

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

REC'D - USDA/DALJ/DHC
2020 FEB 7 PM4:27

In re:)
)
Stearns Zoological Rescue & Rehab)
Center, Inc., a Florida corporation,)
d/b/a Dade City Wild Things,) AWA Docket No. 15-0146
)
Respondent.)

DECISION AND ORDER ON REMAND

Appearances:

Ciarra A. Toomey, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Animal and Plant Health Inspection Service ("APHIS"); and

Ellis L. Bennett, Esq., with Dunlap Bennett & Ludwig PLLC, Leesburg, VA, for the Respondent, Stearns Zoological Rescue & Rehab Center, Inc., a Florida corporation d/b/a Dade City Wild Things.

Before Chief Administrative Law Judge, Channing D. Strother.

INTRODUCTION AND BACKGROUND

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) ("AWA"), and the Regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"). This matter initiated with a Complaint filed on July 17, 2015, by Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS").¹ The Complaint alleged Respondent Stearns Zoological Rescue & Rehab Center, Inc., a Florida corporation doing business as Dade City Wild Things ("Respondent" or "Respondent Stearns"), willfully violated the AWA and Regulations. Respondent timely filed an Answer on August 5, 2015.

¹ While I recognize the Administrator is a person, herein I use the pronoun "it" when referring to Complainant.

An in-person Hearing was held June 27 through June 30, 2016 in Tampa, Florida. On February 15, 2017, then-Chief Administrative Law Judge Bobbie J. McCartney² (“Chief ALJ”) issued a Decision and Order in the instant proceeding. On April 7, 2017, Respondent filed an appeal petition, and on April 27, 2017 Complainant filed a response and cross appeal thereto. On May 1, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (“*Lucia*”), pending in the United States Supreme Court at that time, in which the Solicitor General took the position that administrative law judges (“ALJs”) of the Securities and Exchange Commission are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2.

On December 27, 2017, then-USDA Judicial Officer, William G. Jenson,³ addressed the Appointments Clause issue and remanded this proceeding to the Chief ALJ. On January 10, 2018, this proceeding was reassigned to the undersigned for further action in accordance with the Remand Order. On May 4, 2018, I issued a Stay Order, suspending “[a]ll substantive activities . . . pending the issuance of a Supreme Court opinion in *Lucia v. SEC*, No. 17-130, or July 2, 2018, whichever comes first.” Stay Order at 4. The Supreme Court issued its decision in *Lucia* on June 21, 2018.

I issued an Order Lifting Stay and Setting Filing Deadline on March 21, 2019, which provided that the February 15, 2017 initial Decision and Order was vacated, absent a specific

² Chief Administrative Law Judge Bobbie J. McCartney retired from her position as Chief Administrative Law Judge effective January 19, 2018 but was appointed to the position of Judicial Officer by USDA Secretary Perdue on October 28, 2018, documented on November 16, 2018.

³ Judicial Officer William G. Jenson retired from federal service effective August 31, 2018.

waiver by the parties to a new hearing and a new decision by a new presiding judge, and providing the parties an opportunity to file proposals for the conduct of further proceedings consistent with the guidelines set forth therein. In response, Respondent filed a Proposal Regarding Further Proceedings on May 29, 2019 and Complainant filed a Response to the March 21, 2019 Order on May 30, 2019.

As explained below, the February 15, 2017 Decision and Order is vacated and I find that Respondent is entitled to a new proceeding on the existing record up to, but excluding, the vacated Decision and Order, and a new disposition. However, I also find that Respondent is neither entitled to a new in-person hearing and entirely new record, nor is dismissal of the Complaint and case warranted. Aside from Respondent's request for new hearing under *Lucia*, Respondent neither identifies any particular challenges to prior rulings by then-Chief Judge McCartney nor any basis for the broad contention that all her rulings were improper. Thus, no rulings aside from those that were contained in the now vacated Decision and Order are overturned. Respondent's requests to supplement the record with new evidence is likewise denied for failure to be specific as to the evidence Respondent seeks to add to the record and for failure to demonstrate good cause to add additional evidence to the record. Neither party requested to submit new briefs to be considered during my *de novo* review of the record. Thus, I did not order that new briefs be submitted for review and considered the existing briefs.

Based on a *de novo* review of the record up to, but excluding, the vacated February 15, 2017 Decision and Order, I find that the Complainant failed to show by a preponderance of the evidence that Respondent violated the following AWA regulations on the following occasions:

- 1) On July 27, 2011, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle a macaque during public exhibition with minimal risk of harm to the animal and the public, and with sufficient distance and/or barriers between

the animal and the public.

- 2) On October 10, 2012, and October 13, 2012, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(c)(1).
- 3) On September 30, 2011, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. §§ 2.131 (c)(3), 2.131(d)(1); and on October 13, 2012, Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.131(d)(1).
- 4) Stearns Zoo did not willfully violate the Regulations, 9 C.F.R. § 2.100(a), on the following dates by failing to meet the minimum Standards promulgated under the AWA (9 C.F.R. Part 3), as follows:
 - a. September 6, 2012. (Loose electric wire inside lion enclosure.)
 - b. May 1, 2013. (No method to rapidly eliminate excess water from tiger enclosures.)

Further, I find that the record shows by a preponderance of the evidence that Respondent willfully violated the following AWA regulations on the specified occasions:

- 1) On November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog as required. 9 C.F.R. § 2.50(c).
- 2) On or about January 26, 2012, and September 9, 2013, Stearns Zoo willfully violated the AWA and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).
- 3) On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(b)(1), by failing to handle tigers as carefully as possible in a manner that would not cause behavioral stress, physical harm, or unnecessary discomfort.
- 4) On October 10, 2012, and October 13, 2012, Stearns Zoo willfully violated the

Regulations, 9 C.F.R. § 2.131 (b)(2)(i), by using physical abuse to handle or work young tigers.

- 5) On September 30, 2011, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle tigers during public exhibition with minimal risk of harm to the animals and the public, and with sufficient distance and/or barriers between the animals and the public.
- 6) On October 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(3), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being.
- 7) In three instances on the following dates, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum Standards promulgated under the AWA (9 C.F.R. Part 3), as follows:
 - a. May 1, 2013. Detached support pole for enclosure housing two baboons. 9 C.F.R. § 3.75(a).
 - b. November 21, 2013. Rusted pipe with jagged edges in pig enclosure. 9 C.F.R. § 3.125(a).
 - c. November 21, 2013. Inadequate shelter from inclement weather for tigers. 9 C.F.R. § 3.127(b).

THE HEARING PROCESS ON REMAND UNDER *LUCIA*

In *Lucia*, the Supreme Court held that Administrative Law Judges (“ALJs”) are Officers of the United States within the meaning of Article II of the United States Constitution and are

subject to the Appointments Clause.⁴ The Court also held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, appropriate relief is a new hearing before a different, properly appointed official.⁵

In a ceremony on July 24, 2017, almost a year before the Supreme Court’s opinion in *Lucia*, the Secretary of the United States Department of Agriculture, Sonny Perdue, personally ratified the prior appointments of USDA’s ALJs and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that action.

The USDA Judicial Officer McCartney held in her February 19, 2019 “Order Remanding to the Chief Judge for Further Proceedings” in *Trimble*, Docket No. 15-0097, that as a result of the Secretary’s actions to ratify the appointments of USDA ALJs, as of July 24, 2017, USDA ALJs were duly appointed by a “head of the department” as required by Article II and the Supreme Court’s ruling in *Lucia*.⁶ Furthermore, Secretary Perdue appointed me, Channing D. Strother, USDA Chief ALJ on October 17, 2018.

As stated, under *Lucia*, where a timely challenge to the “validity of the appointment of an officer who adjudicates his case” is made, the remedy for a respondent is the opportunity to seek a new hearing and a new decision by a new presiding judge.⁷ Appointments Clause challenges

⁴ *Lucia*, 138 S. Ct. at 2051-55.

⁵ *See id.* at 2055 (citing *Ryder v. U.S.*, 515 U.S. 177, 182–183, (1995)).

⁶ *Trimble*, Docket No. 15-0097, “Order Remanding to the Chief Judge for Further Proceedings”, at 2, (Feb. 19, 2019) (affirming USDA ALJ authority as of July 24, 2017) available at https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20OJO%20Remand_Redacted_0.pdf (last visited on Aug. 12, 2019).

⁷ *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. 182–83 (internal quotations omitted)).

may also be waived.⁸ Here, a full hearing on the record was held from June 27 through 30, 2016 in Tampa, Florida, and an Decision and Order was entered on February 15, 2017. The Hearing was presided over, and the Decision and Order entered by, then-Chief ALJ McCartney prior to the Secretary's July 24, 2017 ratification of ALJ appointments. Therefore, a remedy of a new hearing and new disposition by a new presiding ALJ is warranted in this case under *Lucia*.

The USDA Judicial Officer has provided guidance on the procedure for new hearing granted under *Lucia* as follows:⁹

The Supreme Court did not specify the type of hearing required to remedy an Appointments clause violation, thereby leaving it to judges' discretion to determine how to comply with its ruling and how to conduct new hearings. . . .

Testimony taken at USDA hearings is taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any new evidence not previously submitted in the prior proceeding.

[T]his process addresses any argument that [the Judge's] prior opinions, orders, and rulings may have been tainted from the Appointments Clause violation by removing any influence of [the Judge] on the record. Doing so does not in any way undermine the integrity of the record regarding the raw evidence produced and testimony taken at the hearing.

⁸ See, e.g., *Finberg*, PACA-APP Docket No. 14-0167, "Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket 14-0167" (where three respondents waived the raising of Appointments Clause challenges and forfeited a new hearing, while one respondent raised such challenge and was granted a remand for new hearing in accordance with *Lucia*), available at https://oalj.oha.usda.gov/sites/default/files/14-0167%20-%20JO%20PROCEDURAL%20STATUS_Redacted.pdf (last visited on Aug. 12, 2019). See also, e.g., *DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

⁹ *Trimble*, Docket No. 15-0097, "Order Remanding to the Chief Judge for Further Proceedings," *supra* note 6, at 2-3.

Thus, in the March 21, 2019 Order Lifting Stay and Setting Filing Deadline (“March 21, 2019 Order”) I provided the parties with the opportunity to waive or accept a new hearing and a new decision by a new presiding judge pursuant to *Lucia* and *Trimble*; and instructed the parties, at 6, that, should a new hearing be held,

absent a showing of good cause, the parties may rely on the existing record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as a part of that written record. The parties will be provided an opportunity to show good cause why any specific previous substantive or procedural ALJ action or ruling should be revisited and/or to show good cause why the written record should be supplemented with any new testimony or other evidence not previously submitted in this proceeding during the hearing held June 27 through June 30, 2016.

The parties were invited to file “proposals for the conduct of further proceedings consistent with the guidelines set forth” and were instructed that proposals “must include the identification of any specific previous substantive or procedural ALJ action being challenged, other than the vacated February 15, 2017 Decision and Order, supported by good cause, and the relief the party is requesting[;]” and “must include any request to supplement the existing record with any new testimony or other evidence not previously submitted in this proceeding during the June 27 through June 30, 2016 hearing *supported by a showing of good cause*” (emphasis added).

Party Proposals for Procedures on Remand

Respondent filed a “Proposal Regarding Further Proceedings” (“Proposal”) on May 29, 2019. In the Proposal at 1, Respondent “demands that the February 15, 2017 Decision and Order issued by Judge McCartney be vacated, and further demands dismissal of the Complaint. In the event the Complaint is not dismissed in its entirety, Respondent demands a new hearing upon an entirely new record conducted by a new presiding judge in accordance with *Lucia v. SEC*, 138 S. Ct. 2044 (2018).”

