UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. 04-0029
	)	
Bodie S. Knapp, an individual	)	
d/b/a Wayne's World Safari,	)	
	)	
Respondent	)	**Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 31, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on March 13, 2002, September 5, 2002, January 9, 2003, April 11, 2003, September 5, 2003, December 18, 2003, March 11, 2004, March 13,

2004, and March 11, 2005, Bodie S. Knapp, d/b/a Wayne's World Safari [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 3-9).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on September 4, 2004.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on October 6, 2004, the Hearing Clerk sent Respondent a letter informing him that he had not filed an answer to the Complaint in accordance with section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 25, 2004.[2] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service. On November 8, 2004,

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4592.

[2]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7342.

Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] extended the time for Respondent's filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to November 19, 2004.[3] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued a Decision and Order By Reason of Admission of Facts [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

On March 11, 2005, Respondent filed a motion for leave to file an affidavit and appealed to, and requested oral argument before, the Judicial Officer. On March 30, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit. On May 18, 2005,

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[3]Order Extending Time to File Objections to Proposed Decision and Order.

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

Based upon a careful review of the record, I agree with the Chief ALJ's January 4, 2005, Initial Decision. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions and rulings by the Judicial Officer follow the Chief ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

§ 2131. Congressional statement of policy

> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—
>
> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
>
> (2) to assure the humane treatment of animals during transportation in commerce; and
>
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

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

§ 2132. Definitions

When used in this chapter—

. . . .

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

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

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

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary

hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

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

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

§ 2151. Rules and regulations

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

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

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

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FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

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

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

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

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PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties—*. . . .

. . . .

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

. . . .

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

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term

excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART D–ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter[.]

. . . .

SUBPART H–COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

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SUBPART I–MISCELLANEOUS

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§ 2.131 Handling of animals.

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(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

. . . .

(c) . . . .

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.

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PART 3—STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 3.75 Housing facilities, general.

. . . .

(c) *Surfaces*–(1) *General requirements*. The surfaces of housing facilities–including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or objects within the facility–must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

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ANIMAL HEALTH AND HUSBANDRY STANDARDS

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§ 3.83 Watering.

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and well-being, but no less than twice daily for at least l hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

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

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

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

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength*. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

. . . .

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

. . . .

§ 3.127 Facilities, outdoor.

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

(b) *Shelter from inclement weather*. Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

(c) *Drainage*. A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.129 Feeding.

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

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

9 C.F.R. §§ 1.1; 2.40(a), (b)(1), .100(a), .131(b)(1), (c)(2); 3.75(c)(1)(i), .83, .84(a), .125(a), (c), .127(a)-(c), .129(a), .131(a) (2004).

THE CHIEF ALJ'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondent failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure

to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual doing business as "Wayne's World Safari" and whose address is 11212 Highway 359, Mathis, Texas 78368. At all times material to this proceeding, Respondent operated as a dealer and as an exhibitor, as those terms are defined in the Regulations and Standards, and held Animal Welfare Act license number 74-C-0533.

2. Respondent exhibits approximately 200 wild and exotic animals to the public. Respondent's exhibition business is significant. Respondent has many customers each year and also solicits and accepts donations from the public. The gravity of Respondent's violations is great and the violations involve willful, deliberate violations of the handling and veterinary care regulations and repeated failures to comply with the facilities standards. The violations themselves demonstrate a lack of good faith on the part of Respondent. Respondent has also exhibited bad faith by lying to Animal and Plant Health Inspection Service officials about the circumstances surrounding the death of two adult tigers in December 2003. Specifically, Respondent informed Animal and Plant Health Inspection Service officials that the animals died in a fight, when in fact both animals had died at the hand of Respondent. Respondent is a respondent in another

enforcement proceeding under the Animal Welfare Act: *In re Corpus Christi Zoological Association*, AWA Docket No. 04-0015.

