timely – Complaint admissions, deemed allegations of – Due process – Excusable neglect – Federal Rules of Civil Procedure – Hearing Clerk's service letter – Presumption of regularity – Public officers, official acts of – Regulatory consequences of untimely answer – Rules of Practice – Sore – Warning letters.

Colleen A. Carroll, Esq., and Lauren Axley, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent Jordan Caudill.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO JORDAN CAUDILL

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 23, 2016. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on August 25, 2016, Jordan Caudill entered a horse known as That's My Luck, while That's My Luck was

[1] 15 U.S.C. § 1825(b)(2), (c).

sore, for showing in class 29 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[2]

On March 28, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Caudill with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated December 28, 2016.[3] Mr. Caudill failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a). On April 24, 2017, Mr. Caudill filed a late-filed Answer to Complaint.

On May 9, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed an Order to Show Cause Why Default Should Not Be Entered. On May 25, 2017, the Administrator filed Complainant's Response to Order to Show Cause stating that a default decision and order should be entered as to Mr. Caudill in light of Mr. Caudill's failure to file a timely answer to the Complaint. On May 25, 2017, the Administrator also filed a Motion for Adoption of Decision and Order as to Respondent Jordan Caudill by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Respondent Jordan Caudill by Reason of Default [Proposed Default Decision]. On May 25, 2017, Mr. Caudill filed Respondent Response to Show Cause Order and Motion to Dismiss for Failure to State a Claim.

On June 20, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order Denying Motion to Dismiss and Request to Accept Late-Filed Answer [Default Decision] in which the Chief ALJ: (1) denied Mr. Caudill's request to accept Mr. Caudill's late-filed Answer to Complaint; (2) denied Mr. Caudill's Motion to Dismiss; (3) concluded Mr. Caudill violated the Horse Protection Act, as alleged in the Complaint; (4) assessed Mr. Caudill a $500 civil penalty; and (5) disqualified Mr. Caudill for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction

[2] Compl. ¶ 22 at the fourth and fifth unnumbered pages.
[3] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX 5709.

and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[4]

On June 30, 2017, Mr. Caudill appealed the Chief ALJ's Default Decision to the Judicial Officer.[5] On July 10, 2017, the Administrator filed a response to Mr. Caudill's Appeal Petition,[6] and, on July 27, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Caudill failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Caudill are adopted as findings of fact. I issue this Decision and Order as to Jordan Caudill pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Caudill is an individual with a mailing address in Kentucky. At all times material to this proceeding, Mr. Caudill was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of Mr. Caudill's prohibited conduct are that Mr. Caudill entered a horse (That's My Luck) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Caudill's prohibited conduct are great. Congress enacted the Horse Protection Act to end the

[4] Chief ALJ's Default Decision at 6-7.
[5] Appeal to Judicial Officer/and/or Motion to Reconsider to Vacate and Set Aside Judgment [Appeal Petition].
[6] Complainant's Response to Petition for Appeal Filed by Jordan Caudill.

practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[7]

3. Mr. Caudill is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[8]

4. The Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], has issued two warning letters to Mr. Caudill.

5. APHIS issued an Official Warning (KY 09091) to Mr. Caudill with respect to his having entered a horse (Designer Original) in a horse show on July 3, 2009, which horse APHIS found was sore.

6. On November 13, 2012, APHIS issued an Official Warning (TN 130046) to Mr. Caudill with respect to his having entered a horse (A Magic Jazz Man) in a horse show on August 23, 2012, which horse APHIS found was sore.

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[7] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

8 Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

Conclusions of Law

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

2. On August 25, 2016, Mr. Caudill entered a horse (That's My Luck), while That's My Luck was sore, for showing in class 29 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

Mr. Caudill's Appeal Petition

Mr. Caudill raises six issues in his Appeal Petition. First, Mr. Caudill contends the Chief ALJ's statement that, "other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer," is error (Appeal Pet. ¶ II at 2).

The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint and that, upon admission by answer of all the material allegations of fact in the complaint, the complainant shall file a proposed decision and a motion for adoption of the proposed decision.[9] The respondent may file objections to the complainant's proposed decision and motion for adoption of the proposed decision, and, if the administrative law judge finds that the respondent has filed meritorious objections, the "complainant's [m]otion shall be denied with supporting reasons."[10] Thus, under the Rules of Practice, the consequences of an untimely filed answer may be avoided by the administrative law judge's finding that the respondent has filed meritorious objections to the complainant's proposed decision and motion for adoption of the proposed decision,[11] as well as by the entry of a consent decision.[12]

[9] 7 C.F.R. §§ 1.136(c), .139.
[10] 7 C.F.R. § 1.139.s
[11] *See* Arbuckle Adventures, LLC, 76 Agric. Dec. 38, 43-44 (U.S.D.A. Feb. 9, 2017) (affirming the administrative law judge's ruling denying the Administrator's motion for default decision and remanding the proceeding to the administrative law judge for further proceedings in accordance with the Rules of Practice).
[12] 7 C.F.R. § 1.138.

The Chief ALJ determined that Mr. Caudill failed to file meritorious objections to the Administrator's Motion for Default Decision and Proposed Default Decision;[13] therefore, the Chief ALJ's statement that, "other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer," is harmless error.

Second, Mr. Caudill contends that the United States Department of Agriculture's determination that That's My Luck was "sore," as that term is defined in the Horse Protection Act, on August 25, 2016, is the product of the United States Department of Agriculture's "inherently flawed inspection process" (Appeal Pet. ¶ III at 3).

Mr. Caudill failed to file a timely answer to the Complaint, and, in accordance with the Rules of Practice, Mr. Caudill is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint.[14] Therefore, Mr. Caudill is deemed, for the purposes of this proceeding, to have admitted that, on August 25, 2016, That's My Luck was sore. Mr. Caudill's challenge in his Appeal Petition to the determination that That's My Luck was sore comes far too late to be considered.

Third, Mr. Caudill contends that the Hearing Clerk's use of the word "may" in the following sentence in the Hearing Clerk's December 28, 2016 service letter, which accompanied the Complaint, was not clear and was prejudicial to Mr. Caudill: "Failure to file a timely answer or filing an answer which does not deny the allegations of the Complaint may constitute an admission of those allegations and waive your right to an oral hearing." (Appeal Pet. ¶ III at 3).

The record does not support Mr. Caudill's contention that the Hearing Clerk's December 28, 2016 service letter was unclear or that the alleged lack of clarity in the Hearing Clerk's letter caused Mr. Caudill to file a late-filed answer to the Complaint. The Rules of Practice, a copy of which accompanied the Hearing Clerk's December 28, 2016 service letter, state the time within which an answer must be filed and the consequences of

[13] Chief ALJ's Default Decision at 3-4.
[14] 7 C.F.R. § 1.136(c).

failing to file a timely answer.[15] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance with the Rules of Practice and that failure to file a timely answer shall constitute an admission of all the material allegations of the Complaint.[16]

Fourth, Mr. Caudill asserts APHIS bombarded him with meaningless warning letters to desensitize him, to confuse him, and to cause him to ignore any future-filed complaint (Appeal Pet. ¶ III at 4).

APHIS issued two warning letters to Mr. Caudill prior to the date the Administrator filed the Complaint. The record does not contain any support for Mr. Caudill's contention that APHIS issued these warning letters to desensitize Mr. Caudill, to confuse Mr. Caudill, and to cause Mr. Caudill to ignore the Complaint. A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume that APHIS officials sent the warning letters to Mr. Caudill for the purpose of warning Mr. Caudill that APHIS believes that he had violated the Horse Protection Act and not for the purpose of desensitizing him, confusing him, or causing him to ignore the Complaint.[17]

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[15] 7 C.F.R. §§ 1.136(a), (c), .139.

[16] Compl. at the fifth unnumbered page.

[17] *See* 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. Chemical 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, his 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*,

Fifth, Mr. Caudill contends the Chief ALJ's Default Decision should be set aside because the Federal Rules of Civil Procedure "would apply in this instance" and Mr. Caudill's failure to file a timely answer was due to excusable neglect (Appeal Pet. ¶ III at 4-5).

The Federal Rules of Civil Procedure govern procedure in the United States district courts[18] and are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Horse Protection Act and the Rules of Practice.[19] Unlike the Federal Rules of Civil

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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 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).

[18] FED. R. CIV. P. 1.

[19] Heartland Kennels, Inc., 61 Agric. Dec. 492, 535 (U.S.D.A. 2002); Mitchell, 60 Agric. Dec. 91, 123 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000).

Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

Sixth, Mr. Caudill contends the Chief ALJ's Default Decision should be set aside because the Rules of Practice do not provide due process and have not been updated since 1977 (Appeal Pet. ¶¶ III-IV at 4-6).

The default provisions of the Rules of Practice have long been held to provide respondents due process.[20] Moreover, contrary to Mr. Caudill's assertion, the Rules of Practice have been amended five times since 1977.[21]

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Caudill is assessed a $500 civil penalty. Mr. Caudill shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

[20] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). *See also* Father & Sons Lumber & Bldg. Supplies, Inc. v. NLRB, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); Kirk v. INS, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[21] *See* 53 Fed. Reg. 7177 (Mar. 7, 1988); 55 Fed. Reg. 30673 (July 27, 1990); 60 Fed. Reg. 8455 (Feb. 14, 1995); 61 Fed. Reg. 11503 (Mar. 21, 1996); 68 Fed. Reg. 6340 (Feb. 7, 2003).

Mr. Caudill's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty (60) days after service of this Order on Mr. Caudill. Mr. Caudill shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0024.

2. Mr. Caudill is disqualified for one (1) year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Caudill shall become effective on the sixtieth (60^{th}) day after service of this Order on Mr. Caudill.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Caudill has the right to seek judicial review of the Order in this Decision and Order as to Jordan Caudill in the court of appeals of the United States for the circuit in which Mr. Caudill resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Caudill must file a notice of appeal in such court within thirty (30) days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[22] The date of this Order is August 2, 2017.

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In re: CHRISTOPHER ALEXANDER, an individual; ALIAS FAMILY INVESTMENTS, LLC, a Mississippi limited liability company; MARGARET ANNE ALIAS, an individual; KELSEY ANDREWS, an individual; TAMMY BARCLAY, an individual; RAY BEECH, an individual; NOEL BOTSCH, an individual; LYNSEY DENNEY, an individual; MIKKI ELRIDGE, an individual; FORMAC STABLES, INC., a Tennessee corporation; JEFFREY GREEN, an individual; WILLIAM TY IRBY, an individual; JAMES DALE McCONNELL, an individual; JOYCE MEADOWS, an individual; JOYCE H. MYERS, an individual; LIBBY STEPHENS, an individual; and TAYLOR WALTERS, an individual.

[22] 15 U.S.C. § 1825(b)(2), (c).

Docket Nos. 17-0195, 17-0196, 17-0197, 17-0198, 17-0199, 17-0200, 17-0201, 17-0202, 17-0203, 17-0204, 17-0205, 17-0206, 17-0207, 17-0208, 17-0209, 17-0210, 17-0211.
Decision and Order.
Filed August 17, 2017.

HPA – Administrative procedure – Answer, failure to file timely – Complaint allegations, deemed admissions of – Default decision – Due process – Extension of time – Federal Rules of Civil Procedure – Hearing Clerk's service letter – Mailbox rule – Prejudice – Rules of Practice – Service of complaint.

Colleen A. Carroll, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent Ray Beech.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO RAY BEECH

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on February 3, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about September 3, 2016, Ray Beech allowed the entry of a horse he owned known as Our Commander in Chief, while Our Commander in Chief was sore, for showing in class 187 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(D).[1]

On February 16, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Beech with the Complaint, the Rules of Practice,

[1] Compl. ¶ 84 at 15.

and the Hearing Clerk's service letter, dated February 8, 2017.[2] Mr. Beech failed to file an answer with the Hearing Clerk within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a). On March 9, 2017, Mr. Beech filed a late-filed Answer to Complaint [Answer].

On March 20, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Respondent Ray Beech by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Respondent Ray Beech by Reason of Default [Proposed Default Decision]. On March 30, 2017, Mr. Beech filed a response to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision.

On May 9, 2017, in accordance with 7 C.F.R. § 1.139, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed a Default Decision and Order [Chief ALJ's Default Decision] in which the Chief ALJ concluded that Mr. Beech violated the Horse Protection Act as alleged in the Complaint and assessed Mr. Beech a $100 civil penalty.[3]

On June 9, 2017, Mr. Beech appealed the Chief ALJ's Default Decision to the Judicial Officer.[4] On August 7, 2017, the Administrator filed a response to Mr. Beech's Appeal Petition,[5] and, on August 8, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Beech failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within

[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX 4641.
[3] Chief ALJ's Default Decision at 6.
[4] Respondent's Objection to Decision and Order [Appeal Petition].
[5] Complainant's Response to Petition for Appeal Filed by Ray Beech.

the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint, as they relate to Mr. Beech, are adopted as findings of fact. I issue this Decision and Order as to Ray Beech pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Beech is an individual with a mailing address in [redacted]. At all times material to this proceeding, Mr. Beech was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of Mr. Beech's prohibited conduct are that Mr. Beech allowed the entry of a horse he owned (Our Commander in Chief) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Beech's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[6]

3. Mr. Beech is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Owners of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act, when they are entered or shown.[7]

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[6] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[7] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997),

Conclusions of Law

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

2. On or about September 3, 2016, Mr. Beech allowed the entry of a horse he owned (Our Commander in Chief), while Our Commander in Chief was sore, for showing in class 187 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(D).

Mr. Beech's Appeal Petition

Mr. Beech raises six issues in his Appeal Petition. First, Mr. Beech contends the Hearing Clerk's service of the Complaint was defective because the Hearing Clerk mailed the Complaint to [redacted],* rather than to Mr. Beech's correct mailing address in [redacted] (Appeal Pet. at 1-2).

On February 8, 2017, the Hearing Clerk sent the Complaint to Mr. Beech by ordinary and certified mail to [redacted].[8] The Administrator asserts this address was derived from the address on the entry form used to register Mr. Beech's horse, Our Commander in Chief, to participate on September 3, 2016, in class 187, in a horse show in Shelbyville, Tennessee.[9] The United States Postal Service tracking information establishes that the United States Postal Service delivered the Complaint by certified mail to an individual at the [redacted], address on February 16, 2017,[10] and Mr. Beech concedes that he received the "letter" on February 16, 2017.[11]

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aff'd per curiam, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

* Addresses, as well as places of residence, have been redacted by the Editor to preserve personal privacy.

[8] Certificate of Service signed by Caroline Hill, Assistant Hearing Clerk.

[9] Administrator's Mot. for Default Decision at 2 n.2.

[10] Administrator's Mot. for Default Decision at 2.

[11] Mr. Beech's Response to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision.

The Rules of Practice provide that a complaint initially served on a person to make that person a party respondent in a proceeding shall be deemed to be received by the party respondent on the date of delivery by certified mail to the last known residence of the party respondent, if the party respondent is an individual.[12] Under the circumstances in this proceeding, I find [redacted], was Mr. Beech's last known residence and the Hearing Clerk properly served Mr. Beech with the Complaint on February 16, 2017.

Second, Mr. Beech contends the Chief ALJ's Default Decision should be reversed because he mailed his Answer "in time to meet the deadline" and the United States Postal Service caused his Answer to be late-filed (Appeal Pet. at 2).

The Hearing Clerk served Mr. Beech with the Complaint on February 16, 2017.[13] The Rules of Practice require that a respondent file an answer with the Hearing Clerk within twenty days after service of the complaint;[14] therefore, Mr. Beech was required to file his Answer with the Hearing Clerk no later than March 8, 2017. Mr. Beech deposited his Answer with the United States Postal Service on Saturday, March 4, 2017, for delivery to the Hearing Clerk, and the United States Postal Service delivered Mr. Beech's Answer to the Hearing Clerk on Thursday, March 9, 2017.[15]

A document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk,[16] and the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice.[17] Therefore,

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[12] 7 C.F.R. § 1.147(c)(1).
[13] *See supra* note 2.
[14] 7 C.F.R. § 1.136(a).
[15] Mr. Beech's Appeal Pet. Exs. 4-6.
[16] 7 C.F.R. § 1.147(g).
[17] Agric. Sales, Inc., 73 Agric. Dec. 612, 620 (U.S.D.A. 2014) (stating the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 86 (U.S.D.A. 2009) (stating the argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer); Knapp, 64 Agric. Dec. 253, 302 (U.S.D.A. 2005) (stating the

the date Mr. Beech posted his Answer with the United States Postal Service is not relevant to the timeliness of Mr. Beech's Answer. Moreover, the failure of the United States Postal Service to deliver Mr. Beech's Answer to the Hearing Clerk within the time Mr. Beech expected the delivery to occur is not a basis for setting aside the Chief ALJ's Default Decision. Mr. Beech could have filed his Answer by email or by facsimile. In addition, Mr. Beech could have requested an extension of time within which to file his Answer.[18] Instead, Mr. Beech chose to bear the risk that the United States Postal Service would deliver his March 4, 2017 mailing to the Hearing Clerk no later than March 8, 2017.

Third, Mr. Beech contends that the Hearing Clerk's use of the word "may" in the following sentence in the Hearing Clerk's February 8, 2017 service letter, which accompanied the Complaint, is misleading: "Failure to file a timely answer or filing an answer which does not deny the allegations of the Complaint may constitute an admission of those allegations and waive your right to an oral hearing." (Appeal Pet. at 2-3).

The record does not support Mr. Beech's contention that the Hearing Clerk's February 8, 2017 service letter was misleading or that the Hearing Clerk's letter caused Mr. Beech to file a late-filed Answer. The Rules of Practice, a copy of which accompanied the Hearing Clerk's February 8, 2017 service letter, state the time within which an answer must be filed and the consequences of failing to file a timely answer.[19] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance with the Rules of Practice and that failure to file a timely answer shall constitute an admission of all the material allegations of the Complaint.[20]

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mailbox rule does not apply in proceedings under the Rules of Practice); Reinhart, 59 Agric. Dec. 721, 742 (U.S.D.A. 2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

[18] 7 C.F.R. §§ 1.143, .147(f).

[19] 7 C.F.R. §§ 1.136(a), (c), .139.

[20] Compl. at 19.

Fourth, Mr. Beech contends the Federal Rules of Civil Procedure should apply in this proceeding because application of the Rules of Practice deprives Mr. Beech of due process (Appeal Pet. at 4-5).

The Federal Rules of Civil Procedure govern procedure in the United States district courts[21] and are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Horse Protection Act and the Rules of Practice.[22] However, the default provisions of the Rules of Practice have long been held to provide respondents due process.[23]

Fifth, Mr. Beech contends the Chief ALJ's Default Decision should be reversed because denial of the Administrator's Motion for Default Decision and acceptance of Mr. Beech's late-filed answer would not have prejudiced the Administrator (Appeal Pet. at 5).

Prejudice to the complainant is not a prerequisite for the issuance of a default decision.[24] Therefore, I reject Mr. Beech's contention that the

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[21] FED. R. CIV. P. 1.

[22] Heartland Kennels, Inc., 61 Agric. Dec. 492, 535 (U.S.D.A. 2002); Mitchell, 60 Agric. Dec. 91, 123 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000).

[23] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). *See also* Father & Sons Lumber and Building Supplies, Inc. v. NLRB, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); Kirk v. INS, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[24] McCoy, 75 Agric. Dec. 193, 200-01 (U.S.D.A. 2016) (Order Den. Pet. for Recons.) (stating lack of prejudice to the complainant is not a basis for denying the complainant's motion for a default decision); Heartland Kennels, Inc.,

Chief ALJ's Default Decision should be reversed because the Administrator would not be prejudiced if the Chief ALJ's Default Decision were set aside and Mr. Beech's late-filed Answer were accepted as timely filed.

Sixth, Mr. Beech contends the Chief ALJ's finding that Mr. Beech's mailing address is in [redacted], is error (Appeal Pet. at 5). Mr. Beech failed to file a timely answer to the Complaint. Therefore, Mr. Beech is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint.[25] One of the allegations in the Complaint is that Mr. Beech is an individual with a mailing address in [redacted].[26] Therefore, I reject Mr. Beech's contention that the Chief ALJ's finding that Mr. Beech's mailing address is in [redacted], is error.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Beech is assessed a $100 civil penalty. Mr. Beech shall pay the civil penalty by check made payable to "USDA, APHIS" and send the check to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

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61 Agric. Dec. 492, 538-39 (U.S.D.A. 2002) (stating the lack of prejudice to the complainant would not constitute a basis for setting aside the administrative law judge's default decision and remanding the proceeding to the administrative law judge for a hearing); Noell 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, the lack of prejudice would not be a basis for setting aside the administrative law judge's default decision), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. United Sates Dep't of Agric., No. 00-10608–A (11th Cir. July 20, 2000); Byard, 56 Agric. Dec. 1543, 1560-61 (U.S.D.A. 1997) (stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that the complainant prove the respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

[25] 7 C.F.R. § 1.136(c).

[26] Compl. ¶ 6 at 2.

Mr. Beech's civil penalty payment shall be forwarded to, and received by, USDA, APHIS, MISCELLANEOUS, within sixty (60) days after service of this Order on Mr. Beech. Mr. Beech shall indicate on the check that the payment is in reference to HPA Docket No. 17-0200.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Beech has the right to seek judicial review of the Order in this Decision and Order as to Ray Beech in the court of appeals of the United States for the circuit in which Mr. Beech resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Beech must file a notice of appeal in such court within thirty (30) days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[1] The date of this Order is August 17, 2017.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; **AMELIA HASELDEN, an individual**; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121; 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; **17-0127**; 17-0128; 17-0129; 17-0130; 17-0131.
Decision and Order.
Filed October 13, 2017.

HPA – Administrative law judges, authority of – Administrative procedure – Appointments Clause – Admissions – Answer, timely filing of – Complaint, requirements of – Complaint, service of – Default decision – Default decision, meritorious objections to – Disqualification – Extension of time – Inferior officers – Judicial Officer, authority of – Notice – Official warning- Presumption of regularity – Principal officers – Privacy Act – Rules of Practice – Sanctions – Service – Warning letters.

[1] 15 U.S.C. § 1825(b)(2), (c).

HORSE PROTECTION ACT

Colleen A. Carroll, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Amelia Haselden.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO AMELIA HASELDEN

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 11, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about August 26, 2016, Amelia Haselden allowed a horse that she owned, known as "Famous and Andy," to be entered, while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(D).[2]

On January 27, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Ms. Haselden with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[3] Ms. Haselden failed to file an answer within twenty days after the Hearing Clerk served her with the Complaint, as required by 7 C.F.R. § 1.136(a). On February 21, 2017, Ms. Haselden filed a late-filed Answer of Respondents.

On March 20, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Amelia Haselden by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Amelia

[2] Compl. ¶ 83 at 14.
[3] United States Postal Service Domestic Return Receipt for article number XXXXXXXXXXXXXXXX 4924.

Haselden by Reason of Default [Proposed Default Decision]. On April 3, 2017, Ms. Haselden filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default Decision]. Ms. Haselden included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated because United States Department of Agriculture administrative law judges cannot lawfully adjudicate her liability for a violation of the Horse Protection Act or lawfully impose a sanction for a violation of the Horse Protection Act. Ms. Haselden contended that only a duly appointed officer of the United States can preside over a proceeding that determines liability and the United States Department of Agriculture's delegation of enforcement authority to United States Department of Agriculture administrative law judges contravenes the Appointments Clause of the Constitution of the United States.[4] The Administrator filed Complainant's Motion to Certify Question to the Judicial Officer:[5]

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 25, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Ms. Haselden violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Ms. Haselden a $2,200 civil penalty; and (3) disqualified Ms. Haselden for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[6]

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[4] Opp'n to Mot. for Default Decision at 5-6.
[5] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).
[6] Chief ALJ's Default Decision at 5-6.

On May 23, 2017, Ms. Haselden appealed the Chief ALJ's Default Decision to the Judicial Officer.[7] On July 17, 2017, the Administrator filed a response to Ms. Haselden's Appeal Petition,[8] and, on August 3, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

MS. HASELDEN'S APPEAL PETITION

Ms. Haselden raises fifteen issues in her Appeal Petition. First, Ms. Haselden contends this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to adjudicate this proceeding (Appeal Pet. at 9-37).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice provide for appeals of the initial decisions of administrative law judges[9] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[10] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States

[7] Respondent Amelia Haselden Appeal Petition and Supporting Brief [Appeal Petition].
[8] Response to Petition for Appeal by Respondent Amelia Haselden.
[9] 7 C.F.R. § 1.145(a).
[10] 15 U.S.C. § 1825(b)-(c).

Court of Appeals.[11] Moreover, Ms. Haselden cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[12] As the United States Court of Appeals for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on

[11] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).

[12] *See* FTC v. Standard Oil Co. of California, 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 because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

> the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Ms. Haselden's contention that this case must be dismissed because the Chief ALJ has not been appointed as an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Ms. Haselden contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 37-66).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[13] Pursuant to the authority to delegate

[13] 7 U.S.C. §§ 450c-450g.

regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[14] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice, including proceedings instituted under the Horse Protection Act.[15] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[16] Therefore, I reject Ms. Haselden's contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory proceedings under the Horse Protection Act.

Ms. Haselden further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 43-44).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Ms. Haselden's contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

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[14] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[15] 7 C.F.R. § 2.35(a)(2).
[16] Attach. 1.

Third, Ms. Haselden asserts she was not provided with notice of this proceeding and an opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 66).

The record establishes that the Hearing Clerk served Ms. Haselden with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 27, 2017.[17] The Complaint states the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought. The Complaint and the Hearing Clerk's service letter, dated January 12, 2017, also state that the Rules of Practice govern the proceeding and that Ms. Haselden has an opportunity for a hearing.[18] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[19] Therefore, I reject Ms. Haselden's assertion that she was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Ms. Haselden contends the Chief ALJ's issuance of the Default Decision, based upon Ms. Haselden's violation of the Rules of Practice, is an abuse of discretion and violates the Administrative Procedure Act, the Horse Protection Act, and United States Department of Agriculture practice (Appeal Pet. at 67).