Respondent asks, at 1, that “in the event the Complaint is not dismissed under *Lucia* . . .

Respondent is entitled to a new hearing at which new evidence and testimony must be allowed.” Respondent broadly states at 1-2 that “Judge McCartney made significant rulings that fundamentally impacted and tainted those proceedings, including, but not limited to issues related to the presentation of evidence. In addition, the proceedings under Judge McCartney were fundamentally flawed from the outset in derogation of Respondent’s rights, and Judge McCartney should have dismissed the Complaint.” Respondent neither cites any authority nor provides any specific reasoning as to why Respondent “must” be afforded an opportunity to submit new evidence and testimony or why the Complaint should have been dismissed, nor does Respondent reference specific rulings by Judge McCartney that Respondent contends “fundamentally impacted and tainted those proceedings.”

In the Proposal at 3, Respondent also asks to incorporate by reference its May 2, 2018 Statement of Position. Respondent requests a full new hearing and new record but asks, if that is not allowed, that new evidence be considered including evidence submitted with the Statement of Position. *Id.* Respondent also asks to “take additional evidence and present additional testimony, including that of the Respondent through its employees and representatives, including but not limited to Kathy Steams. Respondent additionally would like to present expert testimony, including that of Don James Woodman, DVM, who submitted an affidavit on May 2, 2018 in conjunction with Respondent’s Statement of Position which should also be considered.” *Id.*

Complainant APHIS submitted its “Response to March 21, 2019 Order” (“Response”) on May 30, 2019. Complainant states at 2-3: “It has been, and remains, the complainant’s position with respect to how to proceed continues to be that this matter be decided on the written record” and that “respondent has not shown good cause to revisit substantive or procedural actions or rulings by then-Chief Judge McCartney, or to supplement the existing record with evidence that was introduced or could have been introduced at the four-day hearing of this matter.”

As the Judicial Officer pointed out in *Trimble*, the Supreme Court in *Lucia* did not specify the matter in which a “new hearing” must be conducted to remedy an Appointments Clause issue.¹⁰ Under the Judicial Officer precedent in *Trimble* and *Finberg*, a hearing on the record is sufficient and Respondent’s demand for an entirely new hearing with a new record is not merited.¹¹

Further, Respondent’s demand that the Complaint be dismissed is without merit. Although it is well settled that constitutional issues can and should be raised during administrative proceedings, the mere raising of such constitutional issues, whether addressed or not by the ALJ, are not justification on their own for dismissal of a case.¹² As the previous JO,

¹⁰ See *supra* note 6.

¹¹ See *Trimble supra* note 6; *Finberg supra* note 8.

¹² See *Horne v. Dep’t of Agric.*, 569 U.S. 513, 528 (2013) (stating “[a]llowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.”); *Lesser*, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993) (stating “Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ.”); *but see Lesser*, 52 Agric. Dec. at 167-68 (citing *Robinson v. United States*, 718 F.2d 336, 337-38 (10th Cir. 1983) (“no agency ruling on a constitutional challenge could have resulted in a dismissal of the action.”)); *Gallo Cattle Co., Inc.*, 57 Agric. Dec. 357 (U.S.D.A. 1998) (“It would be inappropriate for me to rule on the constitutionality of bloc voting, since ‘[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer.’ *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979)”) (other citations omitted); *Berosini*, 54 Agric. Dec. 886 (U.S.D.A. 1995) (“Respondent [argues] that USDA lacks the jurisdiction to regulate Respondent’s activities. In the first place, it would be inappropriate for me to rule on the constitutionality of the Act. . . .”) (citing *Buckeye Industries, Inc.*, 587 F.2d at 235, and *Orchard*, 47 Agric. Dec. 378, 379 (U.S.D.A. 1988)); and *Horne*, 67 Agric. Dec. 1244, 1253 (U.S.D.A. 2008) (“Mr. Horne and partners are challenging the constitutionality of the Raisin Order . . . I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture . . . Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional”) (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”)).

William Jenson, held, the raising of a constitutional issue should not inhibit the processing of a case.¹³ Respondents cite no authority and provide no reason for the proposition that an otherwise proper complaint must be dismissed.

Last, Respondent demands that I permit new evidence into the record. In particular, Respondent requests to submit new evidence and testimony from “including but not limited to Kathy Stearns” and new “expert testimony including that of Don James Woodman, DVM.” Aside from the fact that Respondent had a full opportunity to directly examine both Ms. Stearns and Dr. Woodman during the hearing, Respondent failed to state the nature of the proposed new evidence and testimony to be adduced and to show that such evidence is not merely cumulative, or to otherwise attempt to make a just cause showing for its addition to the record.¹⁴ As the Judicial Officer points out in *Splish Splash II* “merely stating a desire to present evidence . . . without more, is insufficient grounds.”¹⁵

RULING AND PROCEDURE FOR NEW HEARING ON REMAND

The Decision and Order issued by Judge McCartney on February 15, 2017 is vacated and the parties are granted a new hearing on the record by a new presiding judge. No weight will be given to the vacated February 15, 2017 Decision and Order and no factual finding or legal

¹³ *Beasley et al.*, (“Decision and Order as to Amelia Haseldon”), WL 9473089, at *2-*3 (U.S.D.A. Oct. 2017) (“Ms. Haselden cannot avoid or enjoin this administrative proceeding by raising constitutional issues.”) (citing *Beho v. SEC*, 799 F.3d 765, 774-75 (7th Cir. 2015), cert. denied, 136 S. Ct. 1500 (2016); *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980) (refusing to enjoin an allegedly unlawful administrative proceeding where the court of appeals would be able to review alleged unlawfulness after the agency proceeding had concluded); *Jarkesy v. SEC*, 803 F.3d 9, 27 (D.C. Cir. 2015) (refusing to enjoin proceedings before an administrative law judge based on an Appointments Clause challenge)).

¹⁴ See 7 C.F.R. § 1.146(a)(2).

¹⁵ *Splish Splash II, LLC*, 2019 WL 2539355, at *4 (U.S.D.A. 2019), available at https://oalj.oha.usda.gov/sites/default/files/19-J-0050%20JODO_Redacted.pdf (last visited July 17, 2019).

conclusion determined by then-Chief ALJ McCartney during the instant proceeding has been treated as presumptively correct. In fact, the undersigned has not read the vacated February 15, 2017 Decision and Order and it is not referred to in this Decision for any substantive purpose.

The new hearing will be conducted on the existing Record up to but not including the vacated February 15, 2017 Decision and Order. Respondent's requests to submit new evidence and testimony, including testimony from Kathy Stearns, Dr. Woodman, and to submit Respondents May 2, 2018 Statement of Position as new evidence, are denied. As discussed above, Respondent was provided the opportunity to make a showing of good cause to present specific new evidence and Respondent failed to make such a showing.

SUMMARY OF RECORD

As noted, no factual finding nor legal conclusions determined by then-Chief ALJ McCartney during the instant proceeding has been treated as presumptively correct or have otherwise been utilized for any substantive purpose. I have neither reviewed nor taken into account the analysis or findings in the vacated February 15, 2017 Decision and Order. Orders and rulings of an administrative nature¹⁶ are hereby deemed non-substantive for the purposes of my *de novo* review of the Record. The Record contains of the following substantive pleadings,

¹⁶ The following orders and rulings have been determined non-substantive for *de novo* review of the Record: December 4, 2015 Order to "File by January 27 (Wed) 2016" issued by ALJ Jill S. Clifton, ordering the parties to file joint or separate motions identifying preferences for hearing dates, locations, and format; January 29, 2016 Disclosure Deadlines & Other Instructions issued by ALJ Jill S. Clifton; January 29, 2016 "2016 June 7-10 Hearing Notice" issued by ALJ Jill S. Clifton; March 3, 2016 Order reassigning Docket No. 15-0146 to then-Chief ALJ Bobbie J. McCartney; April 14, 2016 Order reassigning Docket No. 15-0146 to ALJ Jill S. Clifton issued by then-Chief ALJ Bobbie J. McCartney; April 25, 2016 "2016 June 27-July 1 Amended Hearing Notice"; May 26, 2016 Order reassigning Docket No. 15-0146 to then-Chief ALJ Bobbie J. McCartney; June 7, 2016 Notice of Hearing issued by then-Chief ALJ Bobbie J. McCartney; and October 6, 2016 Order Granting Request to Modify Briefing Schedule.

filings, and orders¹⁷:

- July 17, 2015 Complaint
- August 5, 2015 Answer
- March 21, 2016 Complainant's Witness and Exhibit List
- May 18, 2016 Respondent's List of Witnesses and Exhibits
- June 16, 2016 Complainant's Application for Subpoena
- June 21, 2016 Joint Stipulations as to Facts, Witnesses, and Exhibits
- Hearing Transcripts:¹⁸
 - June 27, 2016
 - June 28, 2016
 - June 29, 2016
 - June 30, 2016
- August 5, 2016 Complainant's Proposed Corrections to Transcript of Oral Hearing
- August 18, 2016 Order Adopting Transcript Corrections
- October 14, 2016 Respondent's Post-Hearing Brief
- October 14, 2016 Complainant's Proposed Finding of Fact, Conclusions of Law, Order, and Brief in Support Thereof

The following exhibits were admitted:

By stipulation: ¹⁹	
CX 1-Licenses and renewal forms	RX 1-Amended and original inspection report, 1/7/2010
CX 2-Corporate records	

¹⁷ The following pleadings and filings have been deemed non-substantive for purposes of *de novo* review of the record: Respondent's November 20, 2015 Motion for Case Management Conference; Respondent's January 28, 2016 Response to Case Management Order; Complainant's January 29, 2016 Response to Scheduling Order; Complainant's April 21, 2016 Notice of Appearance (Samuel Jockel); Respondent's October 4, 2016 Agreed Motion for Time Extension; Complainant's October 4, 2016 Request to Modify Briefing Schedule; Complainant's December 21, 2016 Notice of Withdrawal of Attorney (Colleen Carroll); and Respondent's December 28, 2016 Notice of change of Address.

¹⁸ Noting that the Hearing Transcripts are named by date of transcription and each date starts with "page 1" as opposed to being consecutively numbered. Thus, hereinafter the transcripts will be referred to by date: i.e. for June 27, 2016 will be referred to as "Tr. 6/27" *et. seq.*

¹⁹ Accepted into the record due to stipulation, *see* Tr. 6/27 at 10:22-11:2.