3. On or about the following dates, Respondent willfully violated the veterinary care regulations (9 C.F.R. § 2.40), as follows:

a. On March 13, 2002, Respondent failed to have an attending veterinarian provide adequate veterinary care to animals as required. Specifically, Respondent failed to have an attending veterinarian provide care to a porcupine (Scarface) that needed veterinary medical attention for her left eye. (9 C.F.R. § 2.40(a).)

b. On September 5, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the provisions of the Regulations and Standards. Specifically, Respondent lacked facilities to prevent the escape of the brown bears. (9 C.F.R. § 2.40(b)(1).)

4. On or about the following dates, Respondent willfully violated section 2.131 of the Regulations and Standards (9 C.F.R. § 2.131), as follows:

a. On March 13, 2002, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public.

Specifically, there was no barrier between the rhinoceros and the public. (9 C.F.R. § 2.131(b)(1).)

b. On March 13, 2002, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

c. On January 9, 2003, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public. Specifically, the barrier at the gate at the front of Respondent's rhinoceros exhibit was only 18 inches high and was constructed of cattle paneling. (9 C.F.R. § 2.131(b)(1).)

d. On April 11, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animal and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

e. On April 11, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

f. On September 5, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

g. On September 5, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

h. On March 11, 2004, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

i. On March 11, 2004, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

5. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. On March 13, 2002, Respondent failed to provide sufficient water to nonhuman primates continually or as often as necessary for the health and comfort of the animals. Specifically, Respondent provided no drinking water to the spider monkeys. (9 C.F.R. § 3.83.)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

c. On January 9, 2003, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

d. On April 11, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of

excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

e. On April 11, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

f. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

g. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the

doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

h. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

i. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

j. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

k. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

6. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125 of the Regulations and Standards (9 C.F.R. § 3.125), as follows:

a. On March 13, 2002, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored meat in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.125(c).)

b. On September 5, 2002, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury. Specifically, Respondent's coatimundi enclosure had wires protruding from the concrete base, which wires posed a danger to the animals housed inside. (9 C.F.R. § 3.125(a).)

c. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to

protect the animals from injury and contain them. Specifically, the doors of Respondent's bear enclosure were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

d. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

e. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for tigers were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

f. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

g. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the

giraffe barn had been kicked loose and its metal portions structurally compromised. (9 C.F.R. § 3.125(a).)

h. On April 11, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the caracal enclosure was badly rusted, had holes, and was structurally compromised. (9 C.F.R. § 3.125(a).)

i. On April 11, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

j. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and was structurally compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

k. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength

compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

l. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

m. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

n. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

o. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

p. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

q. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

r. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in

the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

s. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a filthy freezer that had blood and food residue on the walls and floor. (9 C.F.R. § 3.125(c).)

t. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a chest freezer with a door that was broken and allowed warm air to enter. (9 C.F.R. § 3.125(c).)

u. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

v. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door

frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

w. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

x. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

y. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

z. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

aa. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

bb. On March 11, 2004, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

cc. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the back wall of the caracal enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

dd. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and its structural strength compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

ee. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ff. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

gg. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in

the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

hh. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ii. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

jj. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

kk. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to

protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

7. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Regulations and Standards (9 C.F.R. § 3.127), as follows:

a. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed Patagonian cavies in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

b. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed reindeer in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

c. On September 5, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed bears in an

enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

d. On April 11, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed an adult male caracal in an enclosure with a single shelter that could not accommodate him and had no floor. (9 C.F.R. § 3.127(b).)

e. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed five African crested porcupines in an enclosure with two doghouse shelters that could not accommodate all of the animals. (9 C.F.R. § 3.127(b).)

f. On September 5, 2003, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

g. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed a sable, an eland, a fallow deer, and

a bongo in an enclosure with a single shelter that did not protect all of the animals from mud. (9 C.F.R. § 3.127(b).)

h. On September 5, 2003, Respondent failed to provide a suitable method to rapidly eliminate excess water for animals housed outdoors. Specifically, Respondent housed a sable, an eland, a fallow deer, and a bongo in an enclosure where the animals were required to stand in mud up to their knees. (9 C.F.R. § 3.127(c).)