The Hearing Clerk served Ms. Haselden with the Complaint on January 27, 2017.[20] The Rules of Practice provide that within twenty days after service of a complaint the respondent shall file an answer with the Hearing a Clerk[21] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[22] Twenty days after the Hearing Clerk

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[17] *See supra* note 2.
[18] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[19] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[20] *See supra* note 2.
[21] 7 C.F.R. § 1.136(a).
[22] 7 C.F.R. §§ 1.136(c), .139.

served Ms. Haselden with the Complaint was February 16, 2017. Ms. Haselden did not file the Answer of Respondents until February 21, 2017, five days after Ms. Haselden's answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Ms. Haselden does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Ms. Haselden's contention that the Chief ALJ violated the Administrative Procedure Act, the Horse Protection Act, and United States Department of Agriculture practice when she issued the Default Decision based upon Ms. Haselden's failure to file a timely answer to the Complaint.

Fifth, citing the four-month period between her alleged violation of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Ms. Haselden questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 66-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Ms. Haselden's violation of the Horse Protection Act was properly conducted and the evidence supports the allegations in the Complaint.[23]

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[23] *See* 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. Foundation, 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, his 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

Sixth, Ms. Haselden contends the Administrator failed to serve her with the Complaint and failed to plead and prove that service of the Complaint was made in accordance with the Rules of Practice (Appeal Pet. at 76-80).

Ms. Haselden raises arguments regarding improper service of the Complaint for the first time on appeal to the Judicial Officer. These arguments should have been raised before the Chief ALJ. New arguments cannot be raised for the first time on appeal to the Judicial Officer.[24]

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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 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).

[24] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc., 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp'ts' Pet. to Reconsider and

Therefore, I conclude Ms. Haselden has waived her arguments regarding defective service of the Complaint and the Administrator's failure to plead and prove service of the Complaint.

Seventh, Ms. Haselden contends the Chief ALJ erroneously failed to address her request for an extension of time within which to file an answer to the Complaint (Appeal Pet. at 80-83).

On February 21, 2017, Ms. Haselden filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[25] I find nothing in the record indicating that the Chief ALJ ruled on Ms. Haselden's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Ms. Haselden's motion. Instead, I find the Chief ALJ's issuance of the April 25, 2017 Default Decision and failure to rule on Ms. Haselden's request for additional time to file an answer operate as an implicit denial of Ms. Haselden's motion to extend the time to respond to the Complaint.[26] Parenthetically, I note Ms. Haselden's motion for an

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Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet. to Reconsider); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).

[25] Answer of Resp'ts ¶ 11 at 3.

[26] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*,

extension of time to file a response to the Complaint was moot when she filed the motion because Ms. Haselden simultaneously filed the Answer of Respondents.

Eighth, Ms. Haselden contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Ms. Haselden's Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Ms. Haselden's Opposition to the Motion for Default Decision (Appeal Pet. at 83-98).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[27] Therefore, I reject Ms. Haselden's contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Ms. Haselden's Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address the merits of Ms. Haselden's objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[28] The Chief ALJ found Ms. Haselden's objections to the Administrator's Motion for Default Decision and Proposed Default Decision were not meritorious, and, therefore, issued the April 25, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).

[27] *See* 7 C.F.R. § 1.139.

[28] *Id.*

Ninth, Ms. Haselden contends, even if she is deemed to have admitted the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 98-103).

The Administrator alleges:

> 83. On or about August 26, 2016, Ms. Haselden allowed Mr. Fleming, Mr. Fulton and Mr. Grant to enter a horse she owned (Famous and Andy), while the horse was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

Complaint ¶ 83 at 14. Based upon Ms. Haselden's failure to file a timely answer, Ms. Haselden is deemed, for the purposes of this proceeding, to have admitted the allegation in paragraph 83 of the Complaint that she violated the Horse Protection Act. Therefore, Ms. Haselden is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 and disqualification from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for not less than one year.[29]

Tenth, Ms. Haselden contends she was excused from filing a timely answer because the Complaint is "conclusory" and does not "describe how or in what manner the horse was determined to be sore;" therefore, the Complaint does not comply with the Administrative Procedure Act or the Rules of Practice (Appeal Pet. at 101).

The formalities and technicalities of court pleading are not applicable in administrative proceedings.[30] A complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the

[29] 15 U.S.C. § 1825(b)-(c).
[30] Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).

absence of a showing that some party was misled.[31] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and, in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the complaint must apprise the respondent of the issues in controversy. The Complaint apprises Ms. Haselden of the issues in controversy and sets forth allegations of fact and provisions of law that constitute a basis for the proceeding.

Eleventh, Ms. Haselden contends any use of warning letters denies her due process (Appeal Pet. at 98-101).

The Administrator alleged and Ms. Haselden is deemed to have admitted that the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued two warning letters to Ms. Haselden, as follows:

> 54. In 2014, APHIS issued an Official Warning (TN 130304) to Ms. Haselden with respect to her having entered a horse (He's Pushin' Jose) in a horse show on August 25, 2011, which horse APHIS found was bearing prohibited substances (including isopropyl myristate).
>
> 55. On June 27, 2016, APHIS issued an Official Warning (TN 160221) to Ms. Haselden with respect to her having allowed the entry of a horse (Bolero) in a horse show on September 5, 2015, which horse APHIS found was sore.

Complaint ¶¶ 54-55 at 10. The Horse Protection Act specifically requires the Secretary of Agriculture, in assessing a civil penalty for a violation, to take into consideration all factors relevant to such determination. [32] A

[31] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); Hickey, Jr., 53 Agric. Dec. 1087, 1097 (U.S.D.A. 1994), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); Petty, 43 Agric. Dec. 1406, 1434-35 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).
[32] 15 U.S.C. § 1825(b)(1).

respondent's receipt of a warning letter from APHIS is a factor that the Secretary of Agriculture may consider in determining the amount of a civil penalty. Warning letters are both relevant and admissible in Horse Protection Act cases (as well as in other administrative enforcement proceedings).[33] Warning letters show that APHIS notified a respondent of noncompliance with the Horse Protection Act. Warning letters are intended to insure future compliance.

Twelfth, Ms. Haselden contends the Complaint does not provide her with sufficient notice to apprise her of the sanctions sought by the Administrator (Appeal Pet. at 102).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[34] The Complaint does just that, namely, the Administrator requests the issuance of "such order or orders with respect to sanctions…as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[35] The specific sanctions authorized by the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Ms. Haselden's contention that the Complaint does not provide her with sufficient notice to apprise her of the sanctions sought by the Administrator.

Thirteenth, Ms. Haselden contends the Chief ALJ lacked jurisdiction to assess a penalty of disqualification pursuant to the Horse Protection Act because there was no pleading or proof that Ms. Haselden had paid a fine assessed under 15 U.S.C. § 1825(b) or was subject to a final order issued by the Secretary of Agriculture assessing a penalty under 15 U.S.C. § 1825(b) (Appeal Pet. at 103-18).

The Horse Protection Act authorizes the Secretary of Agriculture to

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[33] *See*, *e.g.*, Am. Raisin Packers, Inc., 60 Agric. Dec. 165 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); Lawson, 57 Agric. Dec. 980 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166 (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 Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Watlington, 52 Agric. Dec. 1172 (U.S.D.A. 1993).
[34] 7 C.F.R. § 1.135(a).
[35] Compl. at 15-16.

disqualify persons from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation."[36] The Secretary of Agriculture is authorized to disqualify persons as provided in the Horse Protection Act whether or not the complaint "pleads" a prior violation of the Horse Protection Act.

Fourteenth, Ms. Haselden contends the Secretary of Agriculture violated the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [Privacy Act] (Appeal Pet. at 118-21, 128-42).

This proceeding is a disciplinary administrative proceeding to determine whether Ms. Haselden has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Secretary of Agriculture violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Ms. Haselden's Privacy Act claims.[37]

Fifteenth, Ms. Haselden asserts an official warning is not a determination that a person has violated the Horse Protection Act (Appeal Pet. at 125-28).

The Administrator alleges APHIS issued two Official Warnings to Ms. Haselden regarding the entry of horses in horse shows in violation of the Horse Protection Act.[38] I agree with Ms. Haselden that the issuance of a warning letter does not indicate that the Secretary of Agriculture has determined that the person to whom the warning letter is addressed has violated the Horse Protection Act. However, I have long held that prior warnings are relevant to the sanction to be imposed.[39]

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[36] 15 U.S.C. § 1825(c).

[37] See 7 U.S.C. §§ 450c-450g, which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer, and 7 C.F.R. § 2.35, which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer. *See also* Black, 71 Agric. Dec. 1087, 1092 (U.S.D.A. 2012) (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

[38] Compl. ¶ 19 at 5, ¶¶ 54-55 at 10.

[39] Blackburn, 76 Agric. Dec. ___ (U.S.D.A. Sept. 15, 2017) (Order Den. Pet. to Reconsider as to Keith Blackburn); Am. Raisin Packers, Inc., 60 Agric. Dec. 165,

DECISION

Statement of the Case

Ms. Haselden failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Ms. Haselden are adopted as findings of fact. I issue this Decision and Order as to Amelia Haselden pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Ms. Haselden is an individual with a mailing address in Tennessee. At all times material to this proceeding, Ms. Haselden was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of Ms. Haselden's prohibited conduct are that Ms. Haselden allowed the entry of a horse she owned, known as "Famous and Andy," in a horse show, while Famous and Andy was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Ms. Haselden's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse

185 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); Lawson, 57 Agric. Dec. 980, 1013 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166, 174 (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 Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Hutto Stockyard, Inc., 48 Agric. Dec. 436, 488 (U.S.D.A. 1989), *aff'd in part, rev'd in part, vacated in part, and remanded*, 903 F.2d 299 (4th Cir. 1990), *reprinted in* 50 Agric. Dec. 1724 (1991), *final decision on remand*, 49 Agric. Dec. 1027 (U.S.D.A. 1990).

shows.[40]

3. Ms. Haselden is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Owners of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[41]

4. APHIS has issued two warning letters to Ms. Haselden.

5. In 2014, APHIS issued an Official Warning (TN 130304) to Ms. Haselden with respect to her having entered a horse (He's Pushin' Jose) in a horse show on August 25, 2011, which horse APHIS found bearing prohibited substances (including isopropyl myristate).

6. On June 27, 2016, APHIS issued an Official Warning (TN 160221) to Ms. Haselden with respect to her having allowed the entry of a horse (Bolero) in a horse show on September 5, 2015, which horse APHIS found was sore.

Conclusions of Law

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

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[40] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[41] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

2. On or about August 26, 2016, Ms. Haselden allowed the entry of a horse she owned, known as "Famous and Andy," while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(D).

For the foregoing reasons, the following Order is issued.

ORDER

1. Ms. Haselden is assessed a $2,200 civil penalty. Ms. Haselden shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Ms. Haselden's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Ms. Haselden. Ms. Haselden shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0127.

2. Ms. Haselden is disqualified for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Ms. Haselden shall become effective on the 60th day after service of this Order on Ms. Haselden.

RIGHT TO SEEK JUDICIAL REVIEW

Ms. Haselden has the right to seek judicial review of the Order in this Decision and Order as to Amelia Haselden in the court of appeals of the United States for the circuit in which Ms. Haselden resides or has her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Ms. Haselden must file a notice of appeal in such court within thirty days from the date of this Order and must simultaneously

send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[42]

The date of this Order is October 13, 2017.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; **SHAWN FULTON, an individual**; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121; 17-0122; 17-0123; **17-0124**; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Decision and Order.
Filed October 26, 2017.

HPA – Administrative law judges, authority of – Administrative procedure – Appointments Clause – Admissions – Answer, timely filing of – Complaint, requirements of – Complaint, service of – Default decision – Default decision, meritorious objections to – Disqualification – Extension of time – Inferior officers – Judicial Officer, authority of – Notice – Presumption of regularity – Principal officers – Response to objections – Rules of Practice – Sanctions – Service .

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Shawn Fulton.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO SHAWN FULTON

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 11, 2017. The Administrator instituted the proceeding under

[42] 15 U.S.C. § 1825(b)(2), (c).

the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that, on or about August 26, 2016, Shawn Fulton entered a horse known as "Famous and Andy," while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

On January 26, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Fulton with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[2] Mr. Fulton failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 17, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a proposed Decision and Order by Reason of Default [Proposed Default Decision]. On February 21, 2017, Mr. Fulton filed a late-filed Answer of Respondents, and on March 6, 2017, Mr. Fulton filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default Decision]. Mr. Fulton included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated based upon Mr. Fulton's contention that an officer of the United States had not been appointed to preside over the proceeding, as required by the Appointments Clause of the Constitution of the United States.[3] On March 10, 2017, the Administrator requested that the administrative law judge assigned to the proceeding certify the following question to the Judicial Officer:[4]

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[1] Compl. ¶ 78 at 13.
[2] United States Postal Service domestic return receipt for article number XXXXXXXXXXXXXXXX 4894.
[3] Opp'n to Mot. for Default Decision at 5-6.
[4] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

Complainant's Motion to Certify Question to the Judicial Officer at 1.

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 11, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Mr. Fulton violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Fulton a $2,200 civil penalty; and (3) disqualified Mr. Fulton for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[5]

On May 10, 2017, Mr. Fulton appealed the Chief ALJ's Default Decision to the Judicial Officer.[6] On June 30, 2017, the Administrator filed a response to Mr. Fulton's Appeal Petition,[7] and, on August 7, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

MR. FULTON'S APPEAL PETITION

Mr. Fulton raises twelve issues in his Appeal Petition. First, Mr. Fulton contends this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to

[5] Chief ALJ's Default Decision at the fourth and fifth unnumbered pages.
[6] Respondent Shawn Fulton's Appeal Petition and Supporting Brief [Appeal Petition].
[7] Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins.

adjudicate this proceeding (Appeal Pet. at 9-37).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice provide for appeals of the initial decisions of administrative law judges[8] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[9] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States Court of Appeals.[10] Moreover, Mr. Fulton cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[11] As the United

[8] 7 C.F.R. § 1.145(a).
[9] 15 U.S.C. § 1825(b)-(c).
[10] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).
[11] *See* FTC v. Standard Oil Co. of California, 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 because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

States Court of Appeals for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling

legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Mr. Fulton's contention that this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Mr. Fulton contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 37-66).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[12] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[13] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice, including proceedings instituted under the Horse Protection Act.[14] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[15] Therefore, I reject Mr. Fulton's contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory

[12] 7 U.S.C. §§ 450c-450g.
[13] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[14] 7 C.F.R. § 2.35(a)(2).
[15] Attach. 1.

proceedings under the Horse Protection Act.

Mr. Fulton further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 47-54).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Mr. Fulton's contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

Third, Mr. Fulton asserts he was not provided with notice of this proceeding and an opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 66).

The record establishes that the Hearing Clerk served Mr. Fulton with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 26, 2017.[16] The Complaint states the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought. The Complaint and the Hearing Clerk's service letter, dated January 12, 2017, also state that the Rules of Practice govern the proceeding and that Mr. Fulton has an

[16] *See supra* note 2.

opportunity for a hearing.[17] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[18] Therefore, I reject Mr. Fulton's assertion that he was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Mr. Fulton contends the Chief ALJ's issuance of the Default Decision, based upon Mr. Fulton's failure to file a timely response to the Complaint, is an abuse of discretion, violates the Administrative Procedure Act, and is not in accord with the Horse Protection Act and United States Department of Agriculture practice (Appeal Pet. at 67).

The Hearing Clerk served Mr. Fulton with the Complaint on January 26, 2017.[19] The Rules of Practice provide that within twenty days after service of a complaint the respondent shall file an answer with the Hearing Clerk[20] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[21] Twenty days after the Hearing Clerk served Mr. Fulton with the Complaint was February 15, 2017. Mr. Fulton did not file the Answer of Respondents until February 21, 2017, six days after Mr. Fulton's answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Mr. Fulton does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Mr. Fulton's contentions that the Chief ALJ's issuance of the Default Decision violates the Administrative Procedure Act and that the Chief ALJ's issuance of the Default Decision is not in accord with the Horse Protection Act and United States Department of Agriculture practice.

Fifth, citing the four-month period between Mr. Fulton's alleged

[17] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[18] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[19] *See supra* note 2.
[20] 7 C.F.R. § 1.136(a).
[21] 7 C.F.R. §§ 1.136(c), .139.

violation of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Mr. Fulton questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 67-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Mr. Fulton's violation of the Horse Protection Act was properly conducted and the evidence supports the allegations in the Complaint.[22]

[22] *See* 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, his 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 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.,

Sixth, Mr. Fulton contends the Hearing Clerk failed to serve him with the Complaint because the Hearing Clerk sent the Complaint to Mr. Fulton's place of business rather than his residence (Appeal Pet. at 76-82).

Mr. Fulton raises the argument that the Hearing Clerk was required to serve him with the Complaint at his residence rather than his place of business for the first time on appeal to the Judicial Officer. This argument should have been raised before the Chief ALJ. New arguments cannot be raised for the first time on appeal to the Judicial Officer.[23] Therefore, I conclude Mr. Fulton has waived his argument regarding the Hearing Clerk's failure to serve him with the Complaint at his residence.

Even if I were to find that Mr. Fulton has not waived his argument that the Hearing Clerk was required to serve him with the Complaint at his residence, I would reject his argument. The Rules of Practice provide that a complaint shall be deemed to be received by a party to the proceeding on the date of delivery by certified mail to (1) the last known principal place of business of the party, (2) the last known principal place of business of the attorney or representative of record of the party, or (3) the

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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).

[23] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc., 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp'ts' Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet. to Reconsider); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).

last known residence of the party, if that party is an individual.[24] The Hearing Clerk served Mr. Fulton with the Complaint by certified mail at Mr. Fulton's last known principal place of business.[25] Mr. Fulton admits that Joe Fleming received the Complaint for him, but states Mr. Fleming "mistakenly" signed the United States Postal Service domestic return receipt attached to the envelope containing the Complaint.[26] Mr. Fulton's contention that Mr. Fleming mistakenly signed the United States Postal Service domestic return receipt is irrelevant because service is effective when a complaint is delivered to a party's last known principal place of business and someone signs for the complaint.[27]

Seventh, Mr. Fulton contends the Chief ALJ erroneously found that Mr. Fulton signed entry "forms" for "three horses" and "entered one horse and showed two other horses" (Appeal Pet. at 76).

The Chief ALJ states Mr. Fulton's "address appeared on the entry forms that he signed for the three horses at issue in this case"[28] and found Mr. Fulton "entered one horse and showed two other horses in a horse show while the horses were 'sore,' as that term is defined in the Act and Regulations."[29] The Administrator alleges that, with respect to Mr. Fulton, only one horse (Famous and Andy) is at issue in this proceeding[30] and states that Mr. Fulton's address appeared on a single entry form used to enter Famous and Andy for showing in class 54 in a horse show in Shelbyville, Tennessee.[31] Therefore, I find the Chief ALJ's statement that Mr. Fulton's address appeared on the entry forms that he signed for the three horses at issue in this case and the Chief ALJ's finding that

[24] 7 C.F.R. § 1.147(c)(1).
[25] *See supra* note 2.
[26] Opp'n to Mot. for Default Decision ¶ 7 at 2.
[27] McCulloch, 62 Agric. Dec. 83, 95 (U.S.D.A. 2003) (Decision as to Philip Trimble), *aff'd sub nom.* Trimble v. U.S. Dep't of Agric., 87 F. App'x 456 (6th Cir. 2003); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984).
[28] Chief ALJ's Default Decision at the second unnumbered page n.5.
[29] Chief ALJ's Default Decision at the second unnumbered page (Findings of Fact ¶ 2).
[30] Compl. ¶ 78 at 13.
[31] Mot. for Default Decision at 1 n.1.

Mr. Fulton entered one horse and showed two other horses, are error. Despite these factual errors, the Chief ALJ correctly concluded that Mr. Fulton entered only one horse (Famous and Andy), while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[32] Therefore, I conclude the Chief ALJ's errors of fact are harmless.

Eighth, Mr. Fulton contends the Chief ALJ erroneously failed to rule on Mr. Fulton's request for an extension of time to file an answer to the Complaint (Appeal Pet. at 83-85).

On February 21, 2017, Mr. Fulton filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[33] I find nothing in the record indicating that the Chief ALJ ruled on Mr. Fulton's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Fulton's motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Fulton's request for additional time to file an answer operate as an implicit denial of Mr. Fulton's motion to extend the time to respond to the Complaint.[34] Parenthetically, I note Mr. Fulton's motion for an extension

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[32] Chief ALJ's Default Decision at the fourth unnumbered page (Conclusions of Law ¶ 2).

[33] Answer of Resp'ts ¶ 11 at 3.

[34] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on

of time to file a response to the Complaint was moot when he filed the motion because Mr. Fulton simultaneously filed the Answer of Respondents.

Ninth, Mr. Fulton contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Fulton's Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Mr. Fulton's Opposition to the Motion for Default Decision (Appeal Pet. at 85-98).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[35] Therefore, I reject Mr. Fulton's contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Fulton's Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address the merits of Mr. Fulton's objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[36] The Chief ALJ found Mr. Fulton's objections to the Administrator's Motion

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the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).

[35] *See* 7 C.F.R. § 1.139.

[36] *Id.*

for Default Decision and Proposed Default Decision were not meritorious, and, therefore, issued the April 11, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

Tenth, Mr. Fulton contends, even if he is deemed to have admitted the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 98-102).

The Administrator alleges that Mr. Fulton violated the Horse Protection Act and Mr. Fulton is deemed to have admitted that he violated the Horse Protection Act, as follows:

> 78. On or about August 26, 2016, Mr. Fulton entered a horse (Famous and Andy), while the horse was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

Complaint ¶ 78 at 13. Therefore, Mr. Fulton is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 and disqualification from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for not less than one year.[37]

Eleventh, Mr. Fulton contends the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator (Appeal Pet. at 100).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[38] The Complaint does just that, namely, the Administrator requests issuance of "such order or orders with respect to sanctions . . . as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[39] The specific sanctions authorized by

[37] 15 U.S.C. § 1825(b)-(c).
[38] 7 C.F.R. § 1.135(a).
[39] Compl. at 15-16.

the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Mr. Fulton's contention that the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator.

Twelfth, Mr. Fulton contends the Chief ALJ lacked jurisdiction to assess a penalty of disqualification pursuant to the Horse Protection Act because there was no pleading or proof that Mr. Fulton had paid a fine assessed under 15 U.S.C. § 1825(b) or was subject to a final order issued by the Secretary of Agriculture assessing a penalty under 15 U.S.C. § 1825(b) (Appeal Pet. at 102-16).

The Horse Protection Act authorizes the Secretary of Agriculture to disqualify persons from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation."[40] The Secretary of Agriculture is authorized to disqualify persons, as provided in the Horse Protection Act, whether or not the complaint "pleads" a prior violation of the Horse Protection Act.

DECISION

Statement of the Case

Mr. Fulton failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Fulton are adopted as findings of fact. I issue this Decision and Order as to Shawn Fulton pursuant to 7 C.F.R. § 1.139.

[40] 15 U.S.C. § 1825(c).

Findings of Fact

1. Mr. Fulton is an individual with a mailing address in Tennessee. At all times material to this proceeding, Mr. Fulton was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of Mr. Fulton's prohibited conduct are that Mr. Fulton entered a horse known as "Famous and Andy," in a horse show, while Famous and Andy was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Fulton's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse shows.[41]

3. Mr. Fulton is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[42]

4. APHIS has issued a warning letter to Mr. Fulton.

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[41] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[42] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

5. On January 3, 2013, APHIS issued an Official Warning (TN 130206) to Mr. Fulton with respect to his having entered a horse (Extremely Poisonous) in a horse show in August 2012, which horse APHIS found was sore.

Conclusions of Law

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

2. On or about August 26, 2016, Mr. Fulton entered a horse known as "Famous and Andy," while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Fulton is assessed a $2,200 civil penalty. Mr. Fulton shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Fulton's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Mr. Fulton. Mr. Fulton shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0124.

2. Mr. Fulton is disqualified for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Fulton shall become effective on the 60th day after service of this Order on Mr. Fulton.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Fulton has the right to seek judicial review of the Order in this Decision and Order as to Shawn Fulton in the court of appeals of the United States for the circuit in which Mr. Fulton resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Fulton must file a notice of appeal in such court within thirty days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[1]

The date of this Order is October 26, 2017.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; **SAM PERKINS, an individual**; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121; 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; **17-0128**; 17-0129; 17-0130; 17-0131.
Decision and Order.
Filed October 31, 2017.

HPA – Administrative law judges, authority of – Administrative procedure – Appointments Clause – Admissions – Answer, timely filing of – Complaint, requirements of – Complaint, service of – Default decision – Default decision, meritorious objections to – Disqualification – Extension of time – Inferior officers – Judicial Officer, authority of – Notice – Presumption of regularity – Principal officers – Response to objections – Rules of Practice – Sanctions – Service – Warning letters.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Sam Perkins.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

[1] 15 U.S.C. § 1825(b)(2), (c).

HORSE PROTECTION ACT

DECISION AND ORDER AS TO SAM PERKINS

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 11, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that: (1) on August 25, 2016, Sam Perkins entered a horse known as "Kentucky Line," while Kentucky Line was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B); and (2) on August 27, 2016, Mr. Perkins entered a horse known as "Prince at the Ritz," while Prince at the Ritz was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[2]

On January 26, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Perkins with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[3] Mr. Perkins failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 21, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a proposed Decision and Order by Reason of Default [Proposed Default Decision]. On February 21, 2017, Mr. Perkins filed a late-filed Answer of Respondents, and on March 6, 2017, Mr. Perkins filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default

[2] Compl. ¶¶ 84-85 at 14.

[3] United States Postal Service domestic return receipt for article number XXXXXXXXXXXXXXXX 4931.