CX 3-APHIS form 7060 Warning Notice, 5/31/12; and inspection reports	RX 2-Inspection Report, 1/9/13
CX 13-Declaration of Dennis Trainum	RX 3-Inspection Report, 3/12/14
CX 14-Inspection Report, 7/27/11	RX 4-Inspection Report, 5/15/14
CX 15-Inspection Report, 1/26/12	RX 5-Inspection Report, 9/18/14
CX 16-Inspection Report and photographs, 9/6/12	RX 8-Appeal letter for Sept. 14, 2011 Inspection Report
CX 17-Inspection Report and photographs, 5/1/13	RX 9-Letter from USDA to Kathy Stearns re video, dated Jan. 5, 2012
CX 18-Inspection Report, 9/9/13	RX 10-Express mail receipt and U.S. Postal Service tracking confirmation Jan. 31, 2012
CX 19-Inspection Report and photographs, 11 /21/13	RX 11-USDA response to appeal of Sept. 14, 2011 inspection report
	RX 17-Email from Dr. Gaj to Kathy Stearns re investigation, dated May 3, 2012
	RX 18-Interview with Jayanti Seiler, Lenscratch.com, Jan. 11, 2016
	RX 20-E-mails between Dr. Woodman and Megan Adams re male leopard Cleo
During the June 27-30, 2016 Hearing: ²⁰	
CX 4-Video of segment of “Good Morning America 10/10/12” (Tr. 6/28 91:8-9)	RX 7- Video of Sept. 14, 2011 inspection (Tr. 6/30 117:5-6)
CX 5-Video of segment of “Fox and Friends” 10/18/12 (Tr. 6/28 91:8-9)	RX 13- April 11, 2013 letter from Dr. Woodman re tiger behavior (Tr. 6/29 54:20-21)
CX 6-Declaration of Laurie Gage (Tr. 6/28 227:18-19)	RX 14- Tiger cub protocol (Tr. 6/29 70:6-7)

²⁰ The court reporting company did not provide a table of contents for exhibits admitted into evidence. For ease of reference, each exhibit admitted during the Hearing includes reference to the transcript. For further information, CX 23 (Entries of tigers), CX 24 (Entries of tigers), and CX 25 (video of cubs playing) were denied admission to the Record, *see* Tr. 6/30 251:5-22. Respondent chose not to offer RX 6 (*see* Tr. 6/30 226: 6-15), RX 12 (*see* 6/30 226: 16-19), RX 19 (*see* 6/30 226:20-22), RX 21 (*see* 6/30 227:1-2), RX 23 (*see* 6/30 227:3-5), RX 23 (*see* 6/30 227:6-7), and RX 29 (*see* Tr. 6/30 173:2-7) into the Record. There is no RX 26 (*see* Respondent’s List of Witnesses and Exhibits, referring to “all exhibits listed by Complainant” as RX 26).

CX 7-Letter from Jayanti Seiler to APHIS (Tr. 6/27 166:16-9)	RX 15- Adult tiger protocol (Tr. 6/29 82:21-22)
CX 8-Affidavit of Jayanti Seiler, and photographs (Tr. 6/27 50:5-6, 166:16-9)	RX 16- Swimming protocol (Tr. 6/29 96:20-21)
CX 9-Letter from Barbara Keefe to APHIS (Tr. 6/28 85:14-15)	RX 22- Video of tiger swimming at Dade City Wild Things (Tr. 6/30 154:22-155:1)
CX 10-Affidavit of Barbara Keefe (Tr. 6/28 85:14-15)	RX 25- Recordings of baby tiger sounds (Tr. 6/30 154:22-155:1)
CX 11-Photographs provided by respondent to Barbara Keefe (Tr. 6/28 55:8-9)	RX 27- USDA letter to Kathy Steams dated 2/24/12 regarding review of previous denial of appeal; still denied (Tr. 6/30 127:8-9)
CX 12-Photographs provided by Barbara Keefe to APHIS (Tr. 6/28 49:19-20)	RX 28- CD of photos from business hard drive (Tr. 6/29 207:10-11)
CX 20-Letter from Jayanti Seiler and Jim Pivonka 9/11/13, pages 1-3 (Tr. 6/27 164:12-165:1, 165:18-19; 6/28 6:8-9)	RX 30-Overview sheet, screenshots of photo access system, Spreadsheet chart of all tiger and gator swim events (Tr. 6/30 169:21-22)
CX 21-Incident Report 7/30/11 (Tr. 6/28 122:11-12).	
CX 22-Felids dates of birth and death – Page 1 only, Redacted (Tr. 6/30 266:10-11, 267:13-14)	
CX 26-Attachment A to the Subpoena for the custodian of records (Tr. 6/30 269:8-9)	

A party may move for reconsideration of this decision in the event a party is aware of a factual error or factual omission that was not considered but is a part of the record.

JURISDICTION AND BURDEN OF PROOF

The AWA was promulgated to insure the humane care and treatment of animals intended for research facilities, exhibition, or as pets.²¹ Congress provided for enforcement of the AWA

²¹ 7 U.S.C. § 2131.

by the Secretary of Agriculture, USDA.²² Regulations promulgated under the AWA are in the Code of Federal Regulations, part 9, sections 1.1 through 3.142. The burden of proof is on Complainant, APHIS.²³ The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,²⁴ such as this one, is the preponderance of the evidence.²⁵

RELEVANT STATUTORY AND REGULATORY AUTHORITY

The Animal Welfare Act (“AWA”), 7 U.S.C. § 2131 *et. seq.* was promulgated to “insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.” 7 U.S.C. § 2131(1). To this purpose, the AWA provides that:

(a) . . . the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

7 U.S.C. § 2146(a).

The regulations promulgated under the AWA and relevant to this case, provide:

- (a) Each dealer, exhibitor, intermediate handler, or carrier shall, during business hours, allow APHIS officials:
- (1) To enter its place of business;
 - (2) To examine records required to be kept by the Act and the regulations in this part;
 - (3) To make copies of the records;
 - (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
 - (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

²² 7 U.S.C. §§ 2131-59.

²³ 5 U.S.C. § 556(d).

²⁴ 5 U.S.C. §§ 551 *et seq.*

²⁵ See *Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

9 C.F.R. § 2.126(a).

Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(b)(1).

Physical abuse shall not be used to train, work, or otherwise handle animals.

9 C.F.R. § 2.131(b)(2)(i).

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

9 C.F.R. § 2.131(c)(1).

Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or wellbeing.

9 C.F.R. § 2.131(c)(3).

Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

9 C.F.R. § 2.131(d)(1).

A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

9 C.F.R. § 2.50(b).

A class 'C' exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

- (1) As set forth in paragraph (b)(1) or (b)(3) of this section, or
- (2) By identifying each dog or cat with:
 - (i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;
 - (ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and
 - (iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

9 C.F.R. § 2.50(c).

The Regulations define "handling" as:

petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal.

9 C.F.R. § 1.1.

Section 2.100(a) of the Regulations provides:

Each exhibitor . . . shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals.

9 C.F.R. § 2.100(a).

The regulations provide the following standards, relevant to this case:

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

9 C.F.R. § 3.127(c).

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

9 C.F.R. § 3.125(a).

The AWA provides for the following civil penalties if a violation of the statute is found in section 2149(b):

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, **that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation.** Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the **size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.** Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of \$1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 2149(b) (emphasis added).²⁶

DISCUSSION

The Complaint, filed July 17, 2015, alleges that Respondent willfully violated the AWA

²⁶ The civil penalty for a violation of the AWA is a maximum of \$11,390, for violations taking place between December 5, 2017 and March 14, 2018; and a maximum of \$10,000 for violations taking place between May 7, 2010 and December 4, 2017. 7 C.F.R. § 3.91(b)(2)(ii).

and the regulations issued thereunder on multiple occasions between on or about July 27, 2011 through on or about November 21, 2013. In the Answer, filed August 5, 2015, Respondent admits to the jurisdictional allegations but denies all alleged violations. Respondent raises no other affirmative defenses in the Answer.

Under the Administrative Procedure Act, (“APA”), 5 U.S.C. § 558(c), for a license to be withdrawn, suspended, annulled, or revoked, the license holder must be given notice in writing of facts or conduct that warrant such action and an opportunity to demonstrate or achieve compliance “except in cases of willfulness or those in which public health, interest, or safety requires otherwise.” Willfulness determinations are not necessary for issuance of civil penalties or cease and desist orders and only one finding of a willful violation is needed under 7 U.S.C. § 2149(a) which authorizes the suspension or revocation of a license.²⁷

The Judicial Officer has long held that a “willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.”²⁸ Under the AWA, the term “willful” means “action knowingly taken by one subject to the statutory provision in disregard of the action’s legality. . . . Actions taken in reckless disregard of statutory provisions may also be ‘willful’” (internal quotations omitted).²⁹ The Court in *Hodgins* determined that:

²⁷ See *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 139 (U.S.D.A. 1996); *Horton*, 73 Agric. Dec. 77, 85 (U.S.D.A. 2014).

²⁸ *Terranova Enterprises, Inc., A Texas Corp., d/b/a Animal Encounters, Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. July 19, 2012) (citing *Bauck*, 68 Agric. Dec. 853, 860-61 (2009), appeal dismissed, No. 10-1138 (8th Cir. Feb. 24, 2010); *D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *Bond*, 65 Agric. Dec. 92, 107 (2006), *aff’d per curiam*, 275 F. App’x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (1999); *Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff’d mem.*, 582 F.2d 39 (5th Cir. 1978)).

²⁹ *Hodgins v. U.S. Dep’t of Agric.*, 238 F.3d 421, 2000 WL 1785733, *9 (6th Cir. 2000) (table) (quoting *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999));

[the] proper rule . . . is this: Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty.³⁰

Here, regarding each of the allegations, I take into account that Respondent has been in business for about sixteen years and the Executive Director and co-founder, Ms. Kathy Stearns, stated that she “speak[s] a lot on references to USDA and OSHA regulations.”³¹ Thus, I conclude Respondent is well informed regarding the AWA and related regulations. Based on the evidence, Respondent was provided with Inspection Reports (and a chance to demonstrate or achieve compliance) for about eleven of the twenty-four alleged violations.³² The other alleged violations arose out of complaints regarding the handling of animals during encounters with the public, which complaints arguably fall under public interest and public safety.

I. Identification of Animals

The Complaint, at 3, para. 6, alleges that “[o]n November 21, 2013, respondent willfully violated the Regulations by failing to identify a dog, as required. 9 C.F.R. § 2.50(c),”³³ In its Brief at 6, Complainant characterizes this allegation as “[t]he complaint alleges that on

citing *United States v. Illinois Cent. Ry.*, 303 U.S. 239, 242-43 (1938) (one who ‘intentionally disregards the statute or is plainly indifferent to its requirements’ acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961) (one who ‘acts with careless disregard of statutory requirements’ acts willfully); Jacob A. Stein et al., *Administrative Law* § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action “was committed intentionally” or “was done in disregard of lawful requirements” and also noting that “gross neglect of a known duty will also constitute willfulness”).

³⁰ *Hodgins supra* note 29, at *10.

³¹ Tr. 6/30, 5:16-19, 10:21-22. *See also* Tr. 6/30, 11:2-3 (“a lot of the industry will call me about how to be in compliance and do things.”)

³² *See e.g.* CX 3, 14, 15, 16, 17, 18, 19, 21.

³³ Complaint at 3, ¶ 6.

November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog *used for exhibition*” (emphasis added).

In support of this allegation, Complainant presented the testimony of Dr. Luis Navarro, an APHIS Animal Care veterinarian medical officer (“VMO”).³⁴ He testified that the main issue he observed was that “the dog didn’t have any identification, and by regulation they should have an identification tag with the USDA if it’s going to be used for any purpose that is a regulated activity.”³⁵ He testified that during his inspection of Respondent’s facility an identification could not be found on the dog’s collar or on the door of the enclosure.³⁶ Dr. Navarro testified that Ms. Stearns told him at the time of the inspection that the dog was used for interactive sessions.³⁷ The November 21, 2013 Inspection Report, signed by both Dr. Navarro and Ms. Stearns, corroborates Dr. Luis Navarro’s testimony (CX 19 at 1) and includes photographs (CX 19 at 4) taken by Dr. Navarro on the day of the inspection with the description “Dog with collar but no id tag. ‘Boots.’”