i. On March 11, 2004, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

8. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129), as follows:

a. On March 13, 2002, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals meat that had been stored in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.129(a).)

b. On April 11, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

c. On September 5, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, fruit intended to be offered to animals had been thawed and re-frozen into a large block. (9 C.F.R. § 3.129(a).)

d. On March 11, 2004, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

9. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131 of the Regulations and Standards (9 C.F.R. § 3.131), as follows:

a. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

c. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

d. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the capybara enclosure. (9 C.F.R. § 3.131(a).)

e. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

f. On April 11, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

g. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

h. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

i. On December 18, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

j. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

k. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

l. On March 13, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

Conclusions of Law

1. By reason of the Findings of Fact, Respondent has willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraphs 2 through 15 of these Conclusions of Law.

2. On March 13, 2002, Respondent willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

3. On September 5, 2003, Respondent willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

4. On March 13, 2002, January 9, 2003, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [now 9 C.F.R. § 2.131(c)(1) (2005)]).

5. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(c)(2) of the Regulations and Standards. (9 C.F.R. § 2.131(c)(2) (2004) [now 9 C.F.R. § 2.131(d)(2) (2005)]).

6. On March 13, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.83 of the Regulations and Standards (9 C.F.R. § 3.83).

7. On September 5, 2002, and January 9, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.84(a) of the Regulations and Standards (9 C.F.R. § 3.84(a)).

8. On April 11, 2003 (two instances), September 5, 2003 (two instances), December 18, 2003 (two instances), and March 11, 2004 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.75(c)(1)(i) of the Regulations and Standards (9 C.F.R. § 3.75(c)(1)(i)).

9. On September 5, 2002, January 9, 2003 (five instances), April 11, 2003, September 5, 2003 (nine instances), December 18, 2003, (seven instances), March 11, 2004 (five instances), and March 13, 2004 (four instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

10. On March 13, 2002, April 11, 2003, September 5, 2003 (two instances), and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(c) of the Regulations and Standards (9 C.F.R. § 3.125(c)).

11. On March 13, 2002 (two instances), September 5, 2002, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(a) of the Regulations and Standards (9 C.F.R. § 3.127(a)).

12. On April 11, 2003, and September 5, 2003 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

13. On September 5, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum

requirements for outdoor facilities in section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

14. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129(a) of the Regulations and Standards (9 C.F.R. § 3.129(a)).

15. On September 5, 2002 (three instances), January 9, 2003 (two instances), April 11, 2003, September 5, 2003 (two instances), December 18, 2003, March 11, 2004 (two instances), and March 13, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)).

ADDITIONAL CONCLUSIONS AND RULINGS BY THE JUDICIAL OFFICER

Ruling on Respondent's Request for Oral Argument

Respondent requests oral argument before the Judicial Officer (Appeal to the Judicial Officer at 1). Complainant opposes Respondent's request for oral argument on the ground that oral argument is not necessary because the parties have thoroughly addressed the issues and the issues are not complex (Complainant's Response to Respondent's Appeal Pet. at 13).

I agree with Complainant. Respondent's request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Ruling on Respondent's Motion for Leave to File Affidavit

Respondent attaches Jennifer Knapp's March 9, 2005, affidavit, to Respondent's Appeal to the Judicial Officer and requests leave to file the affidavit (Appeal to the Judicial Officer at 8). Complainant contends Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit should be denied because the time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision has passed and the affidavit raises new arguments on appeal (Complainant's Response to Respondent's Appeal Pet. at 13-14).

Jennifer Knapp's March 9, 2005, affidavit is filed in support of Respondent's Appeal to the Judicial Officer, not in support of Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, as Complainant suggests. Moreover, while it is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer,[4] Jennifer Knapp's

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[4]*In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding),

(continued...)

March 9, 2005, affidavit appears to be merely a declaration of facts rather than argument. Therefore, I reject Complainant's arguments for denying Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit, and I grant Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit.