Decision]. Mr. Perkins included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated based upon Mr. Perkins's contention that no United States Department of Agriculture administrative law judge can preside over this proceeding because none has been appointed an officer of the United States, as required by the Appointments Clause of the Constitution of the United States.[4] On March 10, 2017, the Administrator requested that the administrative law judge assigned to the proceeding certify the following question to the Judicial Officer:[5]

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

Complainant's Motion to Certify Question to the Judicial Officer at 1.

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 11, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Mr. Perkins violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Perkins a $4,400 civil penalty; and (3) disqualified Mr. Perkins for two years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[6]

On May 10, 2017, Mr. Perkins appealed the Chief ALJ's Default Decision to the Judicial Officer.[7] On June 30, 2017, the Administrator

[4] Opp'n to Mot. for Default Decision ¶¶ 21, 27 at 5-6.
[5] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).
[6] Chief ALJ's Default Decision at the sixth unnumbered page.
[7] Respondent Sam Perkins Appeal Petition and Supporting Brief [Appeal Petition].

filed a response to Mr. Perkins's Appeal Petition,[8] and, on August 11, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

MR. PERKINS'S APPEAL PETITION

Mr. Perkins raises fourteen issues in his Appeal Petition. First, Mr. Perkins contends this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to adjudicate this proceeding (Appeal Pet. at 8-37).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice provide for appeals of the initial decisions of administrative law judges[9] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[10] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States Court of Appeals.[11] Moreover, Mr. Perkins cannot avoid or enjoin this

[8] Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins.
[9] 7 C.F.R. § 1.145(a).
[10] 15 U.S.C. § 1825(b)-(c).
[11] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel

administrative proceeding by raising constitutional issues.[12] As the United States Court of Appeals for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil*

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all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).

[12] *See* 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 because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

> *Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Mr. Perkins's contention that this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Mr. Perkins contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 37-66).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[13] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position

[13] 7 U.S.C. §§ 450c-450g.

of "Judicial Officer"[14] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice, including proceedings instituted under the Horse Protection Act.[15] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[16] Therefore, I reject Mr. Perkins's contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory proceedings under the Horse Protection Act.

Mr. Perkins further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 47-54).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Mr. Perkins's contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

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[14] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[15] 7 C.F.R. § 2.35(a)(2).
[16] Attach. 1.

Third, Mr. Perkins asserts he was not provided with notice of this proceeding and an opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 66).

The record establishes that the Hearing Clerk served Mr. Perkins with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 26, 2017.[17] The Complaint states the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought. The Complaint and the Hearing Clerk's January 12, 2017 service letter also state that the Rules of Practice govern the proceeding and that Mr. Perkins has an opportunity for a hearing.[18] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[19] Therefore, I reject Mr. Perkins's assertion that he was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Mr. Perkins contends the Chief ALJ's issuance of the Default Decision, based upon Mr. Perkins's failure to file a timely response to the Complaint, is an abuse of discretion, violates the Administrative Procedure Act, and is not in accord with the Horse Protection Act and United States Department of Agriculture practice (Appeal Pet. at 67).

The Hearing Clerk served Mr. Perkins with the Complaint on January 26, 2017.[20] The Rules of Practice provide that within twenty days after service of a complaint the respondent shall file an answer with the Hearing Clerk[21] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[22] Twenty days after the Hearing Clerk

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[17] *See supra* note 2.
[18] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[19] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[20] *See supra* note 2.
[21] 7 C.F.R. § 1.136(a).
[22] 7 C.F.R. §§ 1.136(c), .139.

served Mr. Perkins with the Complaint was February 15, 2017. Mr. Perkins did not file the Answer of Respondents until February 21, 2017, six days after Mr. Perkins's answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Mr. Perkins does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Mr. Perkins's contentions that the Chief ALJ's issuance of the Default Decision violates the Administrative Procedure Act and that the Chief ALJ's issuance of the Default Decision is not in accord with the Horse Protection Act and United States Department of Agriculture practice.

Fifth, citing the four-month period between Mr. Perkins's alleged violations of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Mr. Perkins questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 67-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Mr. Perkins's violations of the Horse Protection Act was properly conducted and the evidence supports the allegations in the Complaint.[23]

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[23] *See* 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, his action is presumed to be valid); Donaldson v. United States, 264 F.2d 804, 807 (6th Cir.

Sixth, Mr. Perkins contends the Hearing Clerk failed to serve him with the Complaint because the Hearing Clerk sent the Complaint to Mr. Perkins's place of business rather than his residence (Appeal Pet. at 76-82).

Mr. Perkins raises the argument that the Hearing Clerk was required to serve him with the Complaint at his residence rather than his place of business for the first time on appeal to the Judicial Officer. This argument should have been raised before the Chief ALJ. New arguments cannot be

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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 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).

raised for the first time on appeal to the Judicial Officer.[24] Therefore, I conclude Mr. Perkins has waived his argument regarding the Hearing Clerk's failure to serve him with the Complaint at his residence.

Even if I were to find that Mr. Perkins has not waived his argument that the Hearing Clerk was required to serve him with the Complaint at his residence, I would reject his argument. The Rules of Practice provide that a complaint shall be deemed to be received by a party to the proceeding on the date of delivery by certified mail to (1) the last known principal place of business of the party, (2) the last known principal place of business of the attorney or representative of record of the party, or (3) the last known residence of the party, if that party is an individual.[25] The Hearing Clerk served Mr. Perkins with the Complaint by certified mail at Mr. Perkins's last known principal place of business.[26] Mr. Perkins admits that Joe Fleming received the Complaint for him, but states Mr. Fleming "mistakenly" signed the United States Postal Service domestic return receipt attached to the envelope containing the Complaint.[27] Mr. Perkins's contention that Mr. Fleming mistakenly signed the United States Postal Service domestic return receipt is irrelevant because service is effective when a complaint is delivered to a party's last known principal place of business and someone signs for the complaint.[28]

Seventh, Mr. Perkins contends the Chief ALJ erroneously found that Mr. Perkins's "address appeared on entry forms that he signed for the three horses at issue in this case" (Appeal Pet. at 76).

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[24] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc., 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp'ts' Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet. to Reconsider); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).
[25] 7 C.F.R. § 1.147(c)(1).
[26] *See supra* note 2.
[27] Opposition to the Mot. for Default Decision ¶ 7 at 2.
[28] McCulloch, 62 Agric. Dec. 83, 95 (U.S.D.A. 2003) (Decision as to Philip Trimble), *aff'd sub nom.* Trimble v. U.S. Dep't of Agric., 87 F. App'x 456 (6th Cir. 2003); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984).

The Chief ALJ states Mr. Perkins's "address appeared on the entry forms that he signed for the three horses at issue in this case."[29] With respect to Mr. Perkins, only two horses (Kentucky Line and Prince at the Ritz) are at issue in this proceeding.[30] Moreover, the Administrator states that Mr. Perkins's address appeared on a single entry form Mr. Perkins used to enter a horse in a horse show on September 1, 2016,[31] and I find no basis for the Chief ALJ's statement that Mr. Perkins's address appeared on entry "forms" that he signed for "three horses." Therefore, I find the Chief ALJ's statement that Mr. Perkins's address appeared on the entry forms that he signed for the three horses at issue in this case, is error. Despite this factual error, the Chief ALJ correctly concluded that Mr. Perkins entered only two horses (Kentucky Line and Prince at the Ritz), while Kentucky Line and Prince at the Ritz were sore, for showing in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[32] Therefore, I conclude the Chief ALJ's statement is harmless error.

Eighth, Mr. Perkins contends the Chief ALJ erroneously failed to rule on Mr. Perkins's request for an extension of time to file an answer to the Complaint (Appeal Pet. at 82-84).

On February 21, 2017, Mr. Perkins filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[33] I find nothing in the record indicating that the Chief ALJ ruled on Mr. Perkins's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Perkins's motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Perkins's request for additional time to file an answer operate as an implicit denial of Mr. Perkins's motion to extend the time to respond to the Complaint.[34] Parenthetically, I note Mr. Perkins's motion for an

[29] Chief ALJ's Default Decision at the second unnumbered page n.4.
[30] Compl. ¶¶ 84-85 at 14.
[31] Mot. for Default Decision at 1 n.3.
[32] Chief ALJ's Default Decision at the sixth unnumbered page (Conclusions of Law ¶¶ 2-3).
[33] Answer of Resp'ts ¶ 11 at 3.
[34] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure

extension of time to file a response to the Complaint was moot when he filed the motion because Mr. Perkins simultaneously filed the Answer of Respondents.

Ninth, Mr. Perkins contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Perkins's Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Mr. Perkins's Opposition to the Motion for Default Decision (Appeal Pet. at 85-98).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[35] Therefore, I reject Mr. Perkins's contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Perkins's Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address

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to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).

[35] *See* 7 C.F.R. § 1.139.

the merits of Mr. Perkins's objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[36] The Chief ALJ found Mr. Perkins's objections to the Administrator's Motion for Default Decision and Proposed Default Decision were not meritorious and, therefore, issued the April 11, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

Tenth, Mr. Perkins contends, even if he is deemed to have admitted the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 98-102).

The Administrator alleges that Mr. Perkins violated the Horse Protection Act and Mr. Perkins is deemed to have admitted that he violated the Horse Protection Act, as follows:

> 84. On August 25, 2016, Mr. Perkins entered a horse (Kentucky Line), while the horse was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).
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> 85. On August 27, 2016, Mr. Perkins entered a horse (Prince at the Ritz), while the horse was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

Complaint ¶¶ 84-85 at 14. Therefore, Mr. Perkins is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 for each

[36] *Id.*

violation of the Horse Protection Act and disqualification from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for not less than one year for each violation of the Horse Protection Act.[37]

Eleventh, Mr. Perkins contends the use of warning letters denies him due process (Appeal Pet. at 99-100).

The Administrator alleged and Mr. Perkins is deemed to have admitted that the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued fourteen warning letters to Mr. Perkins.[38] The Horse Protection Act specifically requires the Secretary of Agriculture, in assessing a civil penalty for a violation, to take into consideration all factors relevant to such determination.[39] A respondent's receipt of a warning letter from APHIS is a factor that the Secretary of Agriculture may consider in determining the amount of a civil penalty. Warning letters are both relevant and admissible in Horse Protection Act cases (as well as in other administrative enforcement proceedings).[40] Warning letters show that APHIS notified a respondent of noncompliance with the Horse Protection Act. Warning letters are intended to insure future compliance.

Twelfth, Mr. Perkins contends the allegations in the Complaint are merely legal conclusions in the guise of allegations of fact that cannot be deemed to have been admitted by his failure to file a timely answer to the Complaint (Appeal Pet. at 101).

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[37] 15 U.S.C. § 1825(b)-(c).
[38] Compl. ¶¶ 56-69 at 10-12.
[39] 15 U.S.C. § 1825(b)(1).
[40] *See*, *e.g.*, Am. Raisin Packers, Inc., 60 Agric. Dec. 165, 185 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); Lawson, 57 Agric. Dec. 980, 1013 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166, 264 (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 Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Watlington, 52 Agric. Dec. 1172, 1185 (U.S.D.A. 1993).

The formalities and technicalities of court pleading are not applicable in administrative proceedings.[41] A complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[42] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and, in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the complaint must apprise the respondent of the issues in controversy. The Complaint apprises Mr. Perkins of the issues in controversy and sets forth allegations of fact and provisions of law that constitute a basis for the proceeding.

Thirteenth, Mr. Perkins contends the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator (Appeal Pet. at 101).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[43] The Complaint does just that, namely, the Administrator requests issuance of "such order or orders with respect to sanctions . . . as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[44] The specific sanctions authorized by the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Mr. Perkins's contention that the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator.

Fourteenth, Mr. Perkins contends the Chief ALJ lacked jurisdiction to assess a penalty of disqualification pursuant to the Horse Protection Act

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[41] Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).
[42] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); Hickey, Jr., 53 Agric. Dec. 1087, 1097 (U.S.D.A. 1994), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); Petty, 43 Agric. Dec. 1406, 1434-35 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).
[43] 7 C.F.R. § 1.135(a).
[44] Compl. at 15-16.

because there was no pleading or proof that Mr. Perkins had paid a fine assessed under 15 U.S.C. § 1825(b) or was subject to a final order issued by the Secretary of Agriculture assessing a penalty under 15 U.S.C. § 1825(b) (Appeal Pet. at 103-17).

The Horse Protection Act authorizes the Secretary of Agriculture to disqualify persons from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation."[45] The Secretary of Agriculture is authorized to disqualify persons, as provided in the Horse Protection Act, whether or not the complaint "pleads" a prior violation of the Horse Protection Act.

DECISION

Statement of the Case

Mr. Perkins failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Perkins are adopted as findings of fact. I issue this Decision and Order as to Sam Perkins pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Perkins is an individual whose business mailing address is c/o Joe Fleming Stables, 2003 Highway 64 W, Shelbyville, Tennessee 37160.

2. At all times material to this proceeding, Mr. Perkins was a "person" and an "exhibitor," as those terms are defined in the Regulations.

[45] 15 U.S.C. § 1825(c).

3. The nature and circumstances of Mr. Perkins's prohibited conduct are that Mr. Perkins entered two horses in a horse show, while the horses were "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Perkins's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse shows.[46]

4. Mr. Perkins is culpable for the violations of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[47]

5. APHIS has issued fourteen warning letters to Mr. Perkins.

6. On October 2, 2014, APHIS issued an Official Warning (MS 140013) to Mr. Perkins with respect to his having entered a horse (Spooky Dollar) in a horse show on March 30, 2013, which horse APHIS found was sore.

7. On October 9, 2014, APHIS issued an Official Warning (TN 140104) to Mr. Perkins with respect to his having entered a horse (Inception) in a

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[46] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[47] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

horse show on June 27, 2014, which horse APHIS found was sore.

8. On October 10, 2014, APHIS issued an Official Warning (FL 140188) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on April 25, 2013, which horse APHIS found was sore.

9. On April 13, 2015, APHIS issued an Official Warning (TN 140111) to Mr. Perkins with respect to his having entered a horse (Cadillac's Bum) in a horse show on June 15, 2013, which horse APHIS found was sore.

10. On December 14, 2015, APHIS issued an Official Warning (TN 150022) to Mr. Perkins with respect to his having shown a horse (Escape from Alcatraz) in a horse show on August 24, 2014, which horse APHIS found was sore.

11. On December 14, 2015, APHIS issued an Official Warning (TN 150023) to Mr. Perkins with respect to his having entered a horse (A Super Bowl MVP) in a horse show on August 26, 2014, which horse APHIS found was sore.

12. On December 18, 2015, APHIS issued an Official Warning (TN 150172) to Mr. Perkins with respect to his having entered a horse (Cadillac's Bum) in a horse show on July 3, 2014, which horse APHIS found was sore and bearing a prohibited substance.

13. On December 18, 2015, APHIS issued an Official Warning (TN 150160) to Mr. Perkins with respect to his having shown a horse (The Sportster) in a horse show on August 23, 2014, which horse APHIS found was sore.

14. On December 18, 2015, APHIS issued an Official Warning (TN 150121) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on August 22, 2014, which horse APHIS found was sore.

15. On December 18, 2015, APHIS issued an Official Warning (TN 150173) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on July 4, 2014, which horse APHIS found was sore.

16. On April 11, 2016, APHIS issued an Official Warning (TN 160008) to Mr. Perkins with respect to his having shown a horse (The American Patriot) in a horse show on August 30, 2015, which horse APHIS found was sore.

17. On April 11, 2016, APHIS issued an Official Warning (TN 160009) to Mr. Perkins with respect to his having shown a horse (Miss Empty Pockets) in a horse show on September 1, 2015, which horse APHIS found was sore.

18. On April 11, 2016, APHIS issued an Official Warning (TN 160010) to Mr. Perkins with respect to his having shown a horse (Sophisticated) in a horse show on September 1, 2015, which horse APHIS found was sore.

19. On April 12, 2016, APHIS issued an Official Warning (TN 160011) to Mr. Perkins with respect to his having shown a horse (I'm a Mastermind) in a horse show on September 2, 2015, which horse APHIS found was sore.

Conclusions of Law

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

2. On August 25, 2016, Mr. Perkins entered a horse known as "Kentucky Line," while Kentucky Line was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

3. On August 27, 2016, Mr. Perkins entered a horse known as "Prince at the Ritz," while Prince at the Ritz was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Perkins is assessed a $4,400 civil penalty. Mr. Perkins shall pay the civil penalty by certified check or money order, made payable to the

"Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Perkins's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Mr. Perkins. Mr. Perkins shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0128.

2. Mr. Perkins is disqualified for two years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Perkins shall become effective on the 60th day after service of this Order on Mr. Perkins.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Perkins has the right to seek judicial review of the Order in this Decision and Order as to Sam Perkins in the court of appeals of the United States for the circuit in which Mr. Perkins resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Perkins must file a notice of appeal in such court within thirty days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[48]

The date of this Order is October 31, 2017.

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[48] 15 U.S.C. § 1825(b)(2), (c).

HORSE PROTECTION ACT

In re: BETH BEASLEY, an individual; **JARRETT BRADLEY, an individual**; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; **17-0120**; 17-0121; 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Decision and Order.
Filed November 1, 2017.

HPA – HPA, purpose of – Administrative law judges, authority of – Administrative procedure – Appointments Clause – Admissions – Answer, timely filing of – Complaint, requirements of – Complaint, service of – Default decision – Default decision, meritorious objections to – Disqualification – Extension of time – Inferior officers – Judicial Officer, authority of – Notice – Presumption of regularity – Principal officers – Rules of Practice – Sanctions – Service – Warning letters.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Jarrett Bradley.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO JARRETT BRADLEY

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 11, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that: (1) on or about August 25, 2016, Jarrett Bradley entered a horse known as "Gambling for Glory," while Gambling for Glory was sore, for showing in class 26B in a horse show in

Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B); (2) on August 28, 2016, Mr. Bradley showed a horse known as "I'm a Mastermind," while I'm a Mastermind was sore, for showing in class 94A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(A); and (3) on September 1, 2016, Mr. Bradley showed a horse known as "Inception," while Inception was sore, for showing in class 148 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(A).[1]

On January 26, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Bradley with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[2] Mr. Bradley failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 17, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a proposed Decision and Order by Reason of Default [Proposed Default Decision]. On February 21, 2017, Mr. Bradley filed a late-filed Answer of Respondents, and on March 6, 2017, Mr. Bradley filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default Decision]. Mr. Bradley included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated based upon Mr. Bradley's contention that no United States Department of Agriculture administrative law judge can preside over this proceeding because none has been appointed an officer of the United States, as required by the Appointments Clause of the Constitution of the United States.[3] On March 10, 2017, the Administrator requested that the administrative law judge assigned to the proceeding certify the following question to the Judicial Officer:[4]

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[1] Compl. ¶¶ 72-74 at 12-13.
[2] United States Postal Service domestic return receipt for article number XXXXXXXXXXXXXXXX 4856.
[3] Opp'n to the Mot. for Default Decision ¶¶ 21, 27 at 5-6.
[4] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

Complainant's Motion to Certify Question to the Judicial Officer at 1.

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 11, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Mr. Bradley violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Bradley a $6,600 civil penalty; and (3) disqualified Mr. Bradley for three years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[5]

On May 10, 2017, Mr. Bradley appealed the Chief ALJ's Default Decision to the Judicial Officer.[6] On June 30, 2017, the Administrator filed a response to Mr. Bradley's Appeal Petition,[7] and, on August 11, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

MR. BRADLEY'S APPEAL PETITION

Mr. Bradley raises thirteen issues in his Appeal Petition. First, Mr. Bradley contends this case must be dismissed because the Chief ALJ

[5] Chief ALJ's Default Decision at the fifth unnumbered page.
[6] Respondent Jarrett Bradley Appeal Petition and Supporting Brief [Appeal Petition].
[7] Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins.

has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to adjudicate this proceeding (Appeal Pet. at 8-37).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice provide for appeals of the initial decisions of administrative law judges[8] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[9] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States Court of Appeals.[10] Moreover, Mr. Bradley cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[11] As the United

[8] 7 C.F.R. § 1.145(a).
[9] 15 U.S.C. § 1825(b)-(c).
[10] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).
[11] *See* 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

States Court of Appeals for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to

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challenge because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

> ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Mr. Bradley's contention that this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Mr. Bradley contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 37-65).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[12] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[13] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice, including proceedings instituted under the Horse Protection Act.[14] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of

[12] 7 U.S.C. §§ 450c-450g.
[13] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[14] 7 C.F.R. § 2.35(a)(2).

Agriculture Sonny Perdue reappointed me as the Judicial Officer.[15] Therefore, I reject Mr. Bradley's contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory proceedings under the Horse Protection Act.

Mr. Bradley further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 47-54).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Mr. Bradley's contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

Third, Mr. Bradley asserts he was not provided with notice of this proceeding and an opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 65-66).

The record establishes that the Hearing Clerk served Mr. Bradley with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 26, 2017.[16] The Complaint states the nature of the proceeding, the identification of the complainant and the respondents, the legal authority and jurisdiction under which the proceeding is instituted, the

[15] Attach. 1.
[16] *See supra* note 2.

allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought. The Complaint and the Hearing Clerk's January 12, 2017 service letter also state that the Rules of Practice govern the proceeding and that Mr. Bradley has an opportunity for a hearing.[17] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[18] Therefore, I reject Mr. Bradley's assertion that he was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Mr. Bradley contends the Chief ALJ's issuance of the Default Decision, based upon Mr. Bradley's failure to file a timely response to the Complaint, is an abuse of discretion, violates the Administrative Procedure Act, and is not in accord with the Horse Protection Act and United States Department of Agriculture practice (Appeal Pet. at 66).

The Rules of Practice provide that within twenty days after service of a complaint the respondent shall file an answer with the Hearing Clerk[19] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[20] The Hearing Clerk served Mr. Bradley with the Complaint on January 26, 2017.[21] Twenty days after the Hearing Clerk served Mr. Bradley with the Complaint was February 15, 2017. Mr. Bradley did not file the Answer of Respondents until February 21, 2017, six days after Mr. Bradley's answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Mr. Bradley does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Mr. Bradley's contentions that the Chief ALJ's issuance of the Default Decision violates the Administrative Procedure

[17] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[18] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[19] 7 C.F.R. § 1.136(a).
[20] 7 C.F.R. §§ 1.136(c), .139.
[21] *See supra* note 2.

Act and that the Chief ALJ's issuance of the Default Decision is not in accord with the Horse Protection Act and United States Department of Agriculture practice.

Fifth, citing the four-month period between Mr. Bradley's alleged violations of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Mr. Bradley questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 67-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Mr. Bradley's violations of the Horse Protection Act was properly conducted and the evidence supports the allegations in the Complaint.[22]

[22] *See* 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, his 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

Sixth, Mr. Bradley contends the Hearing Clerk failed to serve him with the Complaint because the Hearing Clerk sent the Complaint to Mr. Bradley's place of business rather than his residence (Appeal Pet. at 75-81).

Mr. Bradley raises the argument that the Hearing Clerk was required to serve him with the Complaint at his residence rather than his place of business for the first time on appeal to the Judicial Officer. New arguments cannot be raised for the first time on appeal to the Judicial Officer.[23] Therefore, I conclude Mr. Bradley has waived his argument regarding the Hearing Clerk's failure to serve him with the Complaint at his residence.

Even if I were to find that Mr. Bradley has not waived his argument that the Hearing Clerk was required to serve him with the Complaint at his

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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 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).

[23] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc., 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp'ts' Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt (Order Den. Pet. to Reconsider), 66 Agric. Dec. 596, 599 (U.S.D.A. 2007); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).

residence, I would reject his argument. The Rules of Practice provide that a complaint shall be deemed to be received by a party to the proceeding on the date of delivery by certified mail to (1) the last known principal place of business of the party, (2) the last known principal place of business of the attorney or representative of record of the party, or (3) the last known residence of the party, if that party is an individual.[24] The Hearing Clerk served Mr. Bradley with the Complaint by certified mail at Mr. Bradley's last known principal place of business.[25] Mr. Bradley admits that Joe Fleming received the Complaint for him, but states Mr. Fleming "mistakenly" signed the United States Postal Service domestic return receipt attached to the envelope containing the Complaint.[26] Mr. Bradley's contention that Mr. Fleming mistakenly signed the United States Postal Service domestic return receipt is irrelevant because service is effective when a complaint is delivered to a party's last known principal place of business and someone signs for the complaint.[27]

Seventh, Mr. Bradley contends the Chief ALJ erroneously failed to rule on Mr. Bradley's request for an extension of time to file an answer to the Complaint (Appeal Pet. at 82-84).

On February 21, 2017, Mr. Bradley filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[28] I find nothing in the record indicating that the Chief ALJ ruled on Mr. Bradley's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Bradley's motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Bradley's request for additional time to file an answer operate as an

[24] 7 C.F.R. § 1.147(c)(1).
[25] S*ee supra* note 2.
[26] Opp'n to Mot. for Default Decision ¶ 7 at 2.
[27] McCulloch, 62 Agric. Dec. 83, 95 (U.S.D.A. 2003) (Decision as to Philip Trimble), *aff'd sub nom.* Trimble v. U.S. Dep't of Agric., 87 F. App'x 456 (6th Cir. 2003); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984).
[28] Answer of Resp'ts ¶ 11 at 3.

implicit denial of Mr. Bradley's motion to extend the time to respond to the Complaint.[29] Parenthetically, I note Mr. Bradley's motion for an extension of time to file a response to the Complaint was moot when he filed the motion because Mr. Bradley simultaneously filed the Answer of Respondents.

Eighth, Mr. Bradley contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Bradley's Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Mr. Bradley's Opposition to the Motion for Default Decision (Appeal Pet. at 84-97).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[30] Therefore, I reject

[29] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).

[30] *See* 7 C.F.R. § 1.139.

Mr. Bradley's contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Bradley's Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address the merits of Mr. Bradley's objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[31] The Chief ALJ found Mr. Bradley's objections to the Administrator's Motion for Default Decision and Proposed Default Decision were not meritorious and, therefore, issued the April 11, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

Ninth, Mr. Bradley contends, even if he is deemed to have admitted the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 97-101).