Complainant contends that although Ms. Stearns testified that she later corrected the alleged violation by placing identifying information in the dog’s “cage,”³⁸ “correction of a violation does [*sic*] [not] eliminate the fact that it occurred.”³⁹ Complainant’s Brief at 7.

³⁴ Tr. 6/28, 132:4-134:6.

³⁵ Tr. 6/28, 133; 4-11.

³⁶ Tr. 6/28, 133:14-18.

³⁷ Tr. 6/28, 133:19-134:2.

³⁸ Tr. 6/30, 219:8-11.

³⁹ Citing *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. 754, 759, (U.S.D.A. 2013) (citing *Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff’d*, 411 F. App’x 866 (6th Cir. 2011); *Bond*, 65 Agric. Dec. 92, 109 (2006), *aff’d per curiam*, 275 F. App’x 547 (8th Cir. 2008); *Drogosch*, 63 Agric. Dec. 623, 643 (2004); *Parr*, 59 Agric. Dec. 601, 644 (2000), *aff’d per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *Stephens*, 58 Agric. Dec. 149, 184-85 (1999)).

Ms. Stearns testified during the hearing that she “is not in the business of showing dogs,” the dog observed without identification in CX 19 is her son’s dog, and the dog “is not an exhibit” because he “is in an area where the public can never see him.”⁴⁰ She testified that the pen the dog was in was in a place not viewable by the public. She testified that the dog had been there for previous inspections and that previous inspectors understood that the dog was not exhibited. Ms. Stearns further testified that the dog was in a pen because it “is just not a good dog” and if let out unsupervised would kill her chickens and turkeys. Respondent contends that “[r]equiring Kathy Stearns to identify ‘Boots’ her son’s pet dog, as one of the Respondent’s exhibited animals shows just how petty APHIS can be.”⁴¹

The Regulations, 9 C.F.R. § 2.50(c), state “[a] class ‘C’ exhibitor shall identify *all live dogs and cats under his or her control or on his or her premises*, whether held, purchased, or otherwise acquired” (emphasis added). The Regulations do not include an exception for pet animals on the premises not used for exhibition.⁴² Complainant is correct in that the

⁴⁰ Tr 6/30 219:7-219:21. *But see* Complainant’s Brief at 7, n. 1. (contending that Mrs. Stearns never appealed Dr. Navarro’s inspection report or otherwise communicated that the report was incorrect because the dog was a pet).

⁴¹ Respondent’s Brief at 4. (citing “Tr. 4, 21”). Noting that the citation is unclear and, if understood to mean Tr. 6/30, 21, there is no discussion of or reference to this allegation at that cite.

⁴² *See Lawson, d/b/a Noah’s Ark Zoo*, 57 Agric. Dec. 980, 1011 (U.S.D.A.1998) (“Complainant contends that John Curtis’ dogs -- his personal pets -- were regulated animals even though not exhibited because they were on the same premises as animals to be exhibited. . . . [N]either the [Animal Welfare] Act nor the Regulations [and Standards] prohibit APHIS in these circumstances from . . . [regulating] personal pets . . . on an exhibitor’s premises. . . . [Footnote omitted. Considerable] weight is . . . given to . . . APHIS’ . . . interpretation of the Regulations [issued under] the statute [APHIS] enforces. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84[2-45] (1984). Therefore, since Respondents did not maintain records on John [Curtis]’ pets, or provide tags . . . or . . . an exercise program, [Respondents] violated [sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and] sections 2.50 and 2.75 of the [Regulations (9 C.F.R. §§ 2.50, .75)]”; *Wahl*, 56 Agric. Dec. 396, 406 (U.S.D.A. 1997) (“The animals in question are, therefore, subject to regulation under this broad definition, either if Respondents ever intended to exhibit them, or if they were to remain pets.”).

Department's policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. . . . While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.⁴³

I find that Complaint did not prove by a preponderance of the evidence that Boots the dog was exhibited. Ms. Stearns' testimony under oath at hearing, subject to cross-examination, that Boots was not exhibited, with the supporting reasons that the dog was in a pen because it was not safe unsupervised around her chickens and turkeys is sufficient to counterbalance the evidence presented by the Complainant that Ms. Stearns said at the time of the inspection that Boots had been exhibited, which is the only evidence of record that Boots was exhibited.

The record in this case is extensive, but there is no testimony by any witness that the dog was seen being exhibited. There are no photographs or video of the dog being exhibited. The issue as framed by Complainant is whether or not the dog in question was identified, not whether Ms. Stearns misspoke, for whatever reason, in telling the investigator the dog was exhibited. I find Ms. Stearns' testimony at hearing to be credible and compelling, and to overcome on a substantive basis Complainant's evidence that she said something else that was contradictory to the investigator.

However, I also find that the Regulations do not require a dog be exhibited in order to come within the identification requirements of 9 C.F.R. § 2.50(c). Therefore, any issue of whether or not Boots was exhibited, is not relevant to determine that the regulation was violated. Under the express language of the regulation, exhibition of a dog on the premises is not an element of a violation of the regulation. The record is undisputed that Boots was on the premises

⁴³ *Hodgins*, 1997 WL 392606, at *22 (quoting *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996)).

and was unidentified. That Ms. Stearns' testimony is sufficient to prove that the dog was not exhibited does not obviate the uncontested evidence that the dog was on the premises and unidentified, thus that a violation took place. I find that because the record is uncontested that the dog Boots was on the Respondent's premises and was not identified within the meaning of the regulation, that failure to identify the dog Boots violated 9 C.F.R. § 2.50(c).

As noted, Respondent on brief contends "[r]equiring Kathy Stearns to identify 'Boots' her son's pet dog, as one of the Respondent's exhibited animals shows just how petty APHIS can be."⁴⁴ Respondent also states: "It is no wonder that Kathy Stearns insists on being present for every inspection."⁴⁵ It is unclear what Respondent is contending. The record is devoid of any evidence that anyone required Ms. Stearns to tell the USDA inspector that Boots was an exhibited animal if Boots was not an exhibited animal. I find no basis for any contention that an inspector's asking whether a dog on the premises is being exhibited to be "petty." As noted, the tagging and record book requirements of 9 C.F.R. § 2.50(c) apply to any dog on the licensee's premises. In this case the dog was locked in a pen on the premises. Respondent contended that the dog was kept in a pen that was not viewable by the public. Respondent did not contend the pen was not in the general area where exhibited animals were kept. For instance, it was not at Ms. Stearns' residence. Respondent makes no contention that the dog was not "on the premises" within the meaning of the regulation. Respondent does not contend that the tagging and record book procedures are unduly burdensome. Ms. Stearns was able to correct the violation promptly. Apparently, Respondent's contention is that the regulation requirement is petty. I find nothing in these circumstances as to APHIS enforcement of its regulations or its inspectors' actions to be "petty."

⁴⁴ Respondent's Brief at 4. (citing "Tr. 4, 21"). *See supra* n. 41.

⁴⁵ *Id.*

Complaint demonstrated by a preponderance of the evidence that “[o]n November 21, 2013, respondent willfully violated the Regulations by failing to identify a dog, as required. 9 C.F.R. § 2.50(c),”⁴⁶

II. Inspections

The Complaint, at 3, para. 7, alleges that on or about January 26, 2012, and on or about September 9, 2013, Respondent willfully violated the AWA, 7 U.S.C. § 2146(a), and Regulations, 9 C.F.R. § 2.126(a), by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal business hours. As support for this allegation, Dr. Navarro testified that on January 26, 2012 he waited for an hour and made multiple attempts, by phone and by going into the tour store and main office, to get in contact with a responsible adult that could give access to the premises for an AWA inspection.⁴⁷ Dr. Navarro’s signed January 26, 2012 Inspection Report (CX 15) is consistent with his testimony.⁴⁸

Dr. Robert Brandes testified that on September 9, 2013 “he rang the bell at the facility, and called Ms. Stearns, who told him that the facility was closed on Monday and she was busy.”⁴⁹ Dr. Brandes’ testimony is consistent with his signed September 9, 2013 Inspection Report (CX 18).⁵⁰

Complainant contends that “the failure of an exhibitor either to be available to provide

⁴⁶ Complaint, p. 3, ¶ 6.

⁴⁷ Tr. 6/28, 122:22-124:12.

⁴⁸ The January 26, 2012 Incident Report states “Sent by regular mail and certified mail,” dated Jan-26-2012, with USPS mail tracking number “7011 2000 0002 4403 3207” but is not signed by a recipient.

⁴⁹ Complainant’s Brief at 9 (citing Tr. 6/28, 164:12-20).

⁵⁰ The September 9, 2013 Incident Report states “Sent by first class mail,” dated Sep-10-2013 but is not signed by a recipient.

access for inspection or to designate a responsible person to do so constitutes *a willful violation* of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).”⁵¹ Complainant further contends that, although Ms. Stearns testified that she understood that “the rule is during your business hours, meaning my [i.e. Stearns] operation [hours]”⁵² that there “is no rule applicable to the AWA that ‘business hours’ means only those times when a facility is open to the public.”⁵³ Further, Complainant contends that there is no exception to “the regulation requiring exhibitors to allow APHIS officials access to conduct inspections during business hours.”⁵⁴

Respondent, in its Brief at 5, contends that although on January 26, 2012, Ms. Stearns admitted that she was not available to participate in an inspection due to a doctor’s appointment (citing Tr. 6/30 at 184),⁵⁵ because the inspectors “never reached Stearns . . . Complainant cannot say that she [Ms. Stearns] denied them [APHIS inspectors] access.” Respondent also contends that “[t]he agency well knows that Respondent is a public facility that is closed on Monday’s and so there was no violation” on September 9, 2013.⁵⁶ Respondent also contends that Ms. Stearns “always cooperates with inspectors” and notes she testified that she has “even left the hair salon in the middle of a dye treatment to attend an inspection.”⁵⁷

⁵¹ *Id.* (citing *Perry and Perry’s Wilderness Ranch & Zoo, Inc.*, 71 Agric. Dec. 876, 880 (U.S.D.A. 2012); *Perry*, 72 Agric. Dec. 635, 643 (2013)) (emphasis added).

⁵² Tr. 6/30 215:20-216:3. *See also* Tr. 6/30 215:2-14.

⁵³ Complainant’s Brief at 10 (quoting 9 C.F.R. § 1.1 (“*Business hours* means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holiday, each week of the year, during which inspections by APHIS may be made.”); citing *Perry*, 71 Agric. Dec. at 880).

⁵⁴ Citing 9 C.F.R. § 2.126(a); quoting *Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A 2013) (“The fact that no one was at Respondents’ place of business to allow APHIS officials access to the facilities, property, records, and animals is not a defense.”).

⁵⁵ *See* Tr. 6/30, 183:18-184:3.

⁵⁶ Respondent’s Brief at 5 (citing CX 18; Tr. 6/30, 215-16; 9 C.F.R. § 2.126(a)).

⁵⁷ *Id.* *See also* Tr. 6/30 at 185:21-186:3.

During the Hearing Ms. Stearns testified that she is “always” the only person that handles inspections because it is her name on “the application” and “Florida permits,” she is “responsible for everything,” and she wants “to make sure that everything is taken care of . . . [s]o if there is something wrong . . . [she can] know it and fix it [and] [i]f there isn’t, [she] know[s] how to appeal.”⁵⁸

The AWA, 7 U.S.C. § 2146(a), provides that the:

Secretary shall make such investigations or inspections as he deems necessary to determine whether any . . . exhibitor . . . has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title.

The Regulations, 9 C.F.R. § 2.126(a), require that each exhibitor

allow APHIS officials: . . . [t]o inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and . . . [t]o document, by the taking of photographs and other means, conditions and areas of noncompliance.