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[4](...continued)
59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Respondent's Appeal Petition

Respondent raises three issues in the Appeal to the Judicial Officer. First, Respondent contends he made no admissions of fact (Appeal to the Judicial Officer at 1-7).

Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because he failed to file an answer to the Complaint within 20 days after the Hearing Clerk served him with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on September 4, 2004.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

[5]See note 1.

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

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

§ 1.141 Procedure for hearing.

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

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

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

> [T]his complaint shall be served upon the respondent. The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 20-21.

Similarly, the Hearing Clerk informed Respondent in the August 31, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure

to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 31, 2004

Mr. Bodie S. Knapp d/b/a
Wayne's World Safari
11212 Highway 359
Mathis, Texas 78368

Dear Mr. Knapp:

Subject: In re: Bodie S. Knapp d/b/a Wayne's World Safari
Respondent
AWA Docket No. 04-0029

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint.

Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

> In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.
>
> You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.
>
> Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.
>
> Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.
>
> Sincerely,
> /s/
> Joyce A. Dawson
> Hearing Clerk

Respondent's answer was due no later than September 24, 2004. Respondent's first filing in this proceeding is dated and was filed November 8, 2004, 1 month 15 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and

Complainant's Proposed Default Decision. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on October 25, 2004.[6] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant' Proposed Default Decision within 20 days after service. On November 8, 2004, Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, the Chief ALJ extended the time for Respondent's filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to November 19, 2004.[7] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued an Initial Decision: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

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[6]See note 2.

[7]See note 3.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[8] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[9]

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

[9]*See generally In re Wanda McQuary* (Decision as to Wanda McQuary and

(continued...)

[9](...continued)
Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the

(continued...)

[9](...continued)
default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re*
(continued...)

Respondent contends the Chief ALJ's Initial Decision should be set aside for good cause. In support of this contention, Respondent states: (1) at the time the answer was due, he appeared pro se; (2) Sonny Kelm, a United States Department of Agriculture investigator, influenced Respondent not to file a timely answer by stating that Respondent

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[9](...continued)
Ronald DeBruin, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

would only be assessed a civil monetary penalty; (3) Respondent tried to contact Complainant's counsel, Colleen Carroll, and a United States Department of Agriculture inspector, Charlie Currer; and (4) Respondent believed filing was effective on the date of mailing.

I do not find Respondent's appearance pro se constitutes good cause for setting aside the Chief ALJ's Initial Decision. The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel.[10] The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the complaint and provides that failure to file a timely answer shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[11] Respondent's decision to proceed pro se does not operate as an excuse for his failure to file a timely answer to the Complaint.[12]

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[10]*In re Chad Way*, 64 Agric. Dec. ___, slip op. at 17 (Apr. 11, 2005) (stating the Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel); *In re Mary Meyers*, 58 Agric. Dec. 861, 865 (1999) (Order Denying Pet. for Recons.) (stating the respondent is not exempt from the Rules of Practice merely because the respondent was pro se at the time her answer was due).

[11]7 C.F.R. §§ 1.136(a), (c), .139.

[12]*In re Chad Way*, 64 Agric. Dec. ___, slip op. at 17-18 (Apr. 11, 2005) (stating the respondents' decision to proceed pro se does not operate as an excuse for their failure to file a timely answer to the amended complaint); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

I do not find the United States Department of Agriculture investigator's purported statement regarding the sanction constitutes good cause for setting aside the Chief ALJ's Initial Decision. I infer Respondent contends I am estopped from adopting the Chief ALJ's Initial Decision because, allegedly, Sonny Kelm, a United States Department of Agriculture investigator, stated that Respondent would only be assessed a civil monetary penalty. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[13] Even if Respondent acted to his detriment based on Sonny Kelm's statement, it is well settled that the government may not be estopped on the same terms as any other litigant.[14] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[15] Equitable estoppel does not generally apply to the

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[13]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[14]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[15]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

government acting in its sovereign capacity,[16] as it is doing in this case,[17] and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[18] Respondent bears a heavy burden when asserting estoppel against the government, and

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[16]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[17]*See In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 646 (2000) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re Mary Meyers*, 58 Agric. Dec. 861, 868 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 601 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[18]*Lehman v. United* States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, even if I were to find that Sonny Kelm erroneously stated that Respondent would only be assessed a civil monetary penalty, I would reject Respondent's contention that the erroneous statement constitutes good cause for setting aside the Chief ALJ's Initial Decision.