The Administrator alleges that Mr. Bradley violated the Horse Protection Act and Mr. Bradley is deemed to have admitted that he violated the Horse Protection Act, as follows:

> 72. On or about August 25, 2016, Mr. Bradley entered a horse (Gambling for Glory) while the horse was sore, for showing in class 26B in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).
>
> 73. On August 28, 2016, Mr. Bradley showed a horse (I'm a Mastermind) while the horse was sore, for showing

[31] *Id.*

> in class 94A in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(A)).
>
> 74. On September 1, 2016, Mr. Bradley showed a horse (Inception) while the horse was sore, in class 148 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(A)).

Complaint ¶¶ 72-74 at 12-13 (footnotes omitted). Therefore, Mr. Bradley is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 for each violation of the Horse Protection Act and disqualification from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for not less than one year for each violation of the Horse Protection Act.[32]

Tenth, Mr. Bradley contends the allegations in the Complaint are merely legal conclusions in the guise of allegations of fact that cannot be deemed to have been admitted by his failure to file a timely answer to the Complaint (Appeal Pet. at 97, 99).

The formalities and technicalities of court pleading are not applicable in administrative proceedings.[33] A complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[34] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and, in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United

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[32] 15 U.S.C. § 1825(b)-(c).

[33] Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).

[34] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); Hickey, Jr., 53 Agric. Dec. 1087, 1097 (U.S.D.A. 1994), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); Petty, 43 Agric. Dec. 1406, 1434-35 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

States, the complaint must apprise the respondent of the issues in controversy. The Complaint apprises Mr. Bradley of the issues in controversy and sets forth allegations of fact and provisions of law that constitute a basis for the proceeding.

Eleventh, Mr. Bradley contends, when determining the sanction to be imposed for Mr. Bradley's violations of the Horse Protection Act, the Chief ALJ erroneously failed to consider the fact that the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], has not issued a warning letter to Mr. Bradley regarding potential violations of the Horse Protection Act (Appeal Pet. at 98).

The Horse Protection Act authorizes assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824.[35] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200.[36] The Horse Protection Act provides, when determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in the prohibited conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.[37]

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved,

[35] 15 U.S.C. § 1825(b)(1).
[36] 7 C.F.R. § 3.91(b)(2)(viii).
[37] 15 U.S.C. § 1825(b)(1).

> along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In most Horse Protection Act cases, the maximum civil penalty per violation is justified by the facts.[38] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, including the fact that APHIS has not previously issued a Horse Protection Act warning letter to Mr. Bradley, I find the Chief ALJ's assessment of the maximum civil penalty justified by the facts. The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, requests assessment of the maximum civil penalty.[39] Therefore, I affirm the Chief ALJ's assessment of a $2,200 civil penalty for each of Mr. Bradley's three violations of the Horse Protection Act.

The Horse Protection Act provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five years for any subsequent violation of the Horse Protection Act.[40]

The purpose of the Horse Protection Act is to prevent the practice of soring horses. Congress amended the Horse Protection Act in 1976 to

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[38] Sims, 75 Agric. Dec. 184, 190 (U.S.D.A. 2016); Jenne, 74 Agric. Dec. 358, 373 (U.S.D.A. 2015); Jenne, 74 Agric. Dec. 118, 128 (U.S.D.A. 2015); Back, 69 Agric. Dec. 448, 463 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (U.S.D.A. 2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1475 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., 64 Agric. Dec. 173, 208 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

[39] Administrator's Mot. for Default Decision at the second unnumbered page; Administrator's Proposed Default Decision at the third unnumbered page.

[40] 15 U.S.C. § 1825(c).

enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish the purpose of the Horse Protection Act is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[41]

The Horse Protection Act specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b).[42] While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the Administrator has recommended the imposition of a one-year disqualification period for each of Mr. Bradley's three violations of the Horse Protection Act, in addition to the assessment of a civil penalty,[43] and I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[44]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee

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[41] *See* H.R. REP. NO. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

[42] 15 U.S.C. § 1825(c).

[43] Administrator's Mot. for Default Decision at the third and fourth unnumbered pages; Administrator's Proposed Default Decision at the fourth unnumbered page.

[44] Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005) (Decision as to Christopher Jerome Zahnd), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Mr. Bradley's violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted. Therefore, I affirm the Chief ALJ's imposition of a three-year period of disqualification on Mr. Bradley, in addition to the assessment of a $6,600 civil penalty.

Twelfth, Mr. Bradley contends the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator (Appeal Pet. at 100).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[45] The Complaint does just that, namely, the Administrator requests issuance of "such order or orders with respect to sanctions…as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[46] The specific sanctions authorized by the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Mr. Bradley's contention that the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator.

Thirteenth, Mr. Bradley contends the Chief ALJ lacked jurisdiction to assess a penalty of disqualification pursuant to the Horse Protection Act because there was no pleading or proof that Mr. Bradley had paid a fine

[45] 7 C.F.R. § 1.135(a).
[46] Compl. at 15-16.

assessed under 15 U.S.C. § 1825(b) or was subject to a final order issued by the Secretary of Agriculture assessing a penalty under 15 U.S.C. § 1825(b) (Appeal Pet. at 101-15).

The Horse Protection Act authorizes the Secretary of Agriculture to disqualify persons from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation."[47] The Secretary of Agriculture is authorized to disqualify persons, as provided in the Horse Protection Act, whether or not the complaint "pleads" a prior violation of the Horse Protection Act.

DECISION

Statement of the Case

Mr. Bradley failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Bradley are adopted as findings of fact. I issue this Decision and Order as to Jarrett Bradley pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Bradley is an individual whose business mailing address is c/o Joe Fleming Stables, 2003 Highway 64 W, Shelbyville, Tennessee 37160.

2. At all times material to this proceeding, Mr. Bradley was a "person" and an "exhibitor," as those terms are defined in the Regulations.

3. The nature and circumstances of Mr. Bradley's prohibited conduct are

[47] 15 U.S.C. § 1825(c).

that Mr. Bradley entered one horse in a horse show and showed two horses in a horse show, while the horses were "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Bradley's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse shows.[48]

4. Mr. Bradley is culpable for the violations of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[49]

Conclusions of Law

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

2. On or about August 25, 2016, Mr. Bradley entered a horse known as "Gambling for Glory," while Gambling for Glory was sore, for showing in class 26B in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

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[48] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[49] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

3. On August 28, 2016, Mr. Bradley showed a horse known as "I'm a Mastermind," while I'm a Mastermind was sore, in class 94A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(A).

4. On September 1, 2016, Mr. Bradley showed a horse known as "Inception," while Inception was sore, in class 148 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(A).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Bradley is assessed a $6,600 civil penalty. Mr. Bradley shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Bradley's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Mr. Bradley. Mr. Bradley shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0120.

2. Mr. Bradley is disqualified for three years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Bradley shall become effective on the 60th day after service of this Order on Mr. Bradley.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Bradley has the right to seek judicial review of the Order in this Decision and Order as to Jarrett Bradley in the court of appeals of the United States for the circuit in which Mr. Bradley resides or has his place

of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Bradley must file a notice of appeal in such court within thirty days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[1]

The date of this Order is November 1, 2017.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual**; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES**; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121; 17-0122; **17-0123**; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Decision and Order.
Filed November 6, 2017.

HPA – Administrative law judges, authority of – Administrative procedure – Appointments Clause – Admissions – Answer, timely filing of – Complaint, service of – Default decision – Default decision, meritorious objections to – Extension of time – Inferior officers – Judicial Officer, authority of – Notice – Presumption of regularity – Principal officers – Rules of Practice – Sanctions – Service.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., for Respondent Joe Fleming, an individual d/b/a Joe Fleming Stables.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO JOE FLEMING

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator],

[1] 15 U.S.C. § 1825(b)(2), (c).

instituted this disciplinary administrative proceeding by filing a Complaint on January 11, 2017. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that on or about August 26, 2016, Joe Fleming entered a horse known as "Famous and Andy," while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[2]

On January 26, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Fleming with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[3] Mr. Fleming failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 17, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a proposed Decision and Order by Reason of Default [Proposed Default Decision]. On February 21, 2017, Mr. Fleming filed a late-filed Answer of Respondents, and on March 6, 2017, Mr. Fleming filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default Decision]. Mr. Fleming included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated based upon Mr. Fleming's contention that no United States Department of Agriculture administrative law judge can preside over this proceeding because none has been appointed an officer of the United States, as required by the Appointments Clause of the Constitution of the United States.[4] On March 10, 2017, the Administrator requested that the administrative law judge assigned to the proceeding certify the following question to the

[2] Compl. ¶ 77 at 13.
[3] United States Postal Service domestic return receipt for article number XXXXXXXXXXXXXXXX.
[4] Opp'n to Mot. for Default Decision ¶¶ 21, 27 at 5-6.

Judicial Officer:[5]

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

Complainant's Motion to Certify Question to the Judicial Officer at 1.

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 11, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Mr. Fleming violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Fleming a $2,200 civil penalty; and (3) disqualified Mr. Fleming for five years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[6]

On May 10, 2017, Mr. Fleming appealed the Chief ALJ's Default Decision to the Judicial Officer.[7] On June 27, 2017, the Administrator filed a response to Mr. Fleming's Appeal Petition,[8] and, on August 11, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

MR. FLEMING'S APPEAL PETITION

[5] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).
[6] Chief ALJ's Default Decision at the sixth and seventh unnumbered pages.
[7] Respondent Joe Flemming's [sic] Appeal Petition and Supporting Brief [Appeal Petition].
[8] Response to Petition for Appeal Filed by Respondent Joe Fleming.

Mr. Fleming raises thirteenth issues in his Appeal Petition. First, Mr. Fleming contends this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to adjudicate this proceeding (Appeal Pet. at 8-36).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice provide for appeals of the initial decisions of administrative law judges[9] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[10] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process should be raised in an appropriate United States Court of Appeals.[11] Moreover, Mr. Fleming cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[12] As the United

[9] 7 C.F.R. § 1.145(a).
[10] 15 U.S.C. § 1825(b)-(c).
[11] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).
[12] *See* 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

States Court of Appeals for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .We see no evidence from the statute's text, structure, and purpose that

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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 because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

> Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Mr. Fleming's contention that this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Mr. Fleming contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 36-65).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[13] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[14] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice, including proceedings instituted under the Horse Protection Act.[15] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of

[13] 7 U.S.C. §§ 450c-450g.
[14] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[15] 7 C.F.R. § 2.35(a)(2).

Agriculture Sonny Perdue reappointed me as the Judicial Officer.[16] Therefore, I reject Mr. Fleming's contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory proceedings under the Horse Protection Act.

Mr. Fleming further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 46-54).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Mr. Fleming's contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

Third, Mr. Fleming asserts he was not provided with notice of this proceeding and an opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 65).

The record establishes that the Hearing Clerk served Mr. Fleming with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 26, 2017.[17] The Complaint states the nature of the proceeding, the identification of the complainant and the respondents, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the

[16] Attach. 1.
[17] *See supra* note 2.

proceeding, and the nature of the relief sought. The Complaint and the Hearing Clerk's January 12, 2017 service letter also state that the Rules of Practice govern the proceeding and that Mr. Fleming has an opportunity for a hearing.[18] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[19] Therefore, I reject Mr. Fleming's assertion that he was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Mr. Fleming contends the Chief ALJ's issuance of the Default Decision, based upon Mr. Fleming's failure to file a timely response to the Complaint, is an abuse of discretion, violates the Administrative Procedure Act, and is not in accord with the Horse Protection Act and United States Department of Agriculture practice (Appeal Pet. at 65-66).

The Rules of Practice provide that within twenty days after service of a complaint the respondent shall file an answer with the Hearing Clerk[20] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[21] The Hearing Clerk served Mr. Fleming with the Complaint on January 26, 2017.[22] Twenty days after the Hearing Clerk served Mr. Fleming with the Complaint was February 15, 2017. Mr. Fleming did not file the Answer of Respondents until February 21, 2017, six days after Mr. Fleming's answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Mr. Fleming does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Mr. Fleming's contentions that the Chief ALJ's issuance of the Default Decision violates the Administrative Procedure Act and that the Chief ALJ's issuance of the Default Decision is not in

[18] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[19] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.
[20] 7 C.F.R. § 1.136(a).
[21] 7 C.F.R. §§ 1.136(c), .139.
[22] *See supra* note 2.

accord with the Horse Protection Act and United States Department of Agriculture practice.

Fifth, citing the four-month period between Mr. Fleming's alleged violations of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Mr. Fleming questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 67-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Mr. Fleming's violation of the Horse Protection Act was properly conducted and the evidence supports the allegations in the Complaint.[23]

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[23] *See* 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, his 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);

Sixth, Mr. Fleming contends the Chief ALJ erroneously found that Mr. Fleming's "address appeared on the entry forms that he signed for the three horses at issue in this case" (Appeal Pet. at 75).

The Chief ALJ states Mr. Fleming's "address appeared on the entry forms that he signed for the three horses at issue in this case."[24] With respect to Mr. Fleming, only one horse (Famous and Andy) is at issue in this proceeding.[25] Therefore, I find the Chief ALJ's statement that Mr. Fleming's address appeared on the entry forms that he signed for the three horses at issue in this case, is error. Despite this factual error, the Chief ALJ correctly concluded that Mr. Fleming entered only one horse (Famous and Andy), while Famous and Andy was sore, for showing in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[26] Therefore, I conclude the Chief ALJ's statement is harmless error.

Seventh, Mr. Fleming contends the Hearing Clerk failed to serve him

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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 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).

[24] Chief ALJ's Default Decision at the third unnumbered page n.5.

[25] Compl. ¶ 77 at 13.

[26] Chief ALJ's Default Decision at the sixth unnumbered page (Conclusions of Law ¶ 2).

with the Complaint because the Hearing Clerk sent the Complaint to Mr. Fleming's place of business rather than his residence (Appeal Pet. at 75-81).

Mr. Fleming raises the argument that the Hearing Clerk was required to serve him with the Complaint at his residence rather than his place of business for the first time on appeal to the Judicial Officer. New arguments cannot be raised for the first time on appeal to the Judicial Officer.[27] Therefore, I conclude Mr. Fleming has waived his argument regarding the Hearing Clerk's failure to serve him with the Complaint at his residence.

Even if I were to find that Mr. Fleming has not waived his argument that the Hearing Clerk was required to serve him with the Complaint at his residence, I would reject his argument. The Rules of Practice provide that a complaint shall be deemed to be received by a party to the proceeding on the date of delivery by certified mail to (1) the last known principal place of business of the party, (2) the last known principal place of business of the attorney or representative of record of the party, or (3) the last known residence of the party, if that party is an individual.[28]

The Administrator alleges and Mr. Fleming is deemed to have admitted that he does business as Joe Fleming Stables and has a business mailing address of 2003 Highway 64 West, Shelbyville, Tennessee 37160.[29] The Hearing Clerk sent the Complaint by certified mail to Mr. Fleming at the address Mr. Fleming admits is his business mailing address and Mr. Fleming signed the United States Postal Service domestic return receipt attached to the envelope containing the Complaint.[30] Therefore, I conclude the Hearing Clerk served Mr. Fleming with the Complaint at his

[27] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc., 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp'ts' Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet. to Reconsider); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).
[28] 7 C.F.R. § 1.147(c)(1).
[29] Compl. ¶ 5 at 2. *See also* Ans. of Resp'ts ¶ 1 at 1 (in which Mr. Fleming admits he does business as Joe Fleming Stables and has a business mailing address of 2003 Highway 64 West, Shelbyville, Tennessee 37160).
[30] *See supra* note 2.

last known principal place of business, as required by 7 C.F.R. § 1.147(c)(1).

Eighth, Mr. Fleming contends the Chief ALJ erroneously failed to rule on Mr. Fleming's request for an extension of time to file an answer to the Complaint (Appeal Pet. at 82-84).

On February 21, 2017, Mr. Fleming filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[31] I find nothing in the record indicating that the Chief ALJ ruled on Mr. Fleming's motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Fleming's motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Fleming's request for additional time to file an answer operate as an implicit denial of Mr. Fleming's motion to extend the time to respond to the Complaint.[32] Parenthetically, I note Mr. Fleming's motion for an

[31] Ans. of Resp'ts ¶ 11 at 3.

[32] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit

extension of time to file a response to the Complaint was moot when he filed the motion because Mr. Fleming simultaneously filed the Answer of Respondents.

Ninth, Mr. Fleming contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Fleming's Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Mr. Fleming's Opposition to the Motion for Default Decision (Appeal Pet. at 84-97).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[33] Therefore, I reject Mr. Fleming's contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Fleming's Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address the merits of Mr. Fleming's objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[34] The Chief ALJ found Mr. Fleming's objections to the Administrator's Motion for Default Decision and Proposed Default Decision were not meritorious and, therefore, issued the April 11, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

Tenth, Mr. Fleming contends, even if he is deemed to have admitted

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denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014).

[33] *See* 7 C.F.R. § 1.139.

[34] *Id.*

the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 97-101).

The Administrator alleges that Mr. Fleming violated the Horse Protection Act and Mr. Fleming is deemed to have admitted that he violated the Horse Protection Act, as follows:

> 77. On or about August 26, 2016, Mr. Fleming entered a horse (Famous and Andy), while the horse was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

Complaint ¶ 77 at 13 (footnote omitted). Moreover, Mr. Fleming has been found to have violated 15 U.S.C. § 1824(2)(B) on three previous occasions.[35] Therefore, Mr. Fleming is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 for his violation of the Horse Protection Act and disqualification from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for not less than five years for his violation of the Horse Protection Act.[36]

Eleventh, Mr. Fleming contends the allegations in the Complaint are merely legal conclusions in the guise of allegations of fact that cannot be deemed to have been admitted by his failure to file a timely answer to the Complaint (Appeal Pet. at 97, 99).

The formalities and technicalities of court pleading are not applicable in administrative proceedings.[37] A complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the

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[35] *See* Fleming, 41 Agric. Dec. 38 (U.S.D.A. 1982), *aff'd sub nom.* Fleming v. U.S. Dep't of Agric., 713 F.2d 179 (6th Cir. 1983); Fleming, 51 Agric. Dec. 1187 (U.S.D.A. 1992).

[36] 15 U.S.C. § 1825(b)-(c).

[37] Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).

absence of a showing that some party was misled.[38] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and, in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the complaint must apprise the respondent of the issues in controversy. The Complaint apprises Mr. Fleming of the issues in controversy and sets forth allegations of fact and provisions of law that constitute a basis for the proceeding.

Twelfth, Mr. Fleming contends the use of warning letters denies him due process (Appeal Pet. at 98).

The Administrator alleges and Mr. Fleming is deemed to have admitted that the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued ten warning letters to Mr. Fleming.[39] The Horse Protection Act specifically requires the Secretary of Agriculture, in assessing a civil penalty for a violation, to take into consideration all factors relevant to such determination.[40] A respondent's receipt of a warning letter from APHIS is a factor that the Secretary of Agriculture may consider in determining the amount of a civil penalty. Warning letters are both relevant and admissible in Horse Protection Act cases (as well as in other administrative enforcement proceedings).[41] Warning letters show that APHIS notified a respondent of noncompliance with the Horse Protection Act. Warning letters are intended to insure future compliance.

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[38] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); Hickey, Jr., 53 Agric. Dec. 1087, 1097 (U.S.D.A. 1994), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); Petty, 43 Agric. Dec. 1406, 1434-35 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).
[39] Compl. ¶¶ 23-32 at 5-6.
[40] 15 U.S.C. § 1825(b)(1).
[41] *See*, *e.g.*, Am. Raisin Packers, Inc., 60 Agric. Dec. 165, 185 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); Lawson, 57 Agric. Dec. 980, 1013 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166, 264 (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 Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Watlington, 52 Agric. Dec. 1172, 1185 (U.S.D.A. 1993).

Thirteenth, Mr. Fleming contends the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator (Appeal Pet. at 100).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[42] The Complaint does just that, namely, the Administrator requests issuance of "such order or orders with respect to sanctions…as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[43] The specific sanctions authorized by the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Mr. Fleming's contention that the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator.

DECISION

Statement of the Case

Mr. Fleming failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Fleming are adopted as findings of fact. I issue this Decision and Order as to Joe Fleming pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Fleming is an individual whose business mailing address is Joe Fleming Stables, 2003 Highway 64 West, Shelbyville, Tennessee 37160.

2. At all times material to this proceeding, Mr. Fleming was a "person"

[42] 7 C.F.R. § 1.135(a).
[43] Compl. at 15-16.

and an "exhibitor," as those terms are defined in the Regulations.

3. Mr. Fleming was named Walking Horse Trainers Association's Trainer of the Year in 1975.

4. The nature and circumstances of Mr. Fleming's prohibited conduct are that Mr. Fleming entered one horse in a horse show, while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Fleming's prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse shows.[44]

5. Mr. Fleming is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[45]

6. Mr. Fleming has previously been found to have committed three violations of the Horse Protection Act.

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[44] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. REP. NO. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[45] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

7. Former Chief Administrative Law Judge Victor W. Palmer: (a) found that, on October 29, 1986, Mr. Fleming entered for the purpose of showing or exhibiting a horse known as "Delight's Hotline" in a horse show, while Delight's Hotline was sore, in violation of 15 U.S.C. § 1824(2)(B); (b) found that, on June 4, 1988, Mr. Fleming entered for the purpose of showing or exhibiting a horse known as "Ebony's Bad Boy" in a horse show, while Ebony's Bad Boy was sore, in violation of 15 U.S.C. § 1824(2)(B); (c) assessed Mr. Fleming a $4,000 civil penalty; and (d) disqualified Mr. Fleming for five years from showing, exhibiting, or entering a horse in any horse show and from judging, managing, or otherwise participating in any horse show. *Fleming*, 51 Agric. Dec. 1187 (U.S.D.A. 1992).

8. Former Judicial Officer Donald A. Campbell: (a) found that, on April 1, 1977, Mr. Fleming entered and exhibited a horse known as "Delight's Moonrock" in a horse show, while Delight's Moonrock was sore, in violation of Horse Protection Act; (b) assessed Mr. Fleming a $2,000 civil penalty; and (c) disqualified Mr. Fleming for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. *Fleming*, 41 Agric. Dec. 38 (U.S.D.A. 1982), *aff'd sub nom. Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983).

9. APHIS has issued ten Horse Protection Act warning letters to Mr. Fleming.

10. On April 24, 2013, APHIS issued an Official Warning (TN 130316) to Mr. Fleming with respect to his having entered a horse (Prime Poison) in a horse show on July 5, 2012, which horse APHIS found was bearing prohibited substances (o-aminoazolotoluene, isopropyl palmitate, octyl methoxycinnamate, and 1,4-bis[(methylethy)amino]-9,10-anthracenedione).

11. On December 14, 2015, APHIS issued an Official Warning (TN 150022) to Mr. Fleming with respect to his having shown a horse (Escape from Alcatraz) in a horse show on August 24, 2014, which horse APHIS found was sore.

12. On April 11, 2016, APHIS issued an Official Warning (TN 160008) to Mr. Fleming with respect to his having shown a horse (The American Patriot) in a horse show on August 30, 2015, which horse APHIS found was sore.

13. On April 11, 2016, APHIS issued an Official Warning (TN 160009) to Mr. Fleming with respect to his having shown a horse (Miss Empty Pockets) in a horse show on September 1, 2015, which horse APHIS found was sore.

14. On April 12, 2016, APHIS issued an Official Warning (TN 160011) to Mr. Fleming with respect to his having shown a horse (I'm a Mastermind) in a horse show on September 2, 2015, which horse APHIS found was sore.

15. On May 3, 2016, APHIS issued an Official Warning (TN 160089) to Mr. Fleming with respect to his having entered a horse (Rocky Mountain Sky) in a horse show on September 4, 2015, which horse APHIS found was sore.

16. On May 17, 2016, APHIS issued an Official Warning (TN 160194) to Mr. Fleming with respect to his having shown a horse (Prime Poison) in a horse show on September 3, 2015, which horse APHIS found was sore.

17. On June 24, 2016, APHIS issued an Official Warning (TN 160206) to Mr. Fleming with respect to his having shown a horse (Jose it Ain't So) in a horse show on September 2, 2015, which horse APHIS found was sore.

18. On June 27, 2016, APHIS issued an Official Warning (TN 160221) to Mr. Fleming with respect to his having entered a horse (Bolero) in a horse show on September 5, 2015, which horse APHIS found was sore.

19. On July 8, 2016, APHIS issued an Official Warning (TN 160105) to Mr. Fleming with respect to his having entered a horse (Inception) in a horse show on September 1, 2015, which horse APHIS found was sore.

Conclusions of Law

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

2. On or about August 26, 2016, Mr. Fleming entered a horse known as "Famous and Andy," while Famous and Andy was sore, for showing in class 54 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Fleming is assessed a $2,200 civil penalty. Mr. Fleming shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Fleming's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Mr. Fleming. Mr. Fleming shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0123.

2. Mr. Fleming is disqualified for five years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Fleming shall become effective on the 60th day after service of this Order on Mr. Fleming.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Fleming has the right to seek judicial review of the Order in this Decision and Order as to Joe Fleming in the court of appeals of the United States for the circuit in which Mr. Fleming resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Fleming must file a notice of appeal in such court

within thirty days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[46]

The date of this Order is November 6, 2017.

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[46] 15 U.S.C. § 1825(b)(2), (c).

PLANT PROTECTION ACT

DEPARTMENTAL DECISION

In re: DAVID R. MOORE, d/b/a BIG CARP TACKLE, LLC.
Docket No. 17-0215.
Decision and Order.
Filed August 14, 2017.

PPA – Administrative procedure – Default decision – Stay – Written record.