The regulations define “business hours” as “a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal Holidays, each week of the year, during which inspections by APHIS may be made.”⁵⁹

It is well recognized that the “requirement that exhibitors allow APHIS officials access to and inspection of facilities, property, records, and animals, during business hours, which as provided in 9 C.F.R. § 2.126(a), is unqualified and contains no exemption.”⁶⁰ AWA license holders must have “some employee or agent . . . available at each facility . . . to give full and

⁵⁸ Tr. 6/30, 184:4-185:2.

⁵⁹ 9 C.F.R. § 1.1.

⁶⁰ *Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A. Aug. 5, 2013).

ready access to it and its records, for any unannounced APHIS inspection.”⁶¹ Neither a doctor’s appointment nor a licensee’s desire to be the sole responsible adult to facilitate APHIS inspections, can excuse a licensee from compliance with the AWA and regulations.⁶² The regulations define business hours to include “Monday through Friday.”⁶³ Thus, even though Respondent’s business is not open to the public on Mondays, Respondent was still required by the Regulations to provide access during “reasonable” business hours on Mondays. Further, despite a previous inspection report citing the failure to provide access for inspection on January 26, 2017 in violation of 9 C.F.R. § 2.126(a), Respondent again refused APHIS officials’ entry for inspection on Monday, September 9, 2013, when Ms. Stearns stated that the business was closed and she “was busy.” Therefore, I find that Respondent willfully violated the AWA, 7 U.S.C. § 2146(a), and regulations, 9 C.F.R. § 2.126(a), because the evidentiary record shows without dispute that Respondent failed to have a responsible person available to provide access to APHIS officials and thereby denied access to such officials to inspect its facilities, animals and records during normal business hours on January 26, 2012, and on September 9, 2013.

III. Handling of Animals

The Complaint alleges, that on multiple occasions Respondent willfully violated the following regulations: 9 C.F.R. § 2.131(b)(1), by failing to handle animals as carefully as

⁶¹ *Berosini*, 54 Agric. Dec. 886 (U.S.D.A. 1995) (quoting *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 492 (1991) [, aff’d, 991 F.2d 803, (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)]).

⁶² *See Greenly, supra*, 72 Agric. Dec. at 617, where the Judicial Officer determined that, even though the Respondent was ill and had to leave for a doctor’s appointment during an attempted inspection, and even though the APHIS inspector agreed to return on another day, the Respondent was found to have violated the AWA and regulations because “[n]othing in the Animal Welfare Act or the Regulations excuses an exhibitor from compliance with 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).”

⁶³ 9 C.F.R. § 1.1.

possible in a manner that did not cause behavioral stress, physical harm, or unnecessary discomfort;⁶⁴ 9 C.F.R. § 2.131(b)(2)(i), by using physical abuse to handle or work animals;⁶⁵ 9 C.F.R. § 2.131(c)(1), by failing to handle animals during public exhibition with minimal risk of harm to the animals and the public, and with sufficient distance and/or barriers between the animals and the public;⁶⁶ and 9 C.F.R. §§ 2.131(c)(3) and 2.131(d)(1), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and by exhibiting young tigers for periods of time and/or under conditions inconsistent with their good health and well-being.⁶⁷

Respondent generally contends that the handling allegations involve a “strong disagreement [between Respondent and Complainant] over whether or not people should swim with young tigers” but that “[i]t is undisputed . . . that the practice is not prohibited, and the evidence showed that the swimming tiger program is beneficial to both tigers and people.”⁶⁸ Respondent states the tiger swim program was developed to “acclimate captive bred tigers to the presence of humans and to build a greater bond with the public in the animal world” as a part of its tiger training program.⁶⁹ Respondent avers that all tiger protocols were developed with the assistance of qualified veterinarians, that various limits and rules are instilled during tiger swim sessions for the well-being of the tigers, and that a care regimen is in place to account for the tigers’ needs.⁷⁰

⁶⁴ Complaint 3-4, ¶ 8.

⁶⁵ Complaint at 4, ¶ 9.

⁶⁶ Complaint at 4, ¶ 10.

⁶⁷ Complaint at 5, ¶ 11.

⁶⁸ Respondent’s Brief at 1 (citing Tr. 6/28, 144).

⁶⁹ *Id.* at 2 (citing Tr. 6/29, 19).

⁷⁰ *Id.* (citing Tr. 6/30, 24-27, 37, 39-40).

The violations alleged by Complainant involve the handling of animals by an AWA licensee required to abide by the requirements of the AWA, and Regulations promulgated thereunder, on the specific occasions of alleged violations. The AWA and Regulations do not expressly prohibit the exhibition of tiger cubs, nor do they expressly prohibit all direct public contact with tiger cubs. But the AWA charges the Secretary with promulgating “standards to govern the humane care, treatment and transportation of animals by . . . exhibitors,” 7 U.S.C. § 2143 (a)(1), and the Secretary has promulgated such standards through regulations that govern the handling of such animals which each AWA licensee required to meet as further analyzed below. *See* 9 C.F.R. part 2.131.

a) Handling of Animals: July 27, 2011

The Complaint alleges, at 4, para. 10a, that on or about July 27, 2011, Respondent exhibited a macaque with insufficient distance and/or barriers between the macaque and the public in willful violation of 9 C.F.R. § 2.131(c)(1). In support of this allegation, Complainant offered the testimony of Dr. Navarro⁷¹ that he received a handwritten Incident Report dated July 21, 2011,⁷² stating that a monkey “attacked” a customer’s arm during an encounter, hosted by Ms. Stearns, and that the monkey “kept slapping” the customer’s face and “repeatedly bit [the customer’s] arm” which “did break the skin” but that “Kathy [Stearns] did nothing.” *Id.* Complainant contends that “[p]ermitting the public to have direct contact with animals without sufficient distance and/or barriers in a manner that risks harm (including injury or disease) to the animal or the public contravenes the handling Regulations” and “[h]ere, Stearns Zoo permitted a member of the public to have direct contact - without any distance or barrier—with a non-human

⁷¹ Tr. 6/28, 119:12-120:1.

⁷² CX 21.

primate (a macaque), resulting in apparent injury.”⁷³

Respondent contends that Dr. Navarro “did nothing to investigate or verify the facts in his report and instead relied on the hearsay statement of an unidentified health official who reported the bite complaint of an unidentified customer.”⁷⁴ Respondent contends this allegation was investigated by the Florida Wildlife Commission (“FWC”) and “[n]othing came of it” because Ms. Stearns, who was present during the encounter, provided FWC with pictures of the session and maintained that the monkey never bit the customer.⁷⁵

Dr. Navarro testified that he received the hand-written Incident Report, CX 21, via email, along with an email from the Florida Health Department representative regarding a person seeking medical treatment for a monkey bite.⁷⁶ I find the hand-written Incident Report, along with Dr. Navarro’s testimony about how the hand written complaint was received,⁷⁷ an insufficient basis on which to determine there has been a violation as alleged by Complainant.

At hearing, Respondent objected to the admission of CX 21 as hearsay but presiding Judge McCartney overruled that objection and admitted that exhibit into evidence. I find that this ruling was correct. The courts have consistently held that reliable and probative hearsay evidence

⁷³ Complainant’s Brief at 12 (citing *Palazzo, d/b/a Great Cat Adventures*, 69 Agric. Dec. 173, 194 (2010)).

⁷⁴ Respondent’s Brief at 13 (citing CX 14; CX 21; *Hansen*, 57 Agric. Dec. 1072 (U.S.D.A. 1998) (“the probative value of a report depends on the extent to which the inspector documents the facts supporting [the inspector’s] findings.”); Tr. 6/28, 147-48).

⁷⁵ Respondent’s Brief at 14 (citing Tr. 6/30, 174-75, 176-77, 181, 183). Respondent claims that Stearns believed that she appealed the July 27, 2011 Inspection Report but did not keep the paperwork. *Id.*

⁷⁶ Tr. 6/28 at 119:17-120:1. At the bottom of the hand-written Incident Report some writing is scratched out, which could possibly be a signature, but Dr. Navarro testified that he was not sure if it was a signature and that he did not scratch out the writing but recalls receiving the document that way. Tr. 6/28 at 118:22-119:9. The email submitting the Incident Report was not submitted to the record.

⁷⁷ *See* Tr. 6/28 at 147:12-14.

is admissible in cases under the Administrative Procedure Act as long as that evidence is not “irrelevant, immaterial, or unduly repetitious.”⁷⁸ The record supports that a complaint was filed with the Florida Health Department, which deemed it credible enough to merit an investigation by the FWC. However, a ruling that particular hearsay evidence may be admitted into the record, is not determinative of the weight that evidence will be given as to specific issues. Nor is it a determination of as to what that evidence may or may not be relevant. Ms. Stearns testified that she did not recall being informed of someone being bitten during exhibition of a macaque on July 21, 2011, and that she would have known if someone had been bitten as she was the handler.⁷⁹

The person allegedly injured by the macaque did not testify at the hearing, there is no signed document allegedly submitted by that person, and neither the Incident Report, CX 21, nor any other document on the record identifies the author of the Incident Report. The only evidence of record is a handwritten Incident Report submitted by a Florida official, with the signature or other writing crossed out, alleging that a person was injured by a macaque exhibited by

⁷⁸ See *Hansen*, 58 Agric. Dec. 369, 384-86 (U.S.D.A. 1999) (citing 5 U.S.C. § 556(d); 7 C.F.R. § 1.141(h)(1)(iv)); *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible per se); *Crawford v. United States Dep’t of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep’t of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), appeal docketed, No. 97-3899 (6th Cir. Aug. 12, 1997); *Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *Thomas*, 55 Agric. Dec. 800, 821 (1996); *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *Fobber*, 55 Agric. Dec. 60, 69 (1996); *Marion*, 53 Agric. Dec. 1437, 1463 (1994) (additional citations omitted).

⁷⁹ Tr. 6/30, 173-19, 177:6-7.

Respondent.⁸⁰ Respondent is also correct that the record indicates that Dr. Navarro “did nothing to investigate or verify the facts in his report and instead relied on the hearsay statement of an unidentified health official who reported the bite complaint of an unidentified customer.” Neither the customer nor the Florida health official testified at hearing. Thus, neither was subject to cross-examination. There is nothing in the record to indicate whether either would have been available to testify at hearing.

In USDA practice, the fact that an inspector has noted a violation on an inspection report, by itself, is not substantive evidence of the violation.⁸¹ Likewise, the fact that USDA has brought a formal complaint against a respondent for an alleged violation is not deemed evidence that the Respondent actually committed the alleged violation. It would be illogical to treat an unsigned handwritten Incident Report as standalone evidence of a violation. Exhibit CX 21 is evidence that some sort of complaint was made to Florida officials. Standing by itself, which it does, it is not probative of and entitled to no weight as to whether Respondent “exhibit[ed] a macaque with insufficient distance and/or barriers between the macaque and the public.” Therefore, I find that Complainant has failed in its burden of bringing forth reliable record evidence that Respondent willfully violated 9 C.F.R. § 2.131(c)(1) by exhibiting a macaque with insufficient distance and/or barriers between the macaque and the public.

b) Handling of Animals: September 30, 2011

The Complaint alleges that on or about September 30, 2011, Respondent willfully violated 9 C.F.R. §§ 2.131(c)(1), 2.131(b)(1), 2.131(c)(3), and 2.131(d)(1), when Respondent:

⁸⁰ CX 21. Noting also that the Incident Report, CX 21, names “Kathy Sterns” but does not identify the Respondent directly.