I do not find Respondent's attempts to contact Colleen Carroll and Charlie Currer constitute good cause for setting aside the Chief ALJ's Initial Decision. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that a respondent shall file an answer with the Hearing Clerk within 20 days after service of the complaint. As an initial matter, based on Jennifer Knapp's March 9, 2005, affidavit, Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer appear to have been initiated long after Respondent's answer was due. Moreover, even if I were to find Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer occurred within 20 days after service of the Complaint, I would not conclude Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer constituted filing an answer with the Hearing Clerk.[19]

I do not find Respondent's belief that filing is effective on the date of mailing constitutes good cause for setting aside the Chief ALJ's Initial Decision. As an initial

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[19]*See In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk).

matter, Respondent's first filing is dated November 8, 2004, and the filing establishes that Respondent faxed it to the Hearing Clerk on November 8, 2004, 1 month 15 days after Respondent's answer was due. Therefore, even if I were to find the mailbox rule applies to this proceeding (which I do not so find)[20] and Respondent's November 8, 2004, filing is an answer (which it is not), I would not find good cause for setting aside the Chief ALJ's Initial Decision. Moreover, Respondent's belief that the mailbox rule applies in this proceeding is not reasonable. Section 1.147(g) of the Rules of Practice clearly provides the effective date of filing a document is the time when the document reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Respondent's first filing in this proceeding was filed with the Hearing Clerk 1 month 15 days after Respondent's answer was due. Respondent's failure to file a

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[20]*See In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondents' contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted in accordance with the Rules of Practice), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision.

Second, Respondent contends the Chief ALJ's revocation of Respondent's Animal Welfare Act license is far too harsh a sanction under the circumstances (Appeal to the Judicial Officer at 7).

I conclude Respondent committed 84 willful violations of the Regulations and Standards over a 2-year period. Many of these violations are serious violations which jeopardized the health and well-being of Respondent's animals. In light of the number and gravity of the violations and the period of time during which the violations occurred, I find revocation of Respondent's Animal Welfare Act license appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent contends the revocation of his Animal Welfare Act license based upon his failure to file a timely answer deprives him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Appeal to the Judicial Officer at 7-8).

As an initial matter, the due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[21] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Respondent contends.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[22] Therefore, I reject Respondent's contention that revocation of his Animal Welfare Act license, based upon his failure to file an answer to the Complaint, deprives him of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

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[21]See 5 U.S.C. §§ 101, 551(1).

[22]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Paragraphs 7i and 7k of the Complaint

Complainant alleges, and Respondent is deemed to have admitted, that on March 11, 2005, he failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, in violation of section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)) (Compl. ¶¶ 7i, 7k). Complainant filed the Complaint on August 31, 2004, well before the alleged March 11, 2005, violations. As it was impossible for Respondent to have committed the March 11, 2005, violations at the time Complainant filed the Complaint, I decline to include these violations in the findings of fact and conclusions of law, even though Respondent is deemed to have admitted the violations.[23]

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

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

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[23]*See In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197 (2001) (concluding the respondent, by her failure to file an answer, is deemed to have admitted the violations alleged in the complaint, even though the complainant and the respondent agreed the date of the violations alleged in the complaint was in error).

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0533) is revoked.

The license revocation provisions of this Order shall become effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order.[24] The date of entry of this Order is May 31, 2005.

Done at Washington, DC

May 31, 2005

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William G. Jenson
Judicial Officer

[24] 7 U.S.C. § 2149(c).