Elizabeth M. Kruman, Esq., for APHIS.
David R. Moore, *pro se*, for Respondent.
Initial Rulings by Jill S. Clifton, Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Michael C. Gregoire, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on February 7, 2017. The Administrator instituted this proceeding under the Plant Protection Act, as amended and supplemented (7 U.S.C. §§ 7701-7786) [Plant Protection Act]; the Animal Health Protection Act, as amended and supplemented (7 U.S.C. §§ 8301-8321) [Animal Health Protection Act]; regulations issued under the Plant Protection Act (7 C.F.R. § 360.400); regulations issued under the Animal Health Protection Act (9 C.F.R. pts. 95 and 122); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges that: (1) on or about February 17, 2012, David R. Moore imported into the United States from the United Kingdom regulated articles containing *Guizotia abyssinica* (niger seed), in violation of 7 C.F.R. § 360.400; and (2) on or about July 29, 2012, Mr. Moore imported into the United States from the United Kingdom fishing bait and aquaculture products containing regulated articles, in violation of the

permit to import the regulated articles issued pursuant to 9 C.F.R. § 95.4 and 9 C.F.R. pt. 122.[1]

On February 25, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Moore with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter.[2] On March 10, 2017, Mr. Moore filed with the Hearing Clerk a letter, which does not respond to the allegations in the Complaint, but which states Mr. Moore "would actually prefer to get a hearing so we can clarify it is what we do and get a final resolution from someone that can make a decision." On March 24, 2017, the Administrator filed a Motion for a Default Decision and Order and a Proposed Default Decision and Order requesting issuance of a default decision based upon Mr. Moore's purported failure to file a timely answer in response to the Complaint. On April 5, 2017, the Administrator filed a Notice of Withdrawal of Motion for a Default Decision and Order conceding that Mr. Moore's March 10, 2017 filing was a timely response to the Complaint.

On April 24, 2017, the Administrator filed a Second Motion for a Default Decision and Order and a Second Proposed Default Decision and Order requesting issuance of a default decision based upon Mr. Moore's failure to file an answer that denies, or otherwise responds to, the allegations of the Complaint. On April 27, 2017, the Hearing Clerk served Mr. Moore with the Administrator's Second Motion for a Default Decision and Order, the Administrator's Second Proposed Default Decision and Order, and the Hearing Clerk's service letter.[3] Mr. Moore failed to file any objections to the Administrator's Second Motion for a Default Decision and Order and Second Proposed Default Decision and Order, and, on June 19, 2017, Administrative Law Judge Jill S. Clifton [ALJ] issued a Ruling Denying in part and Granting in part APHIS's Second Motion for Default Decision [ALJ's June 19, 2017 Ruling] in which the ALJ treated the Administrator's Second Motion for a Default Decision and Order as a motion for a decision on the written record and ordered the Administrator and Mr. Moore to exchange and to file with the

[1] Compl. ¶ II at 2-3.
[2] United States Postal Service Domestic Return receipt for article number XXXXXXXXXXXXXXXX 5211.
[3] Certificate of Service signed by Caroline Hill, Assistant Hearing Clerk.

Hearing Clerk documents that would provide the ALJ a basis for a decision on the written record.[4]

On July 12, 2017, the Administrator appealed the ALJ's June 19, 2017 Ruling to the Judicial Officer.[5] On July 26, 2017, Mr. Moore filed a response to the Administrator's Appeal Petition, and on July 27, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

The Administrator's Appeal Petition

The Administrator contends the ALJ erroneously denied the Administrator's Second Motion for a Default Decision and Order (Appeal Pet. ¶ II at 5).

The ALJ captioned the ALJ's June 19, 2017 Ruling "Ruling Denying in part and Granting in part APHIS's Second Motion for Default Decision"; however, I find nothing in the ALJ's June 19, 2017 Ruling which grants any part of the Administrator's Second Motion for a Default Decision and Order. Instead, the ALJ states the Administrator's Second Motion for a Default Decision and Order "will be treated as a Motion for a Decision on the Written Record" and orders the Administrator and Mr. Moore to exchange and to file with the Hearing Clerk proposed exhibits, declarations, and affidavits in order to provide the ALJ a basis for a decision on the written record.[6] However, the Administrator's Second Motion for a Default Decision and Order does not request a decision on the written record. To the contrary, the Administrator states "[p]ursuant to [s]ection 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant respectfully requests that the attached Proposed Default Decision and Order be adopted."[7] The proposed decision which the Administrator attached to the Second Motion for a Default Decision and Order is a proposed default decision based upon Mr. Moore's failure to deny, or otherwise respond to, the allegations in the Complaint. Therefore, I find the ALJ erroneously treated the Administrator's Second Motion for a

[4] ALJ's June 19, 2017 Ruling ¶¶ 4-6 at 2.
[5] Appeal of Ruling Denying in part and Granting in part APHIS' Second Motion for a Default Decision [Appeal Petition].
[6] ALJ's June 19, 2017 Ruling ¶¶ 4-6 at 2.
[7] Second Mot. for a Default Decision and Order at 3.

Default Decision and Order as a motion for a decision on the written record, and I find the ALJ's June 19, 2017 Ruling constitutes a denial of the Administrator's Second Motion for a Default Decision and Order.

The Rules of Practice provide, if a respondent fails to file with the Hearing Clerk meritorious objections to a motion for a default decision within twenty days after service of the motion for a default decision and proposed default decision, the administrative law judge shall issue a decision without further procedure or hearing, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139. The Hearing Clerk served Mr. Moore with the Administrator's Second Motion for a Default Decision and Order and Second Proposed Default Decision and Order on April 27, 2017.[8] Mr. Moore failed to file any objections to the Administrator's Second Motion for a Default Decision and Order and Second Proposed Default Decision and Order within twenty days after the Hearing Clerk served Mr. Moore with the Second Motion for a Default Decision and Order and Second Proposed Default Decision and Order. Therefore, I reverse the ALJ's June 19, 2017 Ruling and adopt, with minor changes, the proposed

[8] *See supra* note 3.

findings of fact and proposed conclusions of law in the Administrator's Second Proposed Default Decision and Order.

The Administrator's Request for a Stay

The Administrator requests a stay of the effectiveness of the ALJ's June 19, 2017 Ruling (Appeal Pet. ¶ III at 6). The Administrator's request for a stay is denied as the issuance of this Decision and Order renders moot the Administrator's request for a stay of the effectiveness of the ALJ's June 19, 2017 Ruling.

DECISION

Decision Summary

Mr. Moore's response to the Complaint does not deny, or otherwise respond to, the allegations in the Complaint. The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to deny, or otherwise respond to, an allegation in a complaint shall be deemed, for purposes of the proceeding, an admission of that allegation. Further, pursuant to 7 C.F.R. § 1.139, the admission by the answer of all the material allegations of fact contained in a complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Big Carp Tackle, LLC, is a limited liability corporation incorporated under the laws of the State of Oklahoma, with a principal place of business and business mailing address of 3820 SE Kentucky, Suite #6, Bartlesville, Oklahoma 74006.

2. At all times material to this proceeding, Big Carp Tackle, LLC, under the direction, management, and control of Mr. Moore, was:

   a. Engaged in the business of selling bait and tackle in a store and online;

b. Engaged in the business of importing regulated articles into the United States containing materials from the United Kingdom subject to import permit requirements.

3. Mr. Moore is an individual with a business mailing address of 3820 SE Kentucky, Suite #6, Bartlesville, Oklahoma 74006.

4. At all times material to this proceeding, Mr. Moore was:

a. The sole owner, president, and registered agent of Big Carp Tackle, LLC;

b. Responsible for the direction, management, and control of Big Carp Tackle, LLC;

c. Engaged in the business of importing regulated articles into the United States from the United Kingdom subject to regulatory restrictions.

5. At all times material to this proceeding, Mr. Moore held a "United States Veterinary Permit for Importation and Transportation of Controlled Materials and Organisms and Vectors #C107472 for fish bait containing ingredients of fish/shell fish origin material (May also contain vitamins and/or minerals derived from other animal origin tissue)" for imports from Dynamite Baits Limited in the United Kingdom issued pursuant to 9 C.F.R. § 95.4 and 9 C.F.R. pt. 122.

6. On or about February 17, 2012, a shipment identified by entry number ARV 0811607-6 from the United Kingdom arrived at Koga Transport in Oklahoma City, Oklahoma, for Mr. Moore containing regulated articles from Dynamite Baits Limited and CC Moore, both corporations in the United Kingdom. In this shipment, Mr. Moore imported regulated articles from CC Moore containing *Guizotia abyssinica* (niger seed), in violation of 7 C.F.R. § 360.400.

7. On or about July 29, 2012, a shipment identified by entry number EAY 00031588 from the United Kingdom arrived in Houston, Texas Sea Port, for Mr. Moore containing regulated articles from Dynamite Baits Limited, a corporation located in the United Kingdom. Mr. Moore imported fishing

bait and aquaculture products containing regulated articles from shipper Dynamite Baits Limited, in violation of the permit to import such regulated articles issued pursuant to 9 C.F.R. § 95.4 and 9 C.F.R. pt. 122.

Conclusions of Law

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

2. By reason of the Findings of Fact, Mr. Moore has violated the Plant Protection Act (7 U.S.C. §§ 7701-7786) and the Animal Health Protection Act (7 U.S.C. §§ 8301-8321).

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Moore is assessed a $12,500 civil penalty. Mr. Moore shall pay the civil penalty by certified check or money order made payable to the "Treasurer of the United States" and send the certified check or money order to:

United States Department of Agriculture, APHIS
U.S. Bank
P.O. Box 979043
St. Louis, MO 63197-9000

Mr. Moore's civil penalty payment shall be forwarded to, and received by, the United States Department of Agriculture within 60 days after service of this Order on Mr. Moore. Mr. Moore shall state on the certified check or money order that payment is in reference to P.Q. Docket No. D-17-0215.

RIGHT TO JUDICIAL REVIEW

The Order assessing Mr. Moore a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[9] Mr. Moore must seek judicial

[9] 7 U.S.C. §§ 7734(b)(4), 8313(b)(4)(A).

review within 60 days after entry of the Order.[10] The date of entry of the Order is August 14, 2017.

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[10] 28 U.S.C. § 2344.

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.

ANIMAL WELFARE ACT

In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC.
Docket Nos. 15-0058; 15-0059; 16-0037; 16-0038.
Remand Order.
Filed December 18, 2017.

AWA – Appointments Clause – Remand.

Samuel D. Jockel, Esq., for APHIS.
William J. Cook, Esq., for Respondents.
Initial Decision and Order by Erin M. Wirth, Administrative Law Judge.
Remand Order entered by William G. Jenson, Judicial Officer.

REMAND ORDER

On September 26, 2016, Administrative Law Judge Erin M. Wirth issued a Decision and Order in the instant proceeding. On November 22, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Petition for Appeal, and, on January 9, 2017, Douglas Keith Terranova and Terranova Enterprises, Inc., filed Respondents' Response to Appeal Petition and Cross Appeal. On January 20, 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* (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. Chief

Administrative Law Judge Bobbie J. McCartney informed me that the Secretary of Agriculture has not appointed Administrative Law Judge Wirth as an inferior officer in accordance with the Appointments Clause.

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Chief Administrative Law Judge Bobbie J. McCartney for assignment to an administrative law judge who has been appointed by the Secretary of Agriculture as an inferior officer in accordance with the of the Appointments Clause. The administrative law judge assigned to this proceeding shall:

Issue an order giving the Administrator, Mr. Terranova, and Terranova Enterprises, Inc., an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence which the administrative law judge finds relevant, material, and not unduly repetitious and all substantive and procedural actions taken by Administrative Law Judge Wirth;

Determine whether to ratify or revise in any respect all prior actions taken by Administrative Law Judge Wirth; and

Issue an order stating that the administrative law judge has completed consideration of the record and setting forth the determination regarding ratification.

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In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC., a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Remand Order.
Filed December 27, 2017.

AWA – Appointments Clause – Remand.

Samuel D. Jockel, Esq., for APHIS.
Ellis L. Bennett, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Remand Order by William G. Jenson, Judicial Officer.

REMAND ORDER

On February 15, 2017, Chief Administrative Law Judge Bobbie J. McCartney issued a Decision and Order in the instant proceeding. On April 7, 2017, Stearns Zoological Rescue & Rehab Center, Inc., filed Respondent's Appeal Petition, and, on April 27, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Response to Respondent's Petition for Appeal. On May 1, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, 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* (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing Strother and renewed their oaths of office.[1]

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Chief Administrative Law Judge McCartney who shall:

Issue an order giving the Administrator and Stearns Zoological Rescue & Rehab Center, Inc., an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence and all her previous substantive and procedural actions;

[1] Attach. 1.

Determine whether to ratify or revise in any respect all her prior actions; and

Issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

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In re: WILLIAM BRACKSTON LEE, III, an individual d/b/a LAUGHING VALLEY RANCH.
Docket Nos. 13-0343; 14-0021.
Remand Order.
Filed December 28, 2017.

AWA – Appointments Clause – Remand.

John Doe, Esq., for Complainant.
Jane Boe, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Remand Order by William G. Jenson, Judicial Officer.

REMAND ORDER

On September 8, 2016, Chief Administrative Law Judge Bobbie J. McCartney issued a "Decision and Order Granting Summary Judgment" in the instant proceeding. On November 7, 2016, William Brackston Lee, III, filed "Petitioner's Appeal Petition to Judicial Officer;" on November 18, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Response to Respondent's Petition for Appeal" in *Lee, III*, AWA Docket No. 14-0021; and on November 28, 2016, the Administrator filed "Complainant's Response to Respondent's Petition for Appeal" in *Lee, III,* AWA Docket No. 13-0343. On January 3, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, 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* (No. 17-130), in which the Solicitor General took the position that administrative law judges of the

Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing Strother and renewed their oaths of office.[1]

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Chief Administrative Law Judge McCartney who shall:

Issue an order giving the Administrator and Mr. Lee an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence and all her previous substantive and procedural actions;

Determine whether to ratify or revise in any respect all her prior actions; and

Issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

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CIVIL RIGHTS

WILLIE CHARLES KENNEDY.
Docket No. 17-0259.
Order of Dismissal (With Prejudice).
Filed July 17, 2017.

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[1] Attach. 1.

Miscellaneous Orders & Dismissals
76 Agric. Dec. 561 – 631

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

**In re: WESTMINSTER MEATS, LLC.
Docket No. 16-0030.
Remand Order.
Filed August 24, 2017.**

FMIA/PPIA – Judicial Officer, jurisdiction of – Remand – Summary withdrawal.

Ciarra A. Toomey, Esq., and Elizabeth M. Kruman, Esq., for FSIS.
Daniel Mandich for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Remand Order by William G. Jenson, Judicial Officer.

REMAND ORDER

PROCEDURAL HISTORY

On December 18, 2015, Administrative Law Judge Jill S. Clifton issued *Westminster Meats, LLC*, 74 Agric. Dec. 437, 438 (U.S.D.A. 2015) (Consent Decision). Paragraph 36 of the Consent Decision provides, as follows:

Enforcement Provisions

> 36. The Administrator, FSIS, may summarily withdraw the grant of Federal inspection from [Westminster] upon a determination by the Director, ELD, or his or her designee, that one or more conditions set forth in paragraphs 1 through 35 of this Order have been violated. It is acknowledged that [Westminster] retains the rights to request an expedited hearing pursuant to the rules of practice concerning any violation alleged as the basis for a summary withdrawal of Federal inspection services. . . .

On August 18, 2017, the Director, Enforcement and Litigation Division, Office of Investigation, Enforcement and Audit, Food Safety and Inspection Service, United States Department of Agriculture [FSIS], sent

Westminster Meats, LLC [Westminster], a Notice of Summary Withdrawal stating that FSIS is effectuating action under paragraph thirty-six of *Westminster Meats, LLC*, 74 Agric. Dec. 437, 438 (U.S.D.A. 2015) (Consent Decision), to summarily withdraw the grant of Federal inspection service from Westminster. FSIS' August 18, 2017 Notice of Summary Withdrawal describes Westminster's rights with respect to the summary withdrawal, as follows:

> Your Rights in this Matter
>
> Under paragraph 36 of the Order, Westminster may request an expedited hearing before a USDA administrative law judge to contest the summary withdrawal action. Westminster may request a hearing by filing a request within 30 days from the effect of this Notice with the USDA Hearing Clerk for a hearing under the USDA rules of practice (7 C.F.R. Part 1, Subpart H). . . . . Failure by Westminster to do so may constitute a waiver of any right to an administrative hearing.

On August 18, 2017, Westminster filed with the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], a request for a hearing before a "USDA judge," and, on August 22, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of Westminster's request for a hearing.

DISCUSSION

Westminster's August 18, 2017 hearing request does not constitute an appeal of *Westminster Meats, LLC*, 74 Agric. Dec. 437, 438 (U.S.D.A. 2015) (Consent Decision). Instead, I find Westminster's request is for a hearing regarding the basis for FSIS's August 18, 2017 summary withdrawal of the grant of Federal inspection service from Westminster. Therefore, I conclude I do not have jurisdiction over Westminster's August 18, 2017 request for a hearing and jurisdiction over this proceeding currently lies with the Office of Administrative Law Judges, United States Department of Agriculture.

For the foregoing reasons, the following Order is issued.

ORDER

This proceeding is remanded to Chief Administrative Law Judge Bobbie J. McCartney for assignment to an administrative law judge in the Office of Administrative Law Judges, United States Department of Agriculture, for further proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

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HORSE PROTECTION ACT

In re: JEFFREY PAGE BRONNENBURG, an individual.
Docket No. 17-0121.
Miscellaneous Order.
Filed July 5, 2017.

HPA – Case caption, amendment of.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO AMEND THE CASE CAPTION

On June 29, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I amend the caption of the above-captioned case by changing the name of the respondent currently identified as "Jeff Bronnenburg" to read "Jeffrey Page Bronnenberg." For good reason stated, the Administrator's June 29, 2017 motion to amend the case caption is granted. The caption of this case is amended to read, as follows:

In re:

Beth Beasley, an individual;	)	HPA Docket No. 17-0119
Jarrett Bradley, an individual;	)	HPA Docket No. 17-0120
Jeffrey Page Bronnenburg, an individual;	)	HPA Docket No. 17-0121
Dr. Michael Coleman, an individual;	)	HPA Docket No. 17-0122
Joe Fleming, an individual doing business as Joe Fleming Stables;	)	HPA Docket No. 17-0123
Shawn Fulton, an individual;	)	HPA Docket No. 17-0124
Jimmy Grant, an individual;	)	HPA Docket No. 17-0125
Justin Harris, an individual;	)	HPA Docket No. 17-0126
Amelia Haselden, an individual;	)	HPA Docket No. 17-0127
Sam Perkins, an individual;	)	HPA Docket No. 17-0128
Amanda Wright, an individual;	)	HPA Docket No. 17-0129
G. Russell Wright, an individual; and	)	HPA Docket No. 17-0130
Charles Yoder, an individual,	)	HPA Docket No. 17-0131
Respondents	)	

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In re: JEFFREY PAGE BRONNENBURG, an individual.
Docket No. 17-0121
Miscellaneous Order.
Filed July 5, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO MR. BRONNENBURG'S MOTION FOR RELIEF UNDER THE PRIVACY ACT

On June 28, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend to August 9, 2017, the time for filing the Administrator's response to "Respondent Jeff

Bronnenburg's [sic] Motion for Relief Under the Privacy Act and Supporting Brief." On June 29, 2017, Mr. Bronnenberg filed "Respondent's Response to Motion to Extend Time" stating he does not oppose the Administrator's request.

For good reason stated, the Administrator's request to extend the time for filing a response to "Respondent Jeff Bronnenburg's [sic] Motion for Relief Under the Privacy Act and Supporting Brief" is granted. The time for filing the Administrator's response to "Respondent Jeff Bronnenburg's [sic] Motion for Relief Under the Privacy Act and Supporting Brief" is extended to, and includes, August 9, 2017.[1]

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In re: JUSTIN HARRIS, an individual.
Docket No. 17-0126.
Miscellaneous Order.
Filed July 12, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO MR. HARRIS'S MOTION FOR RELIEF UNDER THE PRIVACY ACT

On July 7, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend the time for filing the Administrator's response to "Respondent Justin Harris' Motion for

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to "Respondent Jeff Bronnenburg's [sic] Motion for Relief Under the Privacy Act and Supporting Brief" is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 9, 2017.

Relief Under the Privacy Act and Supporting Brief" until twenty days after service of the Judicial Officer's ruling on "Complainant's Motion to Strike 'Motion for Relief' Filed by Justin Harris."

For good reason stated, the Administrator's request to extend the time for filing a response to "Respondent Justin Harris' Motion for Relief Under the Privacy Act and Supporting Brief" is granted. The time for filing the Administrator's response to "Respondent Justin Harris' Motion for Relief Under the Privacy Act and Supporting Brief" is extended to, and includes, twenty days after the Administrator is served with the Judicial Officer's ruling on "Complainant's Motion to Strike 'Motion for Relief' Filed by Justin Harris."[1]

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In re: JERRY BEATY, an individual; MIKE DUKES, an individual; and BILL GARLAND, an individual.
Docket Nos. 17-0056; 17-0047; 17-0058.
Miscellaneous Order.
Filed July 24, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and Susan C. Golabek, Esq., for APHIS.
Mike Dukes, pro se Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING MR. DUKES'S REQUEST TO EXTEND THE TIME FOR FILING A PETITION FOR RECONSIDERATION

On July 21, 2017, Mike Dukes, by telephone and facsimile,[1] requested

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to "Respondent Justin Harris' Motion for Relief Under the Privacy Act and Supporting Brief" is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, twenty days after the Administrator is served with the Judicial Officer's ruling on "Complainant's Motion to Strike 'Motion for Relief' Filed by Justin Harris."

[1] I have attached to this Order a copy of the facsimile that Mr. Dukes sent to the Office of the Judicial Officer on July 21, 2017. In an effort to protect Mr. Dukes's

that I extend the time for filing Mr. Dukes's petition for reconsideration of *Beaty*, 76 Agric. Dec. ___ (U.S.D.A. July 13, 2017) (Decision as to Mike Dukes). For good reason stated, Mr. Dukes's request to extend the time for filing a petition for reconsideration is granted. The time for filing Mr. Dukes's petition for reconsideration is extended to, and includes, August 18, 2017.[2]

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In re: JARRETT BRADLEY, an individual.
Docket No. 17-0120.
Miscellaneous Order.
Filed August 1, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO MR. BRADLEY'S JULY 6, 2017 MOTION TO STRIKE

On July 31, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to August 4, 2017, the time for filing the Administrator's response to "Respondent Jarrett Bradley's Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and Supplemental Request for Relief Under the Privacy Act" [Mr. Bradley's July 6, 2017 Motion to Strike].

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personal privacy, I have redacted Mr. Dukes's telephone number which he included in his facsimile.

[2] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Mr. Dukes must ensure his petition for reconsideration is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 18, 2017.

For good reason stated, the Administrator's request to extend the time for filing a response to Mr. Bradley's July 6, 2017 Motion to Strike is granted. The time for filing the Administrator's response to Mr. Bradley's July 6, 2017 Motion to Strike is extended to, and includes, August 4, 2017.[1]

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In re: RAY BEECH, an individual.
Docket No. 17-0200.
Miscellaneous Order.
Filed August 1, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUESTS TO EXTEND THE TIME FOR FILING A RESPONSE TO MR. BEECH'S APPEAL PETITION

On June 28, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend to July 28, 2017, the time for filing the Administrator's response to an appeal petition filed by Ray Beech. Subsequently, by telephone, the Administrator requested that I extend to August 4, 2017, the time for filing the Administrator's response to Mr. Beech's appeal petition.

For good reason stated, the Administrator's requests to extend the time for filing a response to Mr. Beech's appeal petition are granted. The time for filing the Administrator's response to Mr. Beech's appeal petition is

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Bradley's July 6, 2017 Motion to Strike is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 4, 2017.

extended to, and includes, August 4, 2017.[1]

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In re: SHAWN FULTON, an individual.
Docket No. 17-0124.
Miscellaneous Order.
Filed August 1, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO MR. FULTON'S JULY 6, 2017 MOTION TO STRIKE

On July 31, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to August 4, 2017, the time for filing the Administrator's response to "Respondent Shawn Fulton's Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and Supplement to Request for Relief Under the Privacy Act" [Mr. Fulton's July 6, 2017 Motion to Strike].

For good reason stated, the Administrator's request to extend the time for filing a response to Mr. Fulton's July 6, 2017 Motion to Strike is granted. The time for filing the Administrator's response to Mr. Fulton's July 6, 2017 Motion to Strike is extended to, and includes, August 4,

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Beech's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 4, 2017.

2017.[1]

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In re: SAM PERKINS, an individual.
Docket No. 17-0128.
Miscellaneous Order.
Filed August 1, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST OT EXTEND THE TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO MR. PERKINS'S JULY 6, 2017 MOTION TO STRIKE

On July 31, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to August 4, 2017, the time for filing the Administrator's response to "Respondent Sam Perkins' Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and Supplemental Request for Relief Under the Privacy Act" [Mr. Perkins's July 6, 2017 Motion to Strike].

For good reason stated, the Administrator's request to extend the time for filing a response to Mr. Perkins's July 6, 2017 Motion to Strike is granted. The time for filing the Administrator's response to Mr. Perkins's July 6, 2017 Motion to Strike is extended to, and includes, August 4,

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Fulton's July 6, 2017 Motion to Strike is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 4, 2017.

2017.[1]

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In re: RAY BEECH, an individual.
Docket No. 17-0200.
Miscellaneous Order.
Filed August 7, 2017.

HPA – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S THIRD REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO MR. BEECH'S APPEAL PETITION

On August 4, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend to August 7, 2017, the time for filing the Administrator's response to an appeal petition filed by Ray Beech.

For good reason stated, the Administrator's third request to extend the time for filing a response to Mr. Beech's appeal petition is granted. The time for filing the Administrator's response to Mr. Beech's appeal petition is extended to, and includes, August 7, 2017.[1]

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[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Perkins's July 6, 2017 Motion to Strike is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 4, 2017.
[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Beech's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 7, 2017.

In re: DANNY BURKS, an individual; HAYDEN BURKS, an individual; and SONNY McCARTER, an individual.
Docket Nos. 17-0027; 17-0028; 17-0029.
Order Denying Petition for Reconsideration.
Filed August 22, 2017.