⁸¹ *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 134 (U.S.D.A. 1996) (“The fact that an inspector noted a violation in a report is not substantive evidence of the violation, and all findings based upon such documents without testimony subject to cross examination should be dismissed.”).

exhibited young tigers with no distance and/or barriers between the animals and the public;⁸² kept a young tiger in a pool despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool;⁸³ and exposed young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and exhibited young tigers for periods of time and/or under conditions inconsistent with their good health and well-being.⁸⁴

In support of these allegations, Complainant provides the testimony of Ms. Barbara Keefe,⁸⁵ a lay person, as well as a letter from Ms. Keefe⁸⁶ and Ms. Keefe's Affidavit⁸⁷ that are consistent with her testimony and describe in detail her experience attending the tiger swim session. In her letter, CX 9, Ms. Keefe states that "[i]n September 2011, [she] flew from Illinois to Tampa to swim with these tigers" but when she arrived "[t]here were several other people sitting in the waiting area."⁸⁸ Ms. Keefe noted that, when she arrived at the facility where the cubs would be, they were in "a holding cage far too small for them . . . looking anxious" and once the five customers got in to the pool with one of the tigers, "the poor cub 'performed' for [the group] for the next 20 minutes [and] [i]t was apparent he was tired, irritated and plain sick of swimming."⁸⁹ Ms. Keefe testified that during her visit but before the swim she was allowed to

⁸² Complaint at 4, ¶ 10b.

⁸³ Complaint at 3, ¶ 8a.

⁸⁴ Complaint at 5, ¶ 11.

⁸⁵ Tr. 6/28, 10-64.

⁸⁶ CX 9.

⁸⁷ CX 10.

⁸⁸ CX 9 at 1.

⁸⁹ *Id.* at 1-2. In her letter, at 1-2, Ms. Keefe noted that the cub made multiple attempts to exit the pool but was placed back in the pool. Ms. Keefe also wrote that, although she did not know how many times the cubs had "performed," another group arrived after her group to swim with the cubs. *See also* CX 10 at 2 ("This poor cub was extremely exhausted and kept trying to get out of

feed and handle the cubs, but that she did not sanitize her hands at any point before or after handling the cubs nor did she observe any other person (handlers, trainers, or customers) sanitizing their hands before or after handling the cubs.⁹⁰

Complainant contends there “was insufficient distance and/or barriers between the general viewing public and Rajjah and Rori to minimize the risk of harm to the animal and to the public by providing sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of them and the public.”⁹¹ Complainant also contends that, for the age and size of the tigers, and as indicated by the sounds and attempts to exit the pool as observed by Ms. Keefe, the handling of the tigers was not careful and expeditious, and the period of the swim sessions was not “under conditions consistent with the tigers’ good health and well-being” as required by the regulations.⁹²

Respondent contends that Complainant errs in relying on Ms. Keefe’s complaint and testimony because Ms. Keefe “made her complaint a year after her visit, at the prodding of Carol Baskin, a competitor of Respondent who is aligned with animal rights groups.”⁹³ Respondent also contends that “[t]o the extent [Ms. Keefe] provided factual testimony, it should carry very little weight due to her obvious bias, the passage of time, and contemporaneous photographs that

the pool. I know when cubs are happy they make this happy chuffing sound, but this cub made a groaning sound like it was just exasperated.”); Tr. 6/28, 28:4-8 (“The one cat was making sounds of exasperation. He was like (making sound) every time he was picked up by the neck and put back in the water, and they would lift him, and he was just exasperated.”)

⁹⁰ Tr. 6/28 31:20-32:9. See CX 12 at 3-16, and CX 10 at 1-2. See also Tr. 6/29, 19:13-19.

⁹¹ Complainant’s brief at 15 (citing *Zoocats, Inc.*, 68 Agric. Dec. 737 (2009)).

⁹² See *id.* at 17-18 (citing *Mitchell*, 60 Agric. Dec. 1991 (2001); *Perry*, *supra* n. 51; *Zoocats, Inc.*, 68 Agric. Dec. 737 (2009); *The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 90 (2002)).

⁹³ Respondent’s Brief at 5-6 (citing Tr. 6/30, 62). See Tr. 6/30, 62:7-17 and noting that the line of questioning regarding Carole Baskin and Big Cat Rescue was objected to and the objection sustained, Tr. 6/30 62:18-63:20.

contradict her assertions.”⁹⁴ As an example, Respondent stated that in the “many pictures taken of Keefe’s swim show that she enjoyed herself [footnote omitted] and that the tiger was not in any undue distress.”⁹⁵

On Brief, at 7, Respondent cites the testimony of Ms. Stearns, who “was the trainer that day,” and testified that she “did not hear Keefe say anything negative.”⁹⁶ Respondent also noted, Brief at 7, that Ms. Stearns’ testimony “contradicted Keefe’s testimony when she arrived she saw some people leaving”⁹⁷ and that the records Respondent prepared indicated that tiger swims rarely if ever occurred more than once per day.⁹⁸

I reject Respondent’s contentions that Ms. Keefe’s testimony as the principle witness for the alleged violations on September 30, 2011 should be disregarded for lack of credibility. First, Respondent contends that Ms. Keefe’s testimony should be disregarded due to “obvious bias.”⁹⁹ In particular, Respondent states that Ms. Keefe did not write her complaint letter until “after she saw posts on Facebook from Big Cat Rescue and spoke with Ms. Baskin.”¹⁰⁰ During the hearing, Respondent, in questioning Ms. Keefe about her motivation for filing the complaint with USDA, asked Ms. Keefe if she “was Facebook friends with Carole Baskin,”¹⁰¹ if Ms. Keefe “read things that her organization or she [Carol Baskin] had posted on Facebook,”¹⁰² if Ms. Keefe had “spoke

⁹⁴ Respondent’s Brief at 6. Respondent notes that Ms. Keefe’s tiger swim “encounter” was on September 30, 2011 and she wrote the complaint on October 15, 2012.

⁹⁵ Respondents Brief at 6 (citing CX 11 and CX 12).

⁹⁶ Citing Tr. 6/30, 53. *See* Tr. 6/30, 53:17-54:3.

⁹⁷ Citing Tr. 6/30, 56. *See* Tr. 6/30, 55:17-57:6.

⁹⁸ Citing RX 30. *See* Tr. 6/30, 57:7-22.

⁹⁹ Respondent’s Brief at 6.

¹⁰⁰ *Id.*

¹⁰¹ Tr. 6/28 at 69:9-10.

¹⁰² Tr. 6/28 at 69:13-14.

on the phone” with Ms. Baskin,¹⁰³ and if Ms. Baskin “encouraged” Ms. Keefe “to make a complaint about Dade City Wild Things.”¹⁰⁴

Ms. Keefe testified that she was “Facebook friends” with Big Cat Rescue’s Facebook page¹⁰⁵ and communicated with Ms. Baskin through Facebook messages about her concerns with the September 30, 2011 tiger swim,¹⁰⁶ stating “I don’t recall if I’ve ever spoken to Carole on the phone.”¹⁰⁷ When Respondent pointedly asked Ms. Keefe if Ms. Baskin encouraged her to write a complaint to USDA,¹⁰⁸ Ms. Keefe replied:

She didn't encourage me. She said, “If you want to do something, I can give you the avenues on what you can do.” She didn’t prompt me to do it. She just said, “I will tell you,” you know, “you can contact this organization if you want to file a complaint.” And I -- and that was the—that’s how I got the information to the USDA.¹⁰⁹

Respondent went on to question Ms. Keefe about why she stated in her Affidavit: “I didn’t think one person could make a difference, but Carole encouraged me and provided me with the information in the event that I wanted to do something about it.”¹¹⁰ To which Ms. Keefe replied:

She said, “It doesn’t matter that you’re just one person. If you feel you want to do this, then here’s the information. Go ahead and do it.” It’s not like I contacted her every day and was like, “Oh, now what do I do?” She gave me the information that I needed, and I took it upon myself to contact these people.¹¹¹

Respondent also asked Ms. Keefe if Ms. Baskin told her about “the issues that she had with Dade

¹⁰³ Tr. 6/28 at 70:8.

¹⁰⁴ Tr. 6/28 at 70:13-15.

¹⁰⁵ Tr. 6/28 at 69:3-4, 11-12.

¹⁰⁶ Tr. 6/28 at 70:1-4, 12.

¹⁰⁷ Tr. 6/28 at 70:9-10.

¹⁰⁸ Tr. 6/28 at 70:14-15.

¹⁰⁹ Tr. 6/28 at 70:16-71:1.

¹¹⁰ See CX 10 at 2.

¹¹¹ Tr. 6/28 at 71:9-15.

City Wild things?” To which Ms. Keefe replied “[t]hat wasn’t part of our conversation. As I stated, I reached out to her to give me guidance on where I could go if I, in fact, wanted to file a complaint.”¹¹² Respondent’s suggestion that Ms. Keefe’s complaint was motivated by a Respondent’s third-party competitor is unsupported and thus unproven. Ms. Keefe’s credibility is not discredited merely because she was given information about how to file a complaint by a group she reached out to on Facebook.

Second, Respondent contends that Ms. Keefe’s testimony should be disregarded due to the passage of time. Respondent points out that “when Keefe returned home, she told her friends that it was a great experience and she was happy that she did it” and that “her only explanation for waiting so long was that she was ‘still on a high about going.’”¹¹³

Third, Respondent contends that that Ms. Keefe’s testimony contradicts itself. Respondent points out that Ms. Keefe “was unhappy that the tiger was on a leash” and “contrary to her stated concern for the tiger’s well-being, she would have liked the activity to last longer.”¹¹⁴

I agree that Ms. Keefe’s complaint about her participation in the tiger swim was delayed. But I do not agree with Respondent that Ms. Keefe’s testimony is contradictory, at least in any way that would undermine her testimony as to what she observed.¹¹⁵ It is entirely logical that the witness could have concerns about the treatment of the tiger cubs, yet enjoy the overall experience, and be disappointed at the time that the tiger swim included other people, did not last

¹¹² Tr. 6/28 at 71:16-22.

¹¹³ Respondent’s Brief at 6 (citing Tr. 6/28, 65; CX 10).

¹¹⁴ Respondent’s Brief at 6 (citing Tr. 6/28, 73-74, 80).

¹¹⁵ See Tr. 6/28, 74:4-8

longer, and did not allow more direct contact with the tiger cub.¹¹⁶ Moreover, both parties had the opportunity to examine and cross-examine Ms. Keefe about her recollections to their desired extent. The fact that Ms. Keefe apparently had mixed feelings, and even evolving feelings about her experiences, does not discredit her factual observations.

Respondent also contends that “Complainant presented no evidence supporting the allegations that merely exhibiting the cubs in a pool in close proximity to people amounted to a violation” and that Complainant witness, Dr. Gregory Gaj, testified regarding his observation of a swim event that, as to the first tiger, “I did not feel that there was enough of a problem to - - to say that it was dangerous for the public at that point”¹¹⁷ and, as to the second tiger Dr. Gaj observed, although Dr. Gaj felt the tiger was not comfortable in the water and was being made to swim, the tiger “did not appear to be big enough, strong enough, or dangerous to the public; and so, I did not consider that an issue.”¹¹⁸ Respondent further contends that Complainant offered no evidence that the tigers were exposed to rough or excessive handling.¹¹⁹ However, it is unclear whether Dr. Gaj observed the same or a separate swim event than the one about which Ms. Keefe testified.¹²⁰

At issue is whether Respondent willfully violated the Regulations¹²¹ on September 30, 2011. I find the Record demonstrates Respondent willfully violated 9 C.F.R. § 2.131(c)(1) on September 30, 2011 by allowing unlimited direct contact between the public and tiger cubs

¹¹⁶ See Tr. 6/28, 72:20-73:1, 73:10-15, 74:2-4, 74:9-14.

¹¹⁷ Respondent’s Brief at 14 (citing Tr. 6/28, 175). See Tr. 6/28 at 175:2-7.

¹¹⁸ See Respondents Brief at 14-15; Tr. 6/28 176:17-177:9, 177:18-178:1.

¹¹⁹ Respondent’s Brief at 16.

¹²⁰ Dr. Gaj testified that he attended a tiger swim event to observe as an inspector with Dr. Navarro in September 2011 but did not specify the date on which he attended nor the session he attended. Tr. 6/28, 173:9-12.

¹²¹ 9 C.F.R. §§ 2.131(c)(1), 2.131(b)(1), 2.131(c)(3), 2.131(d)(1).

during the tiger swim event.¹²² Although Ms. Keefe testified that the tiger cubs were accompanied by trainers and restrained on a leash,¹²³ indicating that the contact between the public and the tiger cubs was controlled, Ms. Keefe also testified that she and the other members of the public were not directed to sanitize their hands before or after interacting with the cubs¹²⁴ in direct contradiction of Respondent's own Handling Protocol.¹²⁵ Failing to ensure that the handlers and members of the public sanitized their hands before interacting with the tiger cubs was a failure to handle the tigers with "minimal risk of harm to the animal and to the public." Further, because of Respondent's background and experience with the Regulations, and because it is clear Respondent knows the importance of hygiene to for the public, handlers, and animals as clearly outline in Respondent's Handling Protocol, such violation shows, at minimum, a careless disregard for the regulatory requirements.

Based on the record, I find that Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by keeping a young tiger in the pool despite the tiger cub's discomfort and irritation. Ms. Keefe testified that one of the tiger cubs started "making sounds" every time he was placed back in the water, that the cub tried repeatedly to get out of the pool, and that the cub was obviously irritated – so much so that Ms. Stearns had the tiger cub sent back to its cage at some point during the swim event.¹²⁶ This testimony, of course, cuts both ways, in that it indicates the tiger cub was

¹²² See CX 12. See also *Zoocats, Inc.*, 68 Agric. Dec. 737 (2009) (where Respondents violated the regulations by allowing children to pose with a small tiger for photographs).

¹²³ Tr. 6/28 at 19:12-16, 21:22-22:1, 26:8-9.

¹²⁴ Tr. 6/28 31:20-32:9.

¹²⁵ See RX 14 ("2) hand sanitizes before and after contact"). See also Tr. 6/29, 66:12-19 (Dr. Woodman, witness for Respondent, testified that handling humans should "implement common sense sanitary" for the safety of the human and the animal); Tr. 6/29, 19:13-19 (Mr. Stearns stating that Respondent "always" has guests sanitize their hands before and after encounters).

¹²⁶ Tr. 6/28 at 28:4-18.

stressed and protesting, but that at some point it was as a result was given a rest away from the activities. However, I find that there is a preponderance of the evidence that that the cubs' treatment was not expeditious and careful and, based on Ms. Keefe's testimony, led to behavioral stress and unnecessary discomfort before it was removed from the pool.

As to this particular day, I find that the record does not demonstrate by a preponderance of the evidence that Respondent violated 9 C.F.R. §§ 2.131(c)(3), and 2.131(d)(1) by exposing the tiger cubs to rough or excessive handling and/or exhibiting the tiger cubs for periods of time that would be detrimental to their health or well-being. As noted, Ms. Keefe testified that she assumed an earlier group interacted and swam with the tiger cubs because she saw a group returning to the gift shop on the buses and also because the tiger cub did not seem interested in drinking from the bottle.¹²⁷ However, Ms. Stearns testified that she only recalls the one swim encounter that day and that Ms. Keefe could have witnessed a group coming from a swim encounter with another type of animal or Ms. Keefe could have had arrived very early if there was a swim encounter much earlier that day.¹²⁸ Ms. Keefe testified that in total, she estimated that she spent about twenty or twenty-five minutes with the tiger cub during her encounter.¹²⁹ Complainant failed to prove by a preponderance of evidence that the tiger cubs were exhibited for an amount of time that would be detrimental to their health or well-being.

c) Handling of Animals: October 10, 2012

The Complaint alleges that on or about October 10, 2012, Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.131(b)(2)(i), and 2.131(c)(1), when: Respondent allowed a reporter from The American Broadcasting Company's ("ABC") "Good Morning America" to handle a young

¹²⁷ Tr. 6/28 at 15:3-4, 21:2-7.

¹²⁸ See Tr. 6/30 at 56-57.

¹²⁹ Tr. 6/28 at 22:3-4, 30:14-15.

tiger (“Tony”) in a manner that caused the tiger to become visibly stressed, as exhibited by the tiger’s repeated attempts to leave the pool, and the reporter repeatedly pulled the tiger back into the pool;¹³⁰ during exhibition, Respondent’s employees or agents lowered a young tiger into a pool by the tiger’s tail, pulled the tiger’s tail to restrain it while it was in the pool, and pulled the young tiger out of the pool by the tiger’s right front leg;¹³¹ and Respondent exhibited a young (approximately 6 week old)¹³² tiger (“Tarzan”) and a juvenile tiger to a member of the public in a swimming pool with no distance and/or barriers between the animals and the public.¹³³

On Brief, at 19, Complainant states that “[i]t is well settled that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both section 2.131(c)(1) and 2.131(b)(1).”¹³⁴ In support of the contention that Respondent violated 9 C.F.R. §§ 2.131(b)(1), and 2.131(c)(1), Complainant provided video footage of segment of ABC’s “Good Morning America” where the reporter is allowed to directly handle two tigers in a pool.¹³⁵ In the video clip, the smaller cub Tony, repeatedly attempts to get away from the reporter and makes multiple growling or “crying out” sounds when pulled back and handled by the reporter.¹³⁶ The voice of a female reporter states that the male reporter in the pool is “trying to chase the tiger cub who doesn’t look like he wants to be in the pool with that unhappy growl.” *Id.*

Complainant offered the testimony of Dr. Laurie Gage, a highly qualified and

¹³⁰ Complaint at 3, ¶ 8b.

¹³¹ Complaint at 4, ¶ 9a.

¹³² Complainant’s expert witness Gage estimated this cub to be at least 5 months old and about 60 lbs. Tr. 6/28, 211:12; CX 6 at ¶ 3.

¹³³ Complaint at 4, ¶ 10c.

¹³⁴ Citing *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec 128, 138 (U.S.D.A. 2013); *Williams*, 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

¹³⁵ CX 4.

¹³⁶ CX 4 at 0:24-0:57.

experienced large felid expert,¹³⁷ who stated that APHIS Animal Care considers news reporters to be members of the public, and, based on her observation of the video, she was concerned because the tiger cub clearly does not desire to be in the water and the reporter is not trained to handle these types of animals.¹³⁸ Dr. Gage stated in her Affidavit that the “younger tiger was vocalizing (screaming and yowling) in a manner that suggested it was uncomfortable with the situation and wanted to get out of the water.”¹³⁹ Dr. Gage further testified that, in observing the video,¹⁴⁰ of greater concern to her was a larger tiger on a leash, seen behind the reporter handling the tiger cub, that in her opinion should not be near the public because it is “too big and too strong, too fast” and “could cause damage not only to his handler, but to a member of the public.”¹⁴¹

In support of the contention that Respondent violated 9 C.F.R. § 2.131(b)(2)(i), Complainant points out that later in the video, when the ABC reporter is joined in the pool by a larger tiger cub Tarzan,¹⁴² in the background the smaller tiger cub can be seen trying to get out of the water, is pulled out of the water by unknown handler by its leg, and then placed/dropped back in the pool by the handler.¹⁴³ Dr. Gage states in her Declaration, at 1 para. 3, that “the attendants/handlers in both videos grossly understate the actual weight of the juvenile tigers being used. Even the ABC anchors could recognize that ‘Tarzan’ the tiger was ‘much larger than 30 pounds’. I would estimate that animal to be at least 5 months old and likely over 60 pounds.”

¹³⁷ Tr. 6/28, 187-92.

¹³⁸ Tr. 6/28, 202:12-203:2. *See also* CX 6 at 1.

¹³⁹ CX 6 at 1.

¹⁴⁰ CX 4 at 0:36-0:44.

¹⁴¹ Tr. 6/28, 204:13-18.

¹⁴² CX 4 at 2:47.

¹⁴³ CX 4 at 2:47. *See also* Complainant’s Brief at 19.

Respondent, Brief at 7-8, contends that the ABC reporter “had extensive experience with animals in zoo settings; he was very seasoned and brought his own wet suit.”¹⁴⁴ Respondent contends that, contrary to Dr. Gage’s assessment of the tiger’s behavior, Ms. Stearns’ observed that “the tiger was not under any distress and just wanted to play,” that “the tiger actually wanted to continue swimming,” and that the “tiger’s noises indicated excitement.”¹⁴⁵ Respondent avers that an “upset tiger would make more of a roar sound,”¹⁴⁶ but that the vocalization seen in the video is normal for Tony because he is a “talking tiger,” a “chatterbox and very outgoing.”¹⁴⁷ In support of the swim program in general, Respondent offered the testimony of Dr. Don Woodman,¹⁴⁸ contending that “cubs need to be handled . . . allowed to explore their environment, cubs need to be allowed to socialize to be normal animals when they’re young.”¹⁴⁹

Respondent also states that “[i]t is undisputed that Respondent’s employees are trained to hold the base of a tiger’s tail to provide balance and support while the tiger learns to swim”¹⁵⁰ and that Dr. Gage testified “I don’t really see that as a being a big issue.”¹⁵¹ Respondent contends that Dr. Gage “did not specify which videos or pictures depicted pulling the animal by the tail” and that Mr. Stearns testified that he did not and would not pull on a tiger’s tail.¹⁵²

¹⁴⁴ Citing Tr. 6/30, 136-137. *See* Tr. 6/30, 137: 4-21.

¹⁴⁵ Citing Tr. 6/30, 134-35, 134, 142-43.

¹⁴⁶ Citing RX 25 (video of two cubs scuffling and growling); Tr. 6/30, 148-49.

¹⁴⁷ Respondent’s Brief at 8 (citing Tr. 6/30, 142-43).

¹⁴⁸ Respondent’s veterinarian of record for about four or five years at the time of Hearing, *see* Tr. 6/29 at 41:14-19.

¹⁴⁹ Tr. 6/29 at 79:20-80:3. *See also* RX 15 at 1.

¹⁵⁰ Brief at 12 (citing RX 22; Tr. 6/30, 151).

¹⁵¹ Citing Tr. 6/28, 278.

¹⁵² Respondent’s Brief at 12 (citing Tr. 6/29, 28). Also citing Tr. 6/28, 199 (Randy Stearns testified that trainers “usually tell [customers] not to touch the animals while they’re swimming”).