HPA – Administrative procedure – Adjudication on the merits, judicial preference for – Allegations, deemed admissions of – Answer, failure to file timely – Default decision, basis to set aside – Hearing, waiver of – Judicial Officer, authority of – Reconsideration, petition for.

Colleen A. Carroll, Esq., and Lauren C. Axley, Esq., for APHIS.
L. Thomas Austin, Esq., for Respondent Danny Burks.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION AS TO DANNY BURKS

PROCEDURAL HISTORY

On July 31, 2017, Danny Burks filed a Petition for Reconsideration requesting that I reconsider *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks). On August 18, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Reply to Petition for Reconsideration, and, on August 21, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Burks' Petition for Reconsideration.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition for reconsideration of the decision of

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

the Judicial Officer.[2] The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. Burks raises seven issues in his Petition for Reconsideration. First, Mr. Burks contends Chief Administrative Law Judge Bobbie J. McCartney's [Chief ALJ] Default Decision and Order as to Respondent Danny Burks [Default Decision] should be vacated because it does not comply with the Horse Protection Act of 1970, as amended [Horse Protection Act]; the Administrative Procedure Act; or the historical practices of the United States Department of Agriculture (Pet. for Recons. ¶ 1 at 1).

Mr. Burks failed to explain or to offer any support for his contention that the Chief ALJ's Default Decision does not comply with the Horse Protection Act, the Administrative Procedure Act, and the historical practices of the United States Department of Agriculture. A review of the record establishes that the Chief ALJ's Default Decision complies with the Horse Protection Act, the Administrative Procedure Act, and United States Department of Agriculture precedent.

Second, Mr. Burks contends the Chief ALJ's Default Decision should be vacated because of the judicial preference for adjudication on the merits (Pet. for Recons. ¶ 1 at 1).

I agree with Mr. Burks that there exists a judicial preference for a decision on the merits, as opposed to a default decision. While I too prefer a decision on the merits, as opposed to a default decision, that preference is not a basis for setting aside a properly issued default decision.[3] Therefore, I reject Mr. Burks's contention that the Chief ALJ's properly

[2] 7 C.F.R. § 1.146(a)(3).

[3] *See* McCoy, 75 Agric. Dec. 193, 201-02 (U.S.D.A. 2016) (stating an administrative law judge's preference for a decision on the merits, as opposed to a default decision, is not a meritorious reason for denial of a complainant's motion for a default decision).

issued Default Decision should be vacated merely because of the judicial preference for a decision on the merits.

Third, Mr. Burks asserts, after he filed his Petition for Appeal, his attorney, L. Thomas Austin, tried on numerous occasions to contact Colleen A. Carroll, counsel for the Administrator, to discuss a resolution of this proceeding (Pet. for Recons. ¶ 1 at 1).

Mr. Burks's attempts to resolve this proceeding without protracted litigation are commendable and to be encouraged; however, Mr. Burks's counsel's unsuccessful attempts to contact counsel for the Administrator do not constitute a basis for setting aside the Chief ALJ's Default Decision.[4]

Fourth, Mr. Burks asserts he demanded, but was denied, an oral hearing (Pet. for Recons. ¶ 2 at 1).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.[5] Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint;[6] viz., Mr. Burks was required to file an answer to the Complaint no later than January 27, 2017. However, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer, and, on January 27, 2017, the Chief ALJ granted Mr. Burks's request and extended the time for filing Mr. Burks's answer to the Complaint to March 9, 2017.[7]

Mr. Burks did not file a timely answer but, instead, filed his Answer to the Complaint on March 27, 2017, eighteen days after he was required to file his answer. Under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the

[4] *See* Knapp, 64 Agric. Dec. 253, 301-02 (U.S.D.A. 2005) (stating the respondent's unsuccessful attempts to contact counsel for the complainant and a United States Department of Agriculture inspector do not constitute a basis for setting aside the administrative law judge's default decision).
[5] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX XXXX 5587.
[6] 7 C.F.R. § 1.136(a).
[7] Order Granting Respondent's Mot. to Extend Time to Answer Compl.

Complaint and waived the opportunity for hearing.[8] Therefore, there are no issues to be heard and denial of Mr. Burks's request for an oral hearing is not a basis for setting aside the Chief ALJ's Default Decision.

Fifth, Mr. Burks contends the Judicial Officer has no authority under the Horse Protection Act and has not been properly appointed to act for the Secretary of Agriculture under the Horse Protection Act (Pet. for Recons. ¶ 3 at 1-2).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[9] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[10] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice.[11] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[12] Therefore, I reject Mr. Burks's contentions that the Judicial Officer has no authority under the Horse Protection Act and that I have not been properly appointed to act as final deciding officer in adjudicatory proceedings under the Horse Protection Act.

Sixth, Mr. Burks asserts there was no proof submitted to the Judicial Officer as to the merits (Pet. for Recons. ¶ 4 at 2).

Mr. Burks failed to file a timely answer to the Complaint. Therefore, under the Rules of Practice, Mr. Burks is deemed, for purposes of this

[8] 7 C.F.R. §§ 1.136(c), .139.
[9] 7 U.S.C. §§ 450c-450g.
[10] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[11] 7 C.F.R. § 2.35(a)(2).
[12] Attach. 1.

proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing;[13] thus, no proof regarding the merits is necessary for the proper disposition of this proceeding.

Seventh, Mr. Burks requests that I reconsider the nine issues set out in Mr. Burks's Petition for Appeal (Pet. for Recons. at 2).

I considered each of the issued raised by Mr. Burks in his Petition for Appeal. Those issues are addressed in *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks), and Mr. Burks fails to identify any errors of law or fact, any intervening change of controlling law, or any highly unusual circumstances necessitating my reconsideration of *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks).

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[14] Mr. Burks's Petition for Reconsideration was timely filed and automatically stayed *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks). Therefore, since Mr. Burks's Petition for Reconsideration is denied, I lift the automatic stay, and the Order in *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Burks's Petition for Reconsideration, filed July 31, 2017, is denied.

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[13] 7 C.F.R. §§ 1.136(c), .139.
[14] 7 C.F.R. § 1.146(b).

In re: DANNY BURKS, an individual; HAYDEN BURKS, an individual; and SONNY McCARTER, an individual.
Docket Nos. 17-0027; 17-0028; 17-0029.
Order Denying Petition for Reconsideration.
Filed August 22, 2017.

HPA – Administrative procedure – Adjudication on the merits, judicial preference for – Allegations, deemed admissions of – Answer, failure to file timely – Default decision, basis to set aside – Hearing, waiver of – Judicial Officer, authority of – Reconsideration, petition for.

Colleen A. Carroll, Esq., and Lauren C. Axley, Esq., for APHIS.
L. Thomas Austin, Esq., for Respondent Hayden Burks.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION AS TO HAYDEN BURKS

PROCEDURAL HISTORY

On July 31, 2017, Hayden Burks filed a Petition for Reconsideration requesting that I reconsider *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 18, 2017) (Decision as to Hayden Burks). On August 18, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Reply to Petition for Reconsideration, and, on August 21, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Burks's Petition for Reconsideration.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer.[2] The purpose of a petition for ~~reconsideration is to~~

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[2] 7 C.F.R. § 1.146(a)(3).

seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. Burks raises seven issues in his Petition for Reconsideration. First, Mr. Burks contends Chief Administrative Law Judge Bobbie J. McCartney's [Chief ALJ] Default Decision and Order as to Respondent Hayden Burks [Default Decision] should be vacated because it does not comply with the Horse Protection Act of 1970, as amended [Horse Protection Act]; the Administrative Procedure Act; or the historical practices of the United States Department of Agriculture (Pet. for Recons. ¶ 1 at 1).

Mr. Burks failed to explain or to offer any support for his contention that the Chief ALJ's Default Decision does not comply with the Horse Protection Act, the Administrative Procedure Act, and the historical practices of the United States Department of Agriculture. A review of the record establishes that the Chief ALJ's Default Decision complies with the Horse Protection Act, the Administrative Procedure Act, and United States Department of Agriculture precedent.

Second, Mr. Burks contends the Chief ALJ's Default Decision should be vacated because of the judicial preference for adjudication on the merits (Pet. for Recons. ¶ 1 at 1).

I agree with Mr. Burks that there exists a judicial preference for a decision on the merits, as opposed to a default decision. While I too prefer a decision on the merits, as opposed to a default decision, that preference is not a basis for setting aside a properly issued default decision.[3] Therefore, I reject Mr. Burks's contention that the Chief ALJ's properly issued Default Decision should be vacated merely because of the judicial preference for a decision on the merits.

[3] *See* McCoy, 75 Agric. Dec. 193, 201-02 (U.S.D.A. 2016) (stating an administrative law judge's preference for a decision on the merits, as opposed to a default decision, is not a meritorious reason for denial of a complainant's motion for a default decision).

Third, Mr. Burks asserts, after he filed his Petition for Appeal, his attorney, L. Thomas Austin, tried on numerous occasions to contact Colleen A. Carroll, counsel for the Administrator, to discuss a resolution of this proceeding (Pet. for Recons. ¶ 1 at 1).

Mr. Burks's attempts to resolve this proceeding without protracted litigation are commendable and to be encouraged; however, Mr. Burks's counsel's unsuccessful attempts to contact counsel for the Administrator do not constitute a basis for setting aside the Chief ALJ's Default Decision.[4]

Fourth, Mr. Burks asserts he demanded, but was denied, an oral hearing (Pet. for Recons. ¶ 2 at 1).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.[5] Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint;[6] viz., Mr. Burks was required to file an answer to the Complaint no later than January 27, 2017. However, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer, and, on January 27, 2017, the Chief ALJ granted Mr. Burks's request and extended the time for filing Mr. Burks's answer to the Complaint to March 9, 2017.[7]

Mr. Burks did not file a timely answer but, instead, filed his Answer to the Complaint on March 27, 2017, eighteen days after he was required to file his answer. Under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing.[8] Therefore, there are

[4] *See* Knapp, 64 Agric. Dec. 253, 301-02 (U.S.D.A. 2005) (stating the respondent's unsuccessful attempts to contact counsel for the complainant and a United States Department of Agriculture inspector do not constitute a basis for setting aside the administrative law judge's default decision).
[5] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX XXXX 5594.
[6] 7 C.F.R. § 1.136(a).
[7] Order Granting Respondent's Mot. to Extend Time to Answer Compl.
[8] 7 C.F.R. §§ 1.136(c), .139.

no issues to be heard and denial of Mr. Burks's request for an oral hearing is not a basis for setting aside the Chief ALJ's Default Decision.

Fifth, Mr. Burks contends the Judicial Officer has no authority under the Horse Protection Act and has not been properly appointed to act for the Secretary of Agriculture under the Horse Protection Act (Pet. for Recons. ¶ 3 at 1-2).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[9] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[10] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice.[11] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[12] Therefore, I reject Mr. Burks's contentions that the Judicial Officer has no authority under the Horse Protection Act and that I have not been properly appointed to act as final deciding officer in adjudicatory proceedings under the Horse Protection Act.

Sixth, Mr. Burks asserts there was no proof submitted to the Judicial Officer as to the merits (Pet. for Recons. ¶ 4 at 2).

Mr. Burks failed to file a timely answer to the Complaint. Therefore, under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived

[9] 7 U.S.C. §§ 450c-450g.
[10] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[11] 7 C.F.R. § 2.35(a)(2).
[12] Attach. 1.

the opportunity for hearing;[13] thus, no proof regarding the merits is necessary for the proper disposition of this proceeding.

Seventh, Mr. Burks requests that I reconsider the nine issues set out in Mr. Burks's Petition for Appeal (Pet. for Recons. at 2).

I considered each of the issued raised by Mr. Burks in his Petition for Appeal. Those issues are addressed in *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 18, 2017) (Decision as to Hayden Burks), and Mr. Burks fails to identify any errors of law or fact, any intervening change of controlling law, or any highly unusual circumstances necessitating my reconsideration of *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 18, 2017) (Decision as to Hayden Burks).

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[14] Mr. Burks's Petition for Reconsideration was timely filed and automatically stayed *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 18, 2017) (Decision as to Hayden Burks). Therefore, since Mr. Burks's Petition for Reconsideration is denied, I lift the automatic stay, and the Order in *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 18, 2017) (Decision as to Hayden Burks), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Burks's Petition for Reconsideration, filed July 31, 2017, is denied.

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In re: KEITH BLACKBURN, an individual.
Docket No. 17-0094.
Miscellaneous Order.
Filed August 30, 2017.

[13] 7 C.F.R. §§ 1.136(c), .139.
[14] 7 C.F.R. § 1.146(b).

HPA – Extension of time.

Colleen A. Carroll, Esq., and Tracy M. McGowan, Esq.., for APHIS.
Robin Webb, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO MR. BLACKBURN'S PETITION FOR RECONSIDERATION

On August 30, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend to September 7, 2017, the time for filing the Administrator's response to a petition for reconsideration filed by Keith Blackburn.

For good reason stated, the Administrator's request to extend the time for filing a response to Mr. Blackburn's petition for reconsideration is granted. The time for filing the Administrator's response to Mr. Blackburn's petition for reconsideration is extended to, and includes, September 7, 2017.[1]

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In re: TRISTA BROWN, an individual; JORDAN CAUDILL, an individual; and KELLY PEAVY, an individual.
Docket Nos. 17-0023; 17-0024; 17-0025.
Decision and Order.
Filed September 8, 2017.

HPA – Administrative procedure – Petition to reconsider, time to file.

Colleen A. Carroll, Esq., and Lauren C. Axley, Esq., for Complainant.
Robin L. Webb, Esq., for Respondent Jordan Caudill.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order by William G. Jenson, Judicial Officer.

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to Mr. Blackburn's petition for reconsideration is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, September 7, 2017.

ORDER DENYING PETITION TO RECONSIDER AS TO JORDAN CAUDILL

PROCEDURAL HISTORY

On August 17, 2017, Jordan Caudill filed a Motion to Reconsider Ruling of Judicial Officer [Petition to Reconsider] requesting that I reconsider *Brown*, 76 Agric. Dec. ___ (U.S.D.A. Aug. 2, 2017) (Decision as to Jordan Caudill). On September 7, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a reply in opposition to Mr. Caudill's Petition to Reconsider, and, on September 8, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Caudill's Petition to Reconsider.

DISCUSSION

On August 2, 2017, the Hearing Clerk served Mr. Caudill with *Brown*, 76 Agric. Dec. ___ (U.S.D.A. Aug. 2, 2017) (Decision as to Jordan Caudill).[1] The rules of practice applicable to this proceeding[2] provide that a petition for reconsideration must be filed within ten days after the date of service of the Judicial Officer's decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10

[1] Certificate of Service signed by Caroline Hill, Assistant Hearing Clerk.
[2] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

> days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). Therefore, Mr. Caudill was required to file his Petition to Reconsider no later than August 14, 2017.[3] On August 17, 2017, Mr. Caudill filed his Petition to Reconsider *Brown*, 76 Agric. Dec. ___ (U.S.D.A. Aug. 2, 2017) (Decision as to Jordan Caudill). Mr. Caudill's Petition to Reconsider was not timely filed. Accordingly, Mr. Caudill's Petition to Reconsider is denied.[4]

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[3] Ten days after the date the Hearing Clerk served Mr. Caudill with *Brown*, 76 Agric. Dec. ___ (U.S.D.A. Aug. 2, 2017) (Decision as to Jordan Caudill), was Saturday, August 12, 2017. The Rules of Practice provide that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day (7 C.F.R. § 1.147(h)). The next business day after Saturday, August 12, 2017, was Monday, August 14, 2017.

[4] Essary, 75 Agric. Dec. 615 (U.S.D.A. 2016) (denying, as late-filed, the respondent's petition for reconsideration filed sixteen days after it was required to be filed) (Order Den. Pet. to Reconsider); Kriegel, Inc., 74 Agric. Dec. 431 (U.S.D.A. 2015) (Order Den. Pet. to Reconsider) (denying, as late-filed, the respondents' petition to reconsider filed four days after it was required to be filed); Mitchell, 70 Agric. Dec. 409 (U.S.D.A. 2011) (Order Den. Pet. to Reconsider) (denying, as late-filed, the respondent's petition to reconsider filed twenty-four days after the Hearing Clerk served the respondent with the decision and order); Sergojan, 69 Agric. Dec. 1438 (U.S.D.A. 2010) (Order Den. Pet. to Reconsider) (denying, as late-filed, the respondent's petition to reconsider filed twenty-two days after the Hearing Clerk served the respondent with the order denying late appeal); Noble, 69 Agric. Dec. 518 (U.S.D.A. 2010) (Order Den. Mot. for Recons.) (denying, as late-filed, the respondent's motion to reconsider filed nineteen days after the Hearing Clerk served the respondent with the order denying late appeal); Stanley, 65 Agric. Dec. 1171 (U.S.D.A. 2006) (Order Den. Pet. for Recons.) (denying, as late-filed, a petition to reconsider filed thirteen days after the date the Hearing Clerk served the respondents with the decision and order); Heartland Kennels, Inc., 61 Agric. Dec. 562 (U.S.D.A. 2002) (Order Den. Second Pet. for Recons.) (denying, as late-filed, a petition to reconsider filed fifty days after the date the Hearing Clerk served the respondents with the decision and order); Finch, 61 Agric. Dec. 593 (U.S.D.A. 2002) (Order Den. Pet. for Recons.) (denying, as late-filed, a petition to reconsider filed fifteen days after the date the Hearing Clerk served the respondent with the decision and order).

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Caudill's Petition to Reconsider, filed August 17, 2017, is denied.

This Order shall become effective upon service on Mr. Caudill.

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In re: AMY BLACKBURN, an individual; KEITH BLACKBURN, an individual; and AL MORGAN, an individual.
Docket Nos. 17-0093; 17-0094; 17-0095.
Order Denying Petition to Reconsider.
Filed September 15, 2017.

HPA – Administrative law judge, authority of – Administrative procedure – Complaint, contents of – Default decision – Due process – Disqualification period – Judicial Officer, authority of – Jurisdiction – Reconsider, petition to – Rules of Practice – Service letter – Stay – Suspension period – Warning letters.

John Doe, Esq., for Complainant.
Jane Boe, Esq., for Respondent.
Initial Decision and Order by
Order by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER AS TO KEITH BLACKBURN

PROCEDURAL HISTORY

On August 10, 2017, Keith Blackburn filed a Motion to Reconsider Ruling of Judicial Officer [Petition to Reconsider] requesting that I reconsider *Blackburn*, 76 Agric. Dec. ___ (U.S.D.A. July 31, 2017) (Decision as to Keith Blackburn). On September 7, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Reply to Petition for Reconsideration, and, on September 11, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the

Judicial Officer for consideration of, and a ruling on, Mr. Blackburn's Petition to Reconsider.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer.[2] The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. A petition to reconsider is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. Blackburn raises eight issues in his Petition to Reconsider. First, Mr. Blackburn asserts the Complaint does not "contain any attachments in relation to the entry form, inspection paperwork, or violation documentation" (Pet. to Reconsider at 1).

I agree with Mr. Blackburn's assertion that the Complaint does not contain any attachments. The Rules of Practice set forth the requirements for a complaint, as follows:

§ 1.135 Contents of complaint or petition for review.

> (a) *Complaint*. A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[2] 7 C.F.R. § 1.146(a)(3).

7 C.F.R. § 1.135(a). There is no requirement that a complaint filed in a proceeding conducted under the Rules of Practice contain attachments.

Second, Mr. Blackburn asserts the Chief ALJ lacked jurisdiction to issue the May 30, 2017 Default Decision and Order Denying Motion to Accept Late Answer of Respondent Keith Blackburn [Default Decision] and contends the Chief ALJ's Default Decision should be vacated and the case dismissed. Mr. Blackburn contends the functions the United States Department of Agriculture delegated to the Chief ALJ can only be performed by an inferior officer appointed by the Secretary of Agriculture, as required by the Appointments Clause of the Constitution of the United States, and no such appointment has been made. (Pet. to Reconsider at 2-4).

The federal courts have made no final determination that administrative law judges generally – or United States Department of Agriculture administrative law judges specifically – lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice explicitly provide for appeals of the initial decisions of the administrative law judges[3] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[4] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process, should be raised in an appropriate United States Court of Appeals.[5] Moreover, Mr. Blackburn cannot avoid or enjoin this

[3] 7 C.F.R. § 1.145(a).
[4] 15 U.S.C. § 1825(b)-(c).
[5] *See* Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments

administrative proceeding by raising constitutional issues.[6] As the United States Court of Appeal for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC,* 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an

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Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).

6 *See* 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 because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

> administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject Mr. Blackburn's contention that the Chief ALJ's Default Decision should be vacated and the case should be dismissed.

Third, Mr. Blackburn asserts the Order in the Chief ALJ's Default Decision contains "**no mention of a Default Judgment**" (Pet. to Reconsider at 2.

I agree with Mr. Blackburn's assertion that the Order in the Chief ALJ's Default Decision does not mention a default judgment.[7] However, the Rules of Practice do not require that an order in an administrative law judge's decision issued by reason of default mention a default judgment.

Fourth, Mr. Blackburn contends I erroneously stated in *Blackburn*, 76 Agric. Dec. ___ (U.S.D.A. July 31, 2017) (Decision as to Keith Blackburn), that the Chief ALJ's Default Decision contains a "suspension period" (Pet. to Reconsider at 2).

I did not state in *Blackburn* that the Chief ALJ's Default Decision contains a "suspension period." However, I infer Mr. Blackburn's reference to a "suspension period" is a reference to a "disqualification

[7] *See* Chief ALJ's Default Decision at 6-7.

period." A plain reading of the Chief ALJ's Default Decision reveals that the Order issued by the Chief ALJ contains a period of disqualification.[8] Therefore, I reject Mr. Blackburn's assertion that my reference to the Chief ALJ's imposition of a "disqualification period," is error.

Fifth, Mr. Blackburn contends the Judicial Officer does not have authority to enter a final order imposing a sanction for a violation of the Horse Protection Act because no statute authorizes the Judicial Officer's appointment and the function the Judicial Officer performs can only be performed by a principal officer appointed by the President and confirmed by the Senate (Pet. to Reconsider at 4).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or employee of the United States Department of Agriculture.[9] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[10] and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice.[11] Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.[12] Therefore, I reject Mr. Blackburn's contentions that the Judicial Officer has no authority under the Horse Protection Act and that I have not been properly appointed to act as final deciding officer in adjudicatory proceedings under the Horse Protection Act.

Moreover, the Judicial Officer is not a principal officer that must be appointed by the President and confirmed by the Senate, as Mr. Blackburn

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[8] *Id.*
[9] 7 U.S.C. §§ 450c-450g.
[10] Originally the position was designated "Assistant to the Secretary." In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated "Judicial Officer" (10 Fed. Reg. 13769 (Nov. 9, 1945)).
[11] 7 C.F.R. § 2.35(a)(2).
[12] Attach. 1.

contends. The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer has been subject to a performance plan and appraisal by officers of the United States Department of Agriculture.

Sixth, Mr. Blackburn contends the Hearing Clerk's use of the word "may" in the following sentence in the Hearing Clerk's January 26, 2017 service letter, which accompanied the Complaint, is not accurate: "Failure to file a timely answer or filing an answer which does not deny the allegations of the Complaint may constitute an admission of those allegations and waive your right to an oral hearing." (Pet. to Reconsider at 9-10).

The record does not support Mr. Blackburn's contention that the Hearing Clerk's January 26, 2017 service letter is inaccurate. The Rules of Practice, a copy of which accompanied the Hearing Clerk's January 26, 2017 service letter, state the time within which an answer must be filed and the consequences of failing to file a timely answer.[13] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance with the Rules of Practice and that failure to file a timely answer shall constitute an admission of all the material allegations of the Complaint.[14]

Seventh, Mr. Blackburn contends the Rules of Practice deny due process because they do not provide procedures which allow for consideration of late-filed answers and for setting aside default decisions (Pet. to Reconsider at 10-11).

The default provisions of the Rules of Practice have long been held to provide respondents due process.[15] Moreover, the United States Court of

[13] 7 C.F.R. §§ 1.136(a), (c); .139.
[14] Compl. at the fourth unnumbered page.
[15] *See* United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an

Appeals for Sixth Circuit has opined that "the sufficiency of the rules of practice or procedural safeguards which govern proceedings before the USDA under the Horse Protection Act's regulations" would not succeed.[16]

Eighth, Mr. Blackburn contends my reference in *Blackburn*, 76 Agric. Dec. ___ (U.S.D.A. July 31, 2017) (Decision as to Keith Blackburn), to warning letters issued to Mr. Blackburn by the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], regarding violations of the Horse Protection Act that APHIS officials believe Mr. Blackburn committed, is irrelevant. Mr. Blackburn contends the warning letters are "meaningless correspondence that is meant to confuse, intimidate and desensitize citizens, and prejudice" Mr. Blackburn. (Pet. to Reconsider at 13-14).

APHIS issued four warning letters to Mr. Blackburn during the period November 15, 2012, through July 14, 2016, regarding violations of the Horse Protection Act. The record does not contain any support for Mr. Blackburn's contention that APHIS issued these warning letters to confuse, intimidate, and desensitize citizens and to prejudice Mr. Blackburn. A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume that APHIS officials sent the warning letters to Mr. Blackburn for the purpose of warning Mr. Blackburn that APHIS believes that he had violated the Horse Protection Act and not for the purpose of confusing, intimidating, and desensitizing citizens or prejudicing Mr. Blackburn.[17]

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

[16] Fleming v. U.S. Dep't of Agric., 713 F.2d 179, 183 n.8 (6th Cir. 1983).

[17] *See* 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. Chemical 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

Moreover, I reject Mr. Blackburn's contention that the warning letters APHIS issued to him are irrelevant. I have long held that prior warnings are relevant to the sanction to be imposed.[18]

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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, his 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 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).

[18] Am. Raisin Packers, Inc., 60 Agric. Dec. 165, 185 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003);

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a timely-filed petition to reconsider.[19] Mr. Blackburn's Petition to Reconsider was timely filed and automatically stayed *Blackburn* (Decision as to Keith Blackburn), 76 Agric. Dec. ___ (Decision as to Keith Blackburn). Therefore, since Mr. Blackburn's Petition to Reconsider is denied, I lift the automatic stay, and the Order in *Blackburn*, 76 Agric. Dec. ___ (U.S.D.A. July 31, 2017) (Decision as to Keith Blackburn), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Blackburn's Petition to Reconsider, filed August 10, 2017, is denied.

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In re: DANNY BURKS, an individual; HAYDEN BURKS, an individual; and SONNY McCARTER, an individual.
Docket Nos. 17-0027; 17-0028; 17-0029.
Stay Order.
Filed October 21, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., and Lauren Axley, Esq.., for APHIS.
L. Thomas Austin, Esq., for Respondent Danny Burks.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

Lawson, 57 Agric. Dec. 980, 1013 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166, 174 (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 Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Hutto Stockyard, Inc., 48 Agric. Dec. 436, 488 (U.S.D.A. 1989), *aff'd in part, rev'd in part, vacated in part, and remanded*, 903 F.2d 299 (4th Cir. 1990), *reprinted in* 50 Agric. Dec. 1724 (1991), *final decision on remand*, 49 Agric. Dec. 1027 (U.S.D.A. 1990).

[19] 7 C.F.R. § 1.146(b).

STAY ORDER AS TO DANNY BURKS

I issued *Burks*, 76 Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks), in which I (1) assessed Danny Burks a $2,200 civil penalty; and (2) disqualified Mr. Burks for five years from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On September 21, 2017, Mr. Burks filed a Motion to Stay Execution of Order Pending Appeal to the Appellate Courts [Motion for Stay] seeking a stay of the Order in *Burks*, 76 Agric. Dec. __(U.S.D.A. July 19, 2017) (Decision as to Danny Burks), pending the outcome of proceedings for judicial review. On October 2, 2017, Colleen A. Carroll, counsel for the complainant in this proceeding, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, informed me that the Administrator has no objection to Mr. Burks' Motion for Stay.

Mr. Burks's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Burks*, 76 Agric. Dec. (U.S.D.A. July 19, 2017) (Decision as to Danny Burks), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Burks*, 76Agric. Dec. ___ (U.S.D.A. July 19, 2017) (Decision as to Danny Burks), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Danny Burks shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL

WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Rulings.
Filed October 26, 2017.

HPA – Administrative procedure – Appeal petition, response to – Jurisdiction – Motions and requests – Privacy Act – Rules of Practice – Supplemental appeal petition.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Shawn Fulton.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Rulings issued by William G. Jenson, Judicial Officer.

RULINGS:
(1) DISMISSING MR. FULTONS REQUEST FOR PRIVACY ACT RELIEF; (2) DENYING THE ADMINISTRATOR'S MOTION TO STRIKE MR. FULTON'S REQUEST FOR PRIVACY ACT RELIEF; AND (3) DENYING MR. FULTON'S MOTION TO STRIKE THE ADMINISTRATOR'S RESPONSE TO APPEAL PETITIONS

On June 16, 2017, Shawn Fulton filed a motion seeking relief under the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [Privacy Act].[1] On June 28, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion to strike Mr. Fulton's Request for Privacy Act Relief.[2] On June 28, 2017, Mr. Fulton filed a response to the Administrator's Motion to Strike Mr. Fulton's Request for Privacy Act Relief.3 On June 30, 2017, the Administrator filed a single response to three appeal petitions – one of which was filed by Mr. Bradley, one of

[1] "Respondent Shawn Fulton's Motion for Relief Under the Privacy Act and Supporting Brief" [Request for Privacy Act Relief]. On June 28, 2017, Mr. Fulton filed "Respondent's Supplement to Request for Relief Under the Privacy Act."
[2] "Complainant's Motion to Strike 'Motion for Relief' Filed by Shawn Fulton" [Motion to Strike Mr. Fulton's Request for Privacy Act Relief].
[3] "Respondent Shawn Fulton's Response to 'Complainant's Motion to Strike' and 'Request to Extend Time.'"

which was filed by Mr. Fulton, and one of which was filed by Mr. Perkins.[4] On July 6, 2017, Mr. Fulton filed a motion to strike the Administrator's Response to Appeal Petitions.[5] On August 4, 2017, the Administrator filed a response to Mr. Fulton's Motion to Strike the Administrator's Response to Appeal Petitions.[6]

On August 7, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for rulings on Mr. Fulton's Request for Privacy Act Relief, the Administrator's Motion to Strike Mr. Fulton's Request for Privacy Act Relief, and Mr. Fulton's Motion to Strike the Administrator's Response to Appeal Petitions.

The Administrator's Motion to Strike Mr. Fulton's Request for Privacy Act Relief

The Administrator contends Mr. Fulton's Request for Privacy Act Relief must be stricken for two reasons. First, the Administrator contends Mr. Fulton's Request for Privacy Act Relief is an untimely request concerning the Complaint (Mot. to Strike Mr. Fulton's Request for Privacy Act Relief ¶ IIA at 4-5).

The rules of practice applicable to this proceeding[7] provide that all motions and requests concerning the complaint must be made within the time allowed for filing an answer.[8] On January 26, 2017, the Hearing Clerk, by certified mail, served Mr. Fulton with the Complaint.[9] The Rules

[4] "Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins" [Response to Appeal Petitions].

[5] "Respondent Shawn Fulton's Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and Supplement to Request for Relief Under the Privacy Act" [Motion to Strike the Administrator's Response to Appeal Petitions].

[6] "Complainant's Response to Motions to Strike Complainant's Response to Petitions for Appeal."

[7] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

[8] 7 C.F.R. § 1.143(b)(2).

[9] United States Postal Service domestic return receipt for article number [redacted] 4894.

of Practice require that an answer must be filed with the Hearing Clerk within twenty days after the Hearing Clerk serves a respondent with the complaint.[10] Therefore, Mr. Fulton was required to file an answer and any motion or request concerning the Complaint with the Hearing Clerk no later than February 15, 2017. Mr. Fulton did not file his Request for Privacy Act Relief until June 16, 2017. However, I do not find that Mr. Fulton's Request for Privacy Act Relief constitutes a motion or request concerning the Complaint. Therefore, I reject the Administrator's contention that Mr. Fulton's Request for Privacy Act Relief must be stricken because it is an untimely request concerning the Complaint.

Second, the Administrator contends Mr. Fulton's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal (Mot. to Strike Mr. Fulton's Request for Privacy Act Relief ¶ IIB at 5-6). The Administrator correctly states that a supplemental appeal petition is stricken unless the Judicial Officer has granted the party filing the supplemental appeal petition the opportunity to supplement his or her appeal petition.[11] However, while not without doubt, I find Mr. Fulton's Request for Privacy Act Relief is not a supplemental appeal. Therefore, I reject the Administrator's contention that Mr. Fulton's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal.

Mr. Fulton's Request for Privacy Act Relief

Mr. Fulton contends the institution and conduct of this proceeding violate his rights under the Privacy Act and he seeks relief under the Privacy Act.

This proceeding is a disciplinary administrative proceeding to

[10] 7 C.F.R. § 1.136(a).

[11] *See* Coastal Bend Zoological Ass'n, 67 Agric. Dec. 154, 172 (U.S.D.A. 2008) (Decision as to Robert Brock and Michelle Brock), *aff'd per curiam sub nom.* Brock v. U.S. Dep't of Agric., 335 F. App'x 436 (5th Cir. 2009); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1100-01 (U.S.D.A. 2007) (Decision as to Ramos), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009); Mitchell, 60 Agric. Dec. 91, 94 n.5 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002).

determine whether Mr. Fulton has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Secretary of Agriculture has violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Fulton's Privacy Act claims.[12] Therefore, I dismiss Mr. Fulton's Request for Privacy Act Relief.

Mr. Fulton's Motion to Strike the Administrator's Response to Appeal Petitions

Mr. Fulton contends the Administrator's Response to Appeal Petitions must be stricken for three reasons. First, Mr. Fulton contends that the Administrator's response to three appeal petitions each of which was filed by a different respondent in this proceeding, is improper. I find nothing in the Rules of Practice which prohibits a party from filing a single response to multiple petitions for appeal. Therefore, I reject Mr. Fulton's contention that the Administrator's Response to Appeal Petitions must be stricken because it addresses three appeal petitions each of which was filed by a different respondent in this proceeding.

Second, Mr. Fulton contends the Administrator's Response to Appeal Petitions must be stricken because it prejudices Mr. Fulton's right to have his case decided solely on its merits.

Mr. Fulton offers no support for his speculation that the Administrator's Response to Appeal Petitions will result in my issuing a decision that is not based on the merits of Mr. Fulton's appeal petition.

Third, Mr. Fulton contends the Administrator's Response to Appeal Petitions must be stricken because it violates the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Fulton has violated the Horse Protection Act, as

[12] *See* 7 U.S.C. §§ 450c-450g, which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer, and 7 C.F.R. § 2.35, which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer. *See also* Black, 71 Agric. Dec. 1087, 1092 (U.S.D.A. 2012) (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

alleged in the Complaint; it is not a proceeding to determine whether the Administrator's filing the Response to Appeal Petitions violates the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Fulton's Privacy Act claim.[13] Therefore, I decline to address Mr. Fulton's contention that the Administrator's filing the Response to Appeal Petitions violates the Privacy Act.

For the forgoing reasons, the following Rulings are issued.

RULINGS

1. Mr. Fulton's June 16, 2017 Request for Privacy Act Relief is dismissed.

2. The Administrator's June 28, 2017 Motion to Strike Mr. Fulton's Request for Privacy Act Relief is denied.

3. Mr. Fulton's July 6, 2017 Motion to Strike the Administrator's Response to Appeal Petitions is denied.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Rulings.
Filed October 31, 2017.

[13] *Black*, 71 Agric. Dec. at 1092 (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

HPA – Administrative procedure – Appeal petition, response to – Jurisdiction – Motions and requests – Privacy Act – Rules of Practice – Supplemental appeal petition.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Sam Perkins.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Rulings issued by William G. Jenson, Judicial Officer.

RULINGS:
(1) DISMISSING MR. PERKINS'S REQUEST FOR PRIVACY ACT RELIEF; (2) DENYING THE ADMINISTRATOR'S MOTION TO STRIKE MR. PERKINS'S REQUEST FOR PRIVACY ACT RELIEF; AND (3) DENYING MR. PERKINS'S MOTION TO STRIKE THE ADMINISTRATOR'S RESPONSE TO APPEAL PETITIONS

On June 16, 2017, Sam Perkins filed a motion seeking relief under the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [Privacy Act].[1] On June 27, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion to strike Mr. Perkins's Request for Privacy Act Relief.[2] On June 28, 2017, Mr. Perkins filed a response to the Administrator's Motion to Strike Mr. Perkins's Request for Privacy Act Relief.[3] On June 30, 2017, the Administrator filed a single response to three appeal petitions – one of which was filed by Mr. Bradley, one of which was filed by Mr. Fulton, and one of which was filed by Mr. Perkins.[4] On July 6, 2017, Mr. Perkins filed a motion to strike the Administrator's Response to Appeal Petitions.[5] On August 4, 2017, the

[1] "Respondent Sam Perkins' Motion for Relief Under the Privacy Act and Supporting Brief" [Request for Privacy Act Relief]. On June 28, 2017, Mr. Perkins filed "Respondent's Supplement to Request for Relief Under the Privacy Act."
[2] "Complainant's Motion to Strike 'Motion for Relief' Filed by Sam Perkins" [Motion to Strike Mr. Perkins's Request for Privacy Act Relief].
[3] "Respondent Sam Perkins' Response to 'Complainant's Motion to Strike' and 'Request to Extend Time.'"
[4] "Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins" [Response to Appeal Petitions].
[5] "Respondent Sam Perkins' Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and

Administrator filed a response to Mr. Perkins' Motion to Strike the Administrator's Response to Appeal Petitions.[6]

On August 11, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for rulings on Mr. Perkins's Request for Privacy Act Relief, the Administrator's Motion to Strike Mr. Perkins's Request for Privacy Act Relief, and Mr. Perkins's Motion to Strike the Administrator's Response to Appeal Petitions.

The Administrator's Motion to Strike Mr. Perkins's Request for Privacy Act Relief

The Administrator contends Mr. Perkins's Request for Privacy Act Relief must be stricken for two reasons. First, the Administrator contends Mr. Perkins's Request for Privacy Act Relief is an untimely request concerning the Complaint (Mot. to Strike Mr. Perkins's Request for Privacy Act Relief ¶ IIA at 4-5).

The rules of practice applicable to this proceeding[7] provide that all motions and requests concerning the complaint must be made within the time allowed for filing an answer.[8] On January 26, 2017, the Hearing Clerk, by certified mail, served Mr. Perkins with the Complaint.[9] The Rules of Practice require that an answer must be filed with the Hearing Clerk within twenty days after the Hearing Clerk serves a respondent with the complaint.[10] Therefore, Mr. Perkins was required to file an answer and any motion or request concerning the Complaint with the Hearing Clerk no later than February 15, 2017. Mr. Perkins did not file his Request for

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Supplemental Request for Relief Under the Privacy Act" [Motion to Strike the Administrator's Response to Appeal Petitions].

[6] "Complainant's Response to Motions to Strike Complainant's Response to Petitions for Appeal."

[7] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

[8] 7 C.F.R. § 1.143(b)(2).

[9] United States Postal Service domestic return receipt for article number [redacted] 5187 4931.

[10] 7 C.F.R. § 1.136(a).

Privacy Act Relief until June 16, 2017. However, I do not find that Mr. Perkins' Request for Privacy Act Relief constitutes a motion or request concerning the Complaint. Therefore, I reject the Administrator's contention that Mr. Perkins's Request for Privacy Act Relief must be stricken because it is an untimely request concerning the Complaint.

Second, the Administrator contends Mr. Perkins's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal (Mot. to Strike Mr. Perkins's Request for Privacy Act Relief ¶ IIB at 5-6).

The Administrator correctly states that a supplemental appeal petition is stricken unless the Judicial Officer has granted the party filing the supplemental appeal petition the opportunity to supplement his or her appeal petition.[11] Mr. Perkins has not requested, nor have I granted, Mr. Perkins an opportunity to supplement his May 10, 2017 appeal of Chief Administrative Law Judge Bobbie J. McCartney's Default Decision and Order. However, while not without doubt, I find Mr. Perkins' Request for Privacy Act Relief is not a supplemental appeal. Therefore, I reject the Administrator's contention that Mr. Perkins's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal.

Mr. Perkins's Request for Privacy Act Relief

Mr. Perkins contends the institution and conduct of this proceeding violate his rights under the Privacy Act and he seeks relief under the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Perkins has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Secretary of Agriculture has violated the Privacy Act. Moreover, I do not

[11] *See* Coastal Bend Zoological Ass'n, 67 Agric. Dec. 154, 172 (U.S.D.A. 2008) (Decision as to Robert Brock and Michelle Brock), *aff'd per curiam sub nom.* Brock v. U.S. Dep't of Agric., 335 F. App'x 436 (5th Cir. 2009); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1100-01 (U.S.D.A. 2007) (Decision as to Ramos), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009); Mitchell, 60 Agric. Dec. 91, 94 n.5 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002).

have jurisdiction to entertain Mr. Perkins' Privacy Act claims.[12] Therefore, I dismiss Mr. Perkins's Request for Privacy Act Relief.

Mr. Perkins's Motion to Strike the Administrator's Response to Appeal Petitions

Mr. Perkins contends the Administrator's Response to Appeal Petitions must be stricken for three reasons. First, Mr. Perkins contends the Administrator's single response to three appeal petitions each of which was filed by a different respondent in this proceeding, is improper. I find nothing in the Rules of Practice which prohibits a party from filing a single response to multiple petitions for appeal. Therefore, I reject Mr. Perkins's contention that the Administrator's Response to Appeal Petitions must be stricken because it addresses three appeal petitions each of which was filed by a different respondent in this proceeding.

Second, Mr. Perkins contends the Administrator's Response to Appeal Petitions must be stricken because it prejudices Mr. Perkins's right to have his case decided solely on its merits.

Mr. Perkins offers no support for his speculation that the Administrator's Response to Appeal Petitions will result in my issuing a decision that is not based on the merits of Mr. Perkins' appeal petition.

Third, Mr. Perkins contends the Administrator's Response to Appeal Petitions must be stricken because it violates the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Perkins has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Administrator's filing the Response to Appeal Petitions violates the Privacy Act. Moreover, I do not have jurisdiction to entertain

[12] *See* 7 U.S.C. §§ 450c-450g, which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer, and 7 C.F.R. § 2.35, which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer. *See also* Black, 71 Agric. Dec. 1087, 1092 (U.S.D.A. 2012) (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

Mr. Perkins's Privacy Act claim.[13] Therefore, I decline to address Mr. Perkins's contention that the Administrator's filing the Response to Appeal Petitions violates the Privacy Act.

For the forgoing reasons, the following Rulings are issued.

RULINGS

1. Mr. Perkins's June 16, 2017 Request for Privacy Act Relief, is dismissed.

2. The Administrator's June 27, 2017 Motion to Strike Mr. Perkins's Request for Privacy Act Relief, is denied.

3. Mr. Perkins's July 6, 2017 Motion to Strike the Administrator's Response to Appeal Petitions, is denied.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Rulings.
Filed November 1, 2017.

HPA – Administrative procedure – Appeal petition, response to – Jurisdiction – Motions and requests – Privacy Act – Rules of Practice – Supplemental appeal petition.

[13] *Black*, 71 Agric. Dec. at 1092 (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Jarrett Bradley.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Rulings issued by William G. Jenson, Judicial Officer.

RULINGS:
(1) DISMISSING MR. BRADLEY'S REQUEST FOR PRIVACY ACT RELIEF; (2) DENYING THE ADMINISTRATOR'S MOTION TO STRIKE MR. BRADLEY'S REQUEST FOR PRIVACY ACT RELIEF; AND (3) DENYING MR. BRADLEY'S MOTION TO STRIKE THE ADMINISTRATOR'S RESPONSE TO APPEAL PETITIONS

On June 16, 2017, Jarrett Bradley filed a motion seeking relief under the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [Privacy Act].[1] On June 27, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion to strike Mr. Bradley's Request for Privacy Act Relief.[2] On June 28, 2017, Mr. Bradley filed a response to the Administrator's Motion to Strike Mr. Bradley's Request for Privacy Act Relief.[3] On June 30, 2017, the Administrator filed a single response to three appeal petitions – one of which was filed by Mr. Bradley, one of which was filed by Mr. Fulton, and one of which was filed by Mr. Perkins.[4] On July 6, 2017, Mr. Bradley filed a motion to strike the Administrator's Response to Appeal Petitions.[5] On August 4, 2017, the Administrator filed a response to Mr. Bradley's Motion to Strike the

[1] "Respondent Jarrett Bradley's Motion for Relief Under the Privacy Act and Supporting Brief" [Request for Privacy Act Relief]. On June 28, 2017, Mr. Bradley filed "Respondent's Supplement to Request for Relief Under the Privacy Act."
[2] "Complainant's Motion to Strike 'Motion for Relief' Filed by Jarrett Bradley" [Motion to Strike Mr. Bradley's Request for Privacy Act Relief].
[3] "Respondent Jarrett Bradley's Response to 'Complainant's Motion to Strike' and 'Request to Extend Time.'"
[4] "Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins" [Response to Appeal Petitions].
[5] "Respondent Jarrett Bradley's Motion to Strike 'Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton and Sam Perkins' and Supplemental Request for Relief Under the Privacy Act" [Motion to Strike the Administrator's Response to Appeal Petitions].

Administrator's Response to Appeal Petitions.[6]

On August 11, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for rulings on Mr. Bradley's Request for Privacy Act Relief, the Administrator's Motion to Strike Mr. Bradley's Request for Privacy Act Relief, and Mr. Bradley's Motion to Strike the Administrator's Response to Appeal Petitions.

The Administrator's Motion to Strike Mr. Bradley's Request for Privacy Act Relief

The Administrator contends Mr. Bradley's Request for Privacy Act Relief must be stricken for two reasons. First, the Administrator contends Mr. Bradley's Request for Privacy Act Relief is an untimely request concerning the Complaint (Mot. to Strike Mr. Bradley's Request for Privacy Act Relief ¶ IIA at 4-5).

The rules of practice applicable to this proceeding[7] provide that all motions and requests concerning the complaint must be made within the time allowed for filing an answer.[8] The Rules of Practice require that an answer must be filed with the Hearing Clerk within twenty days after the Hearing Clerk serves a respondent with the complaint.[9] On January 26, 2017, the Hearing Clerk, by certified mail, served Mr. Bradley with the Complaint.[10] Therefore, Mr. Bradley was required to file any motion or request concerning the Complaint with the Hearing Clerk no later than February 15, 2017. Mr. Bradley did not file his Request for Privacy Act Relief until June 16, 2017. However, I do not find that Mr. Bradley's Request for Privacy Act Relief constitutes a motion or request concerning the Complaint. Therefore, I reject the Administrator's contention that

[6] "Complainant's Response to Motions to Strike Complainant's Response to Petitions for Appeal."
[7] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[8] 7 C.F.R. § 1.143(b)(2).
[9] 7 C.F.R. § 1.136(a).
[10] United States Postal Service domestic return receipt for article number [redacted] 4856.

Mr. Bradley's Request for Privacy Act Relief must be stricken because it is an untimely request concerning the Complaint.

Second, the Administrator contends Mr. Bradley's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal (Mot. to Strike Mr. Bradley's Request for Privacy Act Relief ¶ IIB at 5-6). The Administrator correctly states that a supplemental appeal petition is stricken unless the Judicial Officer has granted the party filing the supplemental appeal petition the opportunity to supplement his or her appeal petition.[11] Mr. Bradley has not requested, nor have I granted, Mr. Bradley an opportunity to supplement his May 10, 2017 appeal of Chief Administrative Law Judge Bobbie J. McCartney's Default Decision and Order. However, while not without doubt, I find Mr. Bradley's Request for Privacy Act Relief is not a supplemental appeal. Therefore, I reject the Administrator's contention that Mr. Bradley's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal.

Mr. Bradley's Request for Privacy Act Relief

Mr. Bradley contends the institution and conduct of this proceeding violate his rights under the Privacy Act and he seeks relief under the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Bradley has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Secretary of Agriculture has violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Bradley's Privacy Act claims.[12]

[11] *See* Coastal Bend Zoological Ass'n, 67 Agric. Dec. 154, 172 (U.S.D.A. 2008) (Decision as to Robert Brock and Michelle Brock), *aff'd per curiam sub nom.* Brock v. U.S. Dep't of Agric., 335 F. App'x 436 (5th Cir. 2009); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1100-01 (U.S.D.A. 2007) (Decision as to Ramos), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009); Mitchell, 60 Agric. Dec. 91, 94 n.5 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002).

[12] *See* 7 U.S.C. §§ 450c-450g which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer and 7 C.F.R. § 2.35 which lists the regulatory functions which the Secretary of Agriculture has delegated to

Therefore, I dismiss Mr. Bradley's Request for Privacy Act Relief.

Mr. Bradley's Motion to Strike the Administrator's Response to Appeal Petitions

Mr. Bradley contends the Administrator's Response to Appeal Petitions must be stricken for three reasons. First, Mr. Bradley contends the Administrator's single response to three appeal petitions each of which was filed by a different respondent in this proceeding, is improper. I find nothing in the Rules of Practice which prohibits a party from filing a single response to multiple petitions for appeal. Therefore, I reject Mr. Bradley's contention that the Administrator's Response to Appeal Petitions must be stricken because it addresses three appeal petitions each of which was filed by a different respondent in this proceeding.

Second, Mr. Bradley contends the Administrator's Response to Appeal Petitions must be stricken because it prejudices Mr. Bradley's right to have his case decided solely on its merits.

Mr. Bradley offers no support for his speculation that the Administrator's Response to Appeal Petitions will result in my issuing a decision that is not based on the merits of Mr. Bradley's appeal petition.

Third, Mr. Bradley contends the Administrator's Response to Appeal Petitions must be stricken because it violates the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Bradley has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Administrator's filing the Response to Appeal Petitions violates the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Bradley's Privacy Act claim.[13] Therefore, I decline to address Mr. Bradley's contention that the Administrator's filing the Response to

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the Judicial Officer. *See also* Black, 71 Agric. Dec. 1087, 1092 (U.S.D.A. 2012) (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

[13] *Black*, 71 Agric. Dec. at 1092 (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

Appeal Petitions violates the Privacy Act.

For the forgoing reasons, the following Rulings are issued.

RULINGS

1. Mr. Bradley's June 16, 2017 Request for Privacy Act Relief, is dismissed.

2. The Administrator's June 27, 2017 Motion to Strike Mr. Bradley's Request for Privacy Act Relief, is denied.

3. Mr. Bradley's July 6, 2017 Motion to Strike the Administrator's Response to Appeal Petitions, is denied.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Order.
Filed November 3, 2017.

HPA – Consent decision.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Beth Beasley.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING JOINT MOTION FILED BY BETH BEASLEY AND THE ADMINISTRATOR

On October 27, 2017, Beth Beasley and the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a joint motion1 requesting that I: (1) vacate Chief Administrative Law Judge Bobbie J. McCartney's [Chief ALJ] April 25, 2017 Default Decision and Order; (2) permit Ms. Beasley's and the Administrator's withdrawal of all pending motions and petitions and responses to those motions and petitions; and (3) enter the "Consent Decision and Order as to Respondent Beth Beasley" attached to Ms. Beasley and the Administrator's October 27, 2017 Joint Motion.

For good cause shown and based upon the agreement of Ms. Beasley and the Administrator, the October 27, 2017 Joint Motion filed by Ms. Beasley and the Administrator is granted.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Chief ALJ's April 25, 2017 Default Decision and Order is vacated.

2. All pending motions and petitions and responses to those motions and petitions are dismissed.

3. Ms. Beasley and the Administrator's request that I enter the "Consent Decision and Order as to Respondent Beth Beasley" attached to Ms. Beasley and the Administrator's October 27, 2017 Joint Motion, is granted.

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[1] Joint Motion to Vacate Initial Decision and Order and to File Consent Decision and Order as to Respondent Beth Beasley [Joint Motion].

In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Order.
Filed November 3, 2017.

HPA – Consent decision.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Jeffrey Page Bronnenburg.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Miscellaneous Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING JOINT MOTION FILED BY MR. BRONNENBURG AND THE ADMINISTRATOR

On October 27, 2017, Jeffrey Page Bronnenberg and the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a joint motion[1] requesting that I: (1) vacate Chief Administrative Law Judge Bobbie J. McCartney's [Chief ALJ] April 11, 2017 Default Decision and Order; (2) permit Mr. Bronnenberg's and the Administrator's withdrawal of all pending motions and petitions and responses to those motions and petitions; and (3) enter the "Consent Decision and Order as to Respondent Jeffrey Page Bronnenberg" attached to Mr. Bronnenberg and the Administrator's October 27, 2017 Joint Motion.

For good cause shown and based upon the agreement of Mr. Bronnenberg and the Administrator, the October 27, 2017 Joint

[1] Joint Motion to Vacate Initial Decision and Order and to File Consent Decision and Order as to Respondent Jeffrey Paul [sic] Bronnenberg [Joint Motion].

Motion filed by Mr. Bronnenberg and the Administrator is granted.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Chief ALJ's April 11, 2017 Default Decision and Order is vacated.

2. All pending motions and petitions and responses to those motions and petitions are dismissed.

3. Mr. Bronnenberg and the Administrator's request that I enter the "Consent Decision and Order as to Respondent Jeffrey Page Bronnenberg" attached to Mr. Bronnenberg and the Administrator's October 27, 2017 Joint Motion, is granted.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Miscellaneous Rulings.
Filed November 6, 2017.

HPA – Administrative procedure – Jurisdiction – Motions and requests – Privacy Act – Rules of Practice – Supplemental appeal petition.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Joe Fleming.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Rulings issued by William G. Jenson, Judicial Officer.

RULINGS: (1) DISMISSING MR. FLEMING'S REQUEST FOR PRIVACY ACT RELIEF; AND (2) DENYING THE ADMINISTRATOR'S MOTION TO STRIKE MR. FLEMING'S REQUEST FOR PRIVACY ACT RELIEF

On June 16, 2017, Joe Fleming filed a motion seeking relief under the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [Privacy Act].[1] On June 27, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion to strike Mr. Fleming's Request for Privacy Act Relief.[2] On June 29, 2017, Mr. Fleming filed a response to the Administrator's Motion to Strike Mr. Fleming's Request for Privacy Act Relief.[3]

On August 11, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for rulings on Mr. Fleming's Request for Privacy Act Relief and the Administrator's Motion to Strike Mr. Fleming's Request for Privacy Act Relief.

The Administrator's Motion to Strike Mr. Fleming's Request for Privacy Act Relief

The Administrator contends Mr. Fleming's Request for Privacy Act Relief must be stricken for two reasons. First, the Administrator contends Mr. Fleming's Request for Privacy Act Relief is an untimely request concerning the Complaint (Mot. to Strike Mr. Fleming's Request for Privacy Act Relief ¶ IIA at 4-5).

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[1] "Respondent Joe Fleming's Motion for Relief Under the Privacy Act and Supporting Brief" [Request for Privacy Act Relief]. On June 29, 2017, Mr. Fleming filed "Respondent's Supplement to Request for Relief Under the Privacy Act."

[2] "Complainant's Motion to Strike 'Motion for Relief' Filed by Joe Fleming" [Motion to Strike Mr. Fleming's Request for Privacy Act Relief].

[3] "Respondent Joe Fleming's Response to 'Complainant's Motion to Strike' and 'Request to Extend Time.'"

The rules of practice applicable to this proceeding[4] provide that all motions and requests concerning the complaint must be made within the time allowed for filing an answer.[5] The Rules of Practice require that an answer must be filed with the Hearing Clerk within twenty days after the Hearing Clerk serves a respondent with the complaint.[6] On January 26, 2017, the Hearing Clerk, by certified mail, served Mr. Fleming with the Complaint.[7] Therefore, Mr. Fleming was required to file any motion or request concerning the Complaint with the Hearing Clerk no later than February 15, 2017. Mr. Fleming did not file his Request for Privacy Act Relief until June 16, 2017. However, I do not find that Mr. Fleming's Request for Privacy Act Relief constitutes a motion or request concerning the Complaint. Therefore, I reject the Administrator's contention that Mr. Fleming's Request for Privacy Act Relief must be stricken because it is an untimely request concerning the Complaint.

Second, the Administrator contends Mr. Fleming's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal (Mot. to Strike Mr. Fleming's Request for Privacy Act Relief ¶ IIB at 5-6). The Administrator correctly states that a supplemental appeal petition is stricken unless the Judicial Officer has granted the party filing the supplemental appeal petition the opportunity to supplement his or her appeal petition.[8] Mr. Fleming has not requested, nor have I granted, Mr. Fleming an opportunity to supplement his May 10, 2017 appeal of Chief Administrative Law Judge Bobbie J. McCartney's Default Decision and Order. However, while not without doubt, I find Mr. Fleming's Request for Privacy Act Relief is not a supplemental appeal. Therefore, I

[4] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[5] 7 C.F.R. § 1.143(b)(2).
[6] 7 C.F.R. § 1.136(a).
[7] United States Postal Service domestic return receipt for article number [redacted] 4887.
[8] *See* Coastal Bend Zoological Ass'n, 67 Agric. Dec. 154, 172 (U.S.D.A. 2008) (Decision as to Robert Brock and Michelle Brock), *aff'd per curiam sub nom.* Brock v. U.S. Dep't of Agric., 335 F. App'x 436 (5th Cir. 2009); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093, 1100-01 (U.S.D.A. 2007) (Decision as to Ramos), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009); Mitchell, 60 Agric. Dec. 91, 94 n.5 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002).

reject the Administrator's contention that Mr. Fleming's Request for Privacy Act Relief must be stricken because it is, in part, a supplemental appeal.

Mr. Fleming's Request for Privacy Act Relief

Mr. Fleming contends the institution and conduct of this proceeding violate his rights under the Privacy Act and he seeks relief under the Privacy Act.

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Fleming has violated the Horse Protection Act, as alleged in the Complaint; it is not a proceeding to determine whether the Secretary of Agriculture has violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Fleming's Privacy Act claims.[9] Therefore, I dismiss Mr. Fleming's Request for Privacy Act Relief.

For the forgoing reasons, the following Rulings are issued.

RULINGS

1. Mr. Fleming's June 16, 2017 Request for Privacy Act Relief, is dismissed.

2. The Administrator's June 27, 2017 Motion to Strike Mr. Fleming's Request for Privacy Act Relief, is denied.

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[9] *See* 7 U.S.C. §§ 450c-450g which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer and 7 C.F.R. § 2.35 which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer. *See also* Black, 71 Agric. Dec. 1087, 1092 (U.S.D.A. 2012) (stating the Judicial Officer does not have jurisdiction to entertain Privacy Act claims).

In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Stay Order.
Stay Order.
Filed November 27, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., for APHIS.
Steven Mezrano, Esq., for Respondent Amelia Haselden.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

STAY ORDER AS TO AMELIA HASELDEN

I issued *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Oct. 13, 2017) (Decision as to Amelia Haselden), assessing Amelia Haselden a civil penalty and disqualifying Ms. Haselden from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On November 14, 2017, Ms. Haselden filed Amelia Haselden's Motion to Stay Final Order Pending Appeal, Supporting Brief and Exhibits [Motion for Stay] seeking a stay of the Order in *Beasley*, 76 Agric. Dec. (U.S.D.A. Oct. 13, 2017) (Decision as to Amelia Haselden), pending the outcome of proceedings for judicial review. On November 27, 2017, Colleen A. Carroll, counsel for the complainant in this proceeding, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, informed me that the Administrator has no objection to Ms. Haselden's Motion for Stay.

Ms. Haselden's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Beasley*, 76 Agric. Dec. ___

(U.S.D.A. Oct. 13, 2017) (Decision as to Amelia Haselden), is stayed. For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Beasley*, 76Agric. Dec. (U.S.D.A. Oct. 13, 2017) (Decision as to Amelia Haselden), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Amelia Haselden shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Stay Order.
Filed December 6, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Jarrett Bradley.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

STAY ORDER AS TO JARRETT BRADLEY

I issued *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 2, 2017) (Decision as to Jarrett Bradley), assessing Jarrett Bradley a civil penalty and disqualifying Mr. Bradley from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On November 27, 2017, Mr. Bradley filed Jarrett Bradley's Motion to Stay Final Order Pending Appeal, Supporting Brief and

Exhibits [Motion for Stay] seeking a stay of the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 2, 2017) (Decision as to Jarrett Bradley), pending the outcome of proceedings for judicial review. On December 5, 2017, Sheila Novak, Assistant General Counsel, Office of the General Counsel, United States Department of Agriculture, informed me by telephone that Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, has no objection to Mr. Bradley's Motion for Stay.

Mr. Bradley's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Beasle*y, 76 Agric. Dec. ___ (U.S.D.A. Nov. 2, 2017) (Decision as to Jarrett Bradley), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 2, 2017) (Decision as to Jarrett Bradley), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Jarrett Bradley shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Stay Order.
Filed December 6, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Joe Fleming.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

STAY ORDER AS TO JOE FLEMING

I issued *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 7, 2017) (Decision as to Joe Fleming), assessing Joe Fleming a civil penalty and disqualifying Mr. Fleming from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On December 1, 2017, Mr. Fleming filed Joe Fleming's, Sam Perkins' and Shawn Fulton's Combined Motions to Stay Final Orders Pending Appeals, Supporting Brief and Exhibits [Mr. Fleming's Motion for Stay] seeking a stay of the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 7, 2017) (Decision as to Joe Fleming), pending the outcome of proceedings for judicial review. On December 5, 2017, Sheila Novak, Assistant General Counsel, Office of the General Counsel, United States Department of Agriculture, informed me by telephone that Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, has no objection to Mr. Fleming's Motion for Stay.

Mr. Fleming's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 7, 2017) (Decision as to Joe Fleming), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Nov. 7, 2017) (Decision as to Joe Fleming), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Joe Fleming shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Stay Order.
Filed December 6, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Shawn Fulton.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

STAY ORDER AS TO SHAWN FULTON

I issued *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Oct. 26, 2017) (Decision as to Shawn Fulton), assessing Shawn Fulton a civil penalty and disqualifying Mr. Fulton from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On December 1, 2017, Mr. Fulton filed Joe Fleming's, Sam Perkins's, and Shawn Fulton's Combined Motions to Stay Final Orders Pending Appeals, Supporting Brief, and Exhibits [Mr. Fulton's Motion for Stay] seeking a stay of the Order in *Beasley*, 76 Agric. Dec. ___(U.S.D.A. Oct. 26, 2017) (Decision as to Shawn Fulton), pending the outcome of proceedings for judicial review. On December 5, 2017, Sheila Novak, Assistant General Counsel, Office of the General Counsel, United States Department of Agriculture, informed me by telephone that Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, has no objection to Mr. Fulton's Motion for Stay.

Mr. Fulton's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A.

Oct. 26, 2017) (Decision as to Shawn Fulton), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Beasley*, 76 Agric. Dec. (U.S.D.A. Oct. 26, 2017) (Decision as to Shawn Fulton), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Shawn Fulton shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: BETH BEASLEY, an individual; JARRETT BRADLEY, an individual; JEFFREY PAGE BRONNENBURG, an individual; DR. MICHAEL COLEMAN, an individual; JOE FLEMING, an individual d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JIMMY GRANT, an individual; JUSTIN HARRIS, an individual; AMELIA HASELDEN, an individual; SAM PERKINS, an individual; AMANDA WRIGHT, an individual; G. RUSSELL WRIGHT, an individual; and CHARLES YODER, an individual.
Docket Nos. 17-0119; 17-0120; 17-0121, 17-0122; 17-0123; 17-0124; 17-0125; 17-0126; 17-0127; 17-0128; 17-0129; 17-0130; 17-0131.
Stay Order.
Filed December 6, 2017.

HPA – Stay.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Sam Perkins.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

STAY ORDER AS TO SAM PERKINS

I issued *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2017) (Decision as to Sam Perkins), assessing Sam Perkins a civil penalty and disqualifying Mr. Perkins from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. On December 1, 2017, Mr. Perkins filed Joe Fleming's, Sam

Perkins's, and Shawn Fulton's Combined Motions to Stay Final Orders Pending Appeals, Supporting Brief and Exhibits [Mr. Perkins's Motion for Stay] seeking a stay of the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2017) (Decision as to Sam Perkins), pending the outcome of proceedings for judicial review. On December 5, 2017, Sheila Novak, Assistant General Counsel, Office of the General Counsel, United States Department of Agriculture, informed me by telephone that Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, has no objection to Mr. Perkins's Motion for Stay.

Mr. Perkins's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *Beasley*, 76 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2017) (Decision as to Sam Perkins), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Beasley*,76 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2017) (Decision as to Sam Perkins), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Sam Perkins shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: HOWARD HAMILTON & PATRICK W. THOMAS.
Docket Nos. 13-0365; 13-0366.
Remand Order.
Filed December 27, 2017.

HPA – Appointments Clause – Remand.

Brian T. Hill, Esq., for APHIS.
Thomas A. Kakassy, Esq., for Respondents.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Remand Order entered by William G. Jenson, Judicial Officer.

REMAND ORDER

On June 29, 2017, Chief Administrative Law Judge Bobbie J.

McCartney issued a "Decision and Order on the Record" in the instant proceeding. On July 28, 2017, Howard Hamilton and Patrick W. Thomas filed an "Appeal Petition to Judicial Officer and Brief in Support Thereof;" on August 21, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Response in Opposition to Respondents' Appeal Petition;" and on September 12, 2017, Mr. Hamilton and Mr. Thomas filed "Respondents' Reply." On December 21, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, 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*, (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing Strother and renewed their oaths of office.[1]

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Chief Administrative Law Judge McCartney who shall:

Issue an order giving the Administrator, Mr. Hamilton, and Mr. Thomas an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence and all her previous substantive and procedural actions;

Determine whether to ratify or revise in any respect all her prior actions; and

Issue an order stating that she has completed consideration of the

[1] Attach. 1.

record and setting forth her determination regarding ratification.

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PLANT PROTECTION ACT

In re: REDLAND NURSERY, INC. & JOHN C. DeMOTT.
Docket Nos. 15-0104; 15-0105.
Remand Order.
Filed December 28, 2017.

PPA – Appointments Clause – Remand.

Elizabeth M. Kruman, Esq., for APHIS.
Susan E. Trench, Esq., for Respondents.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Remand Order entered by William G. Jenson, Judicial Officer.

REMAND ORDER

On October 20, 2016, Chief Administrative Law Judge Bobbie J. McCartney issued a "Decision and Order" in the instant proceeding. On November 18, 2016, Redland Nursery, Inc., and John C. DeMott appealed Chief Administrative Law Judge McCartney's Decision and Order to the Judicial Officer; on December 7, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Opposition to Respondents' Appeal Petition;" and on January 10, 2017, Redland Nursery, Inc., and Mr. DeMott filed "Petitioners' Reply to Complainant's Opposition to Appeal Petition." On March 3, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, 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*, (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and

Administrative Law Judge Channing Strother and renewed their oaths of office.[1]

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Chief Administrative Law Judge McCartney who shall:

Issue an order giving the Administrator, Redland Nursery, Inc., and Mr. DeMott an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence and all her previous substantive and procedural actions;

Determine whether to ratify or revise in any respect all her prior actions; and

Issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

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[1] Attach. 1.

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].

No Default Decisions reported.

CONSENT DECISIONS

ANIMAL WELFARE ACT

Summer Wind Farm Sanctuary, a Michigan corporation.
Docket No. 16-0036.
Consent Decision and Order.
Filed July 25, 2017.

Victor Hollender & Lori Hollender, d/b/a Vic's Exotics.
Docket Nos. 16-0109; 16-0110.
Consent Decision and Order.
Filed November 1, 2017.

HORSE PROTECTION ACT

E. Lincoln "Link" Webb, an individual; and Lincoln Webb, an individual.
Docket Nos. 15-0021; 16-0018.
Consent Decision and Order.
Filed July 31, 2017.

Bert Head, an individual.
Docket No. 17-0092.
Consent Decision and Order.
Filed August 30, 2017.

Nancy Evans, an individual.
Docket No. 17-0144.
Consent Decision and Order.
Filed August 30, 2017.

Mickey Joe McCormick, d/b/a Mickey McCormick Stables, a sole proprietorship or unincorporated association; Mane Motion Stables, LLC, a Tennessee limited liability company; and Mickey Joe McCormick, an individual d/b/a Mickey McCormick Stables.
Docket Nos. 16-0040; 17-0004; 17-0160.
Consent Decision and Order.
Filed August 31, 2017.

Sandy Brumbaugh, an individual.
Docket No. 17-0050.
Consent Decision and Order.
Filed August 31, 2017.

Fred Allred, an individual.
Docket No. 17-0068.
Consent Decision and Order.
Filed September 1, 2017.

Laura Mauney, an individual.
Docket No. 17-0099.
Consent Decision and Order.
Filed September 1, 2017.

Roger Mauney, an individual.
Docket No. 17-0100.
Consent Decision and Order.
Filed September 1, 2017.

Jannie Chapman, an individual.
Docket No. 17-0132.
Consent Decision and Order.
Filed September 1, 2017.

Judy Case, an individual.
Docket No. 17-0162.
Consent Decision and Order.
Filed September 7, 2017.

Alias Family Investments, LLC, a Mississippi limited liability company.
Docket No. 17-0196.
Consent Decision and Order.
Filed September 7, 2017.

CONSENT DECISIONS

Margaret Anne Alias, an individual.
Docket No. 17-0196.
Consent Decision and Order.
Filed September 7, 2017.

Buddy Dick, an individual.
Docket No. 17-0076.
Consent Decision and Order.
Filed September 7, 2017.

Joann Dowell, an individual.
Docket No. 17-0078.
Consent Decision and Order.
Filed September 7, 2017.

Ronnie Reed, an individual.
Docket No. 17-0102.
Consent Decision and Order.
Filed September 7, 2017.

David Latham, an individual.
Docket No. 17-0181.
Consent Decision and Order.
Filed September 9, 2017.

Barbara Civils, an individual.
Docket No. 17-0046.
Consent Decision and Order.
Filed September 11, 2017.

Andrea Claborn, an individual.
Docket No. 17-0109.
Consent Decision and Order.
Filed September 11, 2017.

Mary Lou Rollins, an individual.
Docket No. 17-0153.
Consent Decision and Order.
Filed September 11, 2017.

Robert W. Rollins, an individual.
Docket No. 17-0154.
Consent Decision and Order.
Filed September 11, 2017.

Herb Murrath, an individual.
Docket No. 17-0031.
Consent Decision and Order.
Filed September 13, 2017.

Sharon Tolhurst, an individual.
Docket No. 17-0186.
Consent Decision and Order.
Filed September 13, 2017.

Chris Helton, an individual.
Docket No. 17-0062.
Consent Decision and Order.
Filed September 15, 2017.

Jim Welch, an individual.
Docket No. 17-0103.
Consent Decision and Order.
Filed September 15, 2017.

Dr. Michael Coleman, an individual.
Docket No. 17-0122.
Consent Decision and Order.
Filed September 18, 2017.

Nancy Hodges, an individual.
Docket No. 17-0180.
Consent Decision and Order.
Filed September 18, 2017.

Chuck Tolhurst, an individual.
Docket No. 17-0186.
Consent Decision and Order.
Filed September 18, 2017.

CONSENT DECISIONS

Jeff Smith, an individual.
Docket No. 17-0037.
Consent Decision and Order.
Filed September 19, 2017.

Joe P. Robinson, an individual.
Docket No. 17-0118.
Consent Decision and Order.
Filed September 19, 2017.

Jerrod Cagle, an individual.
Docket No. 17-0140.
Consent Decision and Order.
Filed September 19, 2017.

Stephanie Cagle, an individual.
Docket No. 17-0141.
Consent Decision and Order.
Filed September 19, 2017.

Ginger Williams, an individual.
Docket No. 17-0156.
Consent Decision and Order.
Filed September 19, 2017.

Berry Davis Coffey, an individual.
Docket No. 17-0047.
Consent Decision and Order.
Filed September 20, 2017.

Jimbo Conner, an individual.
Docket No. 17-0061.
Consent Decision and Order.
Filed September 20, 2017.

Tina Graves, an individual.
Docket No. 17-0070.
Consent Decision and Order.
Filed September 20, 2017.

William Ty Irby, an individual.
Docket No. 17-0206.
Consent Decision and Order.
Filed September 20, 2017.

Karen L. Bean, an individual.
Docket No. 17-0138.
Consent Decision and Order.
Filed September 22, 2017.

William J. Bean, an individual.
Docket No. 17-0139.
Consent Decision and Order.
Filed September 22, 2017.

Bill Garland, an individual.
Docket No. 17-0058.
Consent Decision and Order.
Filed September 26, 2017.

Brittany Baum, an individual.
Docket No. 17-0167.
Consent Decision and Order.
Filed September 26, 2017.

Jacob Baum, an individual.
Docket No. 17-0168.
Consent Decision and Order.
Filed September 26, 2017.

Keith Rosbury, an individual.
Docket No. 17-0172.
Consent Decision and Order.
Filed September 26, 2017.

Lorraine Rosbury, an individual.
Docket No. 17-0173.
Consent Decision and Order.
Filed September 26, 2017.

CONSENT DECISIONS

Joyce Meadows, an individual.
Docket No. 17-0208.
Consent Decision and Order.
Filed September 26, 2017.

Joyce H. Myers, an individual.
Docket No. 17-0209.
Consent Decision and Order.
Filed September 26, 2017.

Charles Yoder, an individual.
Docket No. 17-0131.
Consent Decision and Order.
Filed September 26, 2017.

Amanda Wright, an individual.
Docket No. 17-0129.
Consent Decision and Order.
Filed September 28, 2017.

G. Russell Wright, an individual.
Docket No. 17-0130.
Consent Decision and Order.
Filed September 28, 2017.

Beth Pippin, an individual.
Docket No. 17-0191.
Consent Decision and Order.
Filed September 28, 2017.

Gail Putman, an individual.
Docket No. 17-0192.
Consent Decision and Order.
Filed September 28, 2017.

Mike Chandler, an individual.
Docket No. 17-0142.
Consent Decision and Order.
Filed October 3, 2017.

Emily Kiser-Jackson, an individual.
Docket No. 17-0085.
Consent Decision and Order.
Filed October 4, 2017.

Molly Walters, an individual.
Docket No. 13-0375.
Consent Decision and Order.
Filed October 5, 2017.

Jerry Beaty, an individual.
Docket No. 17-0056.
Consent Decision and Order.
Filed October 17, 2017.

Jeannie Roberts, an individual.
Docket No. 17-0150.
Consent Decision and Order.
Filed October 17, 2017.

Jim Roberts, an individual.
Docket No. 17-0151.
Consent Decision and Order.
Filed October 17, 2017.

Daniel McSwain, an individual & Robert Keith McSwain, an individual.
Docket Nos. 17-0182; 17-0183.
Consent Decision and Order.
Filed October 20, 2017.

Libby Stephens, an individual.
Docket No. 17-0210.
Consent Decision and Order.
Filed October 27, 2017.

CONSENT DECISIONS

Courtney Grider, an individual.
Docket No. 17-0054.
Consent Decision and Order.
Filed October 30, 2017.

Charles E. Tooley, an individual.
Docket No. 17-0055.
Consent Decision and Order.
Filed October 30, 2017.

Chad Thompson, an individual.
Docket No. 17-0079.
Consent Decision and Order.
Filed October 30, 2017.

Gail Walling, an individual.
Docket No. 17-0080.
Consent Decision and Order.
Filed October 30, 2017.

Mikki Eldridge, an individual.
Docket No. 17-0203.
Consent Decision and Order.
Filed October 30, 2017.

Lynsey Denney, an individual.
Docket No. 17-0202.
Consent Decision and Order.
Filed October 31, 2017.

Beth Beasley, an individual.
Docket No. 17-0119.
Consent Decision and Order.
Filed November 3, 2017.

Jeffrey Page Bronnenburg, an individual.
Docket No. 17-0121.
Consent Decision and Order.
Filed November 3, 2017.

Bill Webb, an individual.
Docket No. 17-0155.
Consent Decision and Order.
Filed November 9, 2017.

Trista Brown, an individual.
Docket No. 17-0023.
Consent Decision and Order.
Filed November 14, 2017.

Mike Hannah, an individual.
Docket No. 17-0030.
Consent Decision and Order.
Filed November 14, 2017.

Heather Beard, an individual.
Docket No. 17-0097.
Consent Decision and Order.
Filed November 14, 2017.

Trish Harrison-Spivey, an individual.
Docket No. 17-0171.
Consent Decision and Order.
Filed November 16, 2017.

Scott Cooper, an individual.
Docket No. 17-0177.
Consent Decision and Order.
Filed November 16, 2017.

Brianne Eastridge, an individual.
Docket No. 17-0052.
Consent Decision and Order.
Filed December 14, 2017.

Rofle Mullins, an individual.
Docket No. 17-0072.
Consent Decision and Order.
Filed December 14, 2017.

CONSENT DECISIONS

Cassie Kathman, an individual.
Docket No. 17-0112.
Consent Decision and Order.
Filed December 14, 2017.

Cynthia J. Napier, an individual.
Docket No. 17-0113.
Consent Decision and Order.
Filed December 14, 2017.

Mandie Napier, an individual.
Docket No. 17-0114.
Consent Decision and Order.
Filed December 14, 2017.

Jimmy Grant, an individual.
Docket No. 17-0125.
Consent Decision and Order.
Filed December 14, 2017.

ORGANIC FOODS PRODUCTION ACT

Xochitl, Inc.
Docket No. 16-0108.
Consent Decision and Order.
Filed July 20, 2017.

Christine Grovenstein, an individual d/b/a Seeds of Love Nursery.
Docket No. 17-0261.
Consent Decision and Order.
Filed November 9, 2017.

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