Respondent contends that Dr. Gage's "personal" opinion that tiger swim sessions are a "bad idea" is contrary to current USDA guidance that "the public could safely handle animals between eight and twelve weeks old" and that Dr. Gage testified that animals between twelve and sixteen weeks could be handled by the public if smaller and well-behaved.¹⁵³ Respondent points out that the Florida Fish and Wildlife Conservation Commission limits public contact with tigers exceeding forty pounds, but the USDA's standard is that the tiger must be under control of the attendant.¹⁵⁴ Respondent contends that Dr. Gage, in her Declaration (CX 6), incorrectly assessed the age and weight of the larger tiger, Tarzan, who Stearns testified was about four months old, about 36 to 38 pounds, and fully under control by Mr. Stearns during the filming of the Good Morning America segment.¹⁵⁵

Complainant's video and expert testimony evidence on the subject allegations are quite comprehensive and compelling.

I find that on or about October 10, 2012, Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1) and 2.131(b)(2)(i). Based on the record, and specifically the video of the "Good Morning America" segment (CX 4), the tiger cub Tony became visibly agitated and, whether the cub was vocalizing because it did not want to be in the water or because it was being restrained by the reporter, the behavior exhibited showed that the tiger cub was stressed and or agitated by the situation. In fact, RX 22 (a video of a tiger cub swimming with its trainer while being supported by its tail) shows the tiger cub swimming and making "chuffing" sounds, which sound very different from Tony the tiger cub's vocalizations in CX 4 (the ABC "Good Morning

¹⁵³ Respondent's Brief at 15 (citing Tr. 6/28, 198, 238).

¹⁵⁴ Respondent's Brief at 15 (citing Tr. 6/28, 109).

¹⁵⁵ See Respondent's Brief at 15-16 (citing Tr. 6/30, 130, 155, 215, 218-19). *But see* CX 4 at 2:57 (where the reporter states that "Tarzan" is "about thirty pounds").

America” segment), which sound like growls or crying out. It is also clear from the video (CX 4 at 2:47) that the trainer handling the smaller tiger cub in the background (apparently Tony the tiger) unquestionably improperly lowered the tiger into the water by its tail, pulled the tiger cub out by its front leg, and immediately placed the cub back in the water even though the video clearly shows the cub was attempting to get out of the water. I reject Respondent’s contention that the handler was properly holding the tiger’s tail to offer support as the handler was not in the water with the tiger.¹⁵⁶ The video evidence is clear cut on these points. I find that Respondent’s contentions contrary to this video evidence are inconsistent with this record evidence and, thus, not credible.

I find that the Record is not sufficient to show that Respondent willfully violated 9 C.F.R. § 2.131(c)(1) by allowing the “juvenile” tiger Tarzan to be exhibited to the reporter, a member of the public. Dr. Gage estimated that Tarzan was over five months old and over sixty pounds in weight in the video,¹⁵⁷ but Complainant offers no other evidence of Tarzan’s size or age at the time of the filming for the “Good Morning America” segment, and Mrs. Stearns testified that Tarzan weighed only 36 to 38 lbs.¹⁵⁸ It creates a difficult evidentiary issue to have a felid expert of Dr. Gage’s caliber and experience opine that a tiger weighs more than sixty pounds, while a licensee testifies that tiger weighs less than forty pounds. I find nothing substantial in the record to contradict either witness and nothing to undermine the credibility of the testimony of either witness. The burden of proof resides with Complainant. I find that the actual weight of Tarzan is

¹⁵⁶ Again noting the difference of the handling in RX 22, where the handler is with the tiger in the water and is supporting the tiger’s tail from the bottom. In CX 4, the handler is holding the tiger’s tail as she lowers it into the pool.

¹⁵⁷ CX 6 at ¶ 3.

¹⁵⁸ Tr. 6/30, 143:16-19. For what it is worth, Tarzan looks to be over 40 lbs to me, too, but I cannot claim any expertise in judging the weights of tigers, so my impression of this tiger’s weight is not evidence and is not probative.

not established by a preponderance of the evidence. Further, during the video Mr. Stearns has the tiger on a leash, remains with the tiger, Mr. Stearns appears to have full control over the tiger, and the tiger appears to be calm. I find that the preponderance of the evidence does not demonstrate that Respondent willfully violated 9 C.F.R. § 2.131(c)(1) as to the tiger Tarzan.

d) Handling of Animals: October 13, 2012

The Complaint alleges that on or about October 13, 2012, Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.131(b)(2)(i), 2.131(c)(1), 2.131(c)(3), and 2.131(d)(1) when: Respondent kept a young tiger Tony in a pool despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool;¹⁵⁹ during exhibition, Respondent's principal, Randy Stearns, handled or worked a young tiger Tony by pulling the tiger's tail, and holding the tiger aloft by the tiger's neck;¹⁶⁰ when Respondent exhibited a young tiger Tony with no distance and/or barriers between the animal and the public; and when Respondent exposed young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being, and exhibited young tigers for periods of time and/or under conditions inconsistent with their good health and well-being.

As support for these contentions, Complainant offers the testimony of and contemporaneous photographs taken by Jayanti Seiler, a layperson, who participated in a "tiger swim" session on October 13, 2012. In her Affidavit, Ms. Seiler stated that "when [Tony] tried to get away the trainer often yanked him back by the tail . . . the tiger resisted while being

¹⁵⁹ Complaint at 3, ¶ 8c.

¹⁶⁰ Complaint at 4, ¶ 9b.

constantly forced over and over to sit near us and he continually made sounds of distress.”¹⁶¹ Ms. Seiler testified that “[Tony] was pulled in the water by his tail to return him back to the line . . . Tony definitely was resisting and wanting to get out of the pool. He reached for the edge many times and lurched up trying to get out. He was pulled back in by his tail . . . He was making signs . . . he was calling out.”¹⁶² Ms. Seiler also testified that the “tiger swim” session lasted for about fifteen to twenty minutes and each of the about five guests had an opportunity to swim from one side of the about twenty-foot pool to the other and back about two to three times, and “during this entire time in the pool, didn’t have any time to sit, rest, get out of the pool, take a break.”¹⁶³ Complainant also notes that, after the swim, “Ms. Seiler observed that Tony was ‘shivering violently and was dangled by the neck to pose for more pictures.’”¹⁶⁴

Respondent contends, Brief at 9, that the complaints and testimony of Ms. Seiler should be disregarded as not probative because her “statements regarding abuse and the propriety of the activity are her own personal opinion based largely on information she received in an e-mail after the activity.” Respondent contends that Ms. Seiler’s observations and opinions should carry little weight because she “is a photographer and has no significant experience or education in animals or animal training.”¹⁶⁵ Respondent points out that the pictures of Ms. Seiler from the tiger swim event show Ms. Seiler enjoying herself and that the “tiger shown in the pictures obviously was not in distress.”¹⁶⁶ Respondent also offers the testimony of Mr. Stearns who was

¹⁶¹ CX 8 at 1. *See also* CX 8 at 7 (a photograph of Randy Stearns, the trainer during the October 13, 2012 “tiger swim” session, holding the tiger by its tail).

¹⁶² Tr. 6/27, 39:1-9. *See also* CX 9 at 9 (a photograph showing Tony trying to exit the pool).

¹⁶³ Tr. 6/27, 41:2-19.

¹⁶⁴ Brief at 24 (citing CX 8 at 2).

¹⁶⁵ *Id.* (citing Tr. 6/27, 97).

¹⁶⁶ Respondent’s Brief at 9 (citing CX 8; RX 28; Tr. 6/27, 108).

present during Ms. Seiler's encounter and stated during the hearing that he has not witnessed the type of behavior from Tony the tiger that Ms. Seiler described and he recalls that "everything went smoothly and Seiler made no negative comments."¹⁶⁷

Respondent contends that Mr. Stearns explained that in each picture where his hand is seen near the tiger's tail, he is simply providing additional support to the tiger.¹⁶⁸ Further, allegations that Respondent held the tiger during the encounter from the neck were taken from Ms. Seiler's affidavit "which she corrected during the hearing to reflect that the tiger was being held by the scruff of the neck and not strangled,"¹⁶⁹ and which Dr. Gage testified "is a common practice" as "tigers will relax when held by the scruff, as the mother would do."¹⁷⁰

Respondent contends that Complainant presented no evidence showing that Tony the tiger presented a danger to the public nor that USDA prohibits contact with tiger cubs the age that Tony was during the encounter.¹⁷¹ Respondent further contends that Complainant offered no evidence that the tigers were exposed to rough or excessive handling.¹⁷²

I find Ms. Seiler's testimony and Affidavit to be probative of her direct observations during her encounter with Tony the tiger. A witness does not "have to significant experience or education in animals or animal training" in order to competently testify as to direct observations that a tiger was being pulled by its tail, was being forced back into a pool while it was vocalizing in an agitated manner and trying to get out of the water, and was being forced to stay in one place despite its vocalized protests. However, I give no weight to her personal opinions or

¹⁶⁷ *Id.* at 10 (citing Tr. 6/29, 25, 204, 208, 76).

¹⁶⁸ *Id.* at 13 (citing Tr. 6/29, 29, 33-4).

¹⁶⁹ *Id.* (citing Tr. 6/27, 85).

¹⁷⁰ *Id.* at 12 (citing Tr. 6/28, 218, 267).

¹⁷¹ *Id.* at 16.

¹⁷² *Id.*

conjectures about what the tiger cub Tony might have been subjected to before or after Ms. Seiler's encounter. I do not find that Ms. Seiler's apparent enjoyment of her interaction with the tiger to undermine her testimony or render it inconsistent as to what she observed. It is not inconsistent for a witness to have enjoyed an interaction with a tiger cub, but to have qualms about the treatment of that cub, either at the time or upon reflection later.

I further find that the record does not support by a preponderance of the evidence that holding the tiger cub by the scruff of the neck in the circumstances described, such as size, weight, and age of the tiger, was a violation of the regulations.

Based on the record, I find that on or about October 13, 2012 Respondent willfully violated 9 C.F.R. §§ 2.131(b)(1), 2.131(b)(2)(i), and 2.131(c)(3), and by keeping a tiger cub, Tony, in a pool despite the tiger's discomfort, as exhibited by the tiger's vocalizing and attempts to exit the pool; by allowing Mr. Stearns to roughly handle Tony the tiger by pulling the tiger's tail and forcing the tiger to stay in one spot despite its efforts to avoid being touched or petted; and by exhibiting the young tiger for a period of time inconsistent with its good health and well-being. Ms. Seiler testified that as soon Tony the tiger was placed on the ground with her and other members of the public, he tried to move away and "he hissed, he growled, he shrieked, and made a lot of various different noises when his tail was pulled to bring him back to the spot."¹⁷³

Ms. Seiler testified that "Tony definitely was resisting and wanting to get out of the pool,"¹⁷⁴ that he was shrieking, hissing when he was out of the water, and "making sounds like you could say crying"¹⁷⁵; and "there wasn't anywhere for Tony to rest" during the swim

¹⁷³ Tr. 6/27 at 36:6-9, 37:10-13. *See also* CX 8 at 7 (photo of Mr. Stearns restraining the tiger by its tail).

¹⁷⁴ Tr. 6/27 at 39:4-5; *see also* CX 8 at 9 (photo of Tony trying to exit the pool and being restrained by the tail).

¹⁷⁵ Tr. 6.28 at 40:5-13.

encounter which consisted of about five to seven people allowed to take turns swimming across the pool.¹⁷⁶ Ms. Seiler also testified that the swim encounter alone lasted about fifteen to twenty minutes and the entire encounter was supposed to be thirty minutes but “may have run over a little bit”¹⁷⁷ and that after the swim encounter the customers were posed for additional pictures with Tony who was “dripping wet, and he wasn’t dried off, and he have [sic] shivering violently, and he continued to shiver the entire time.”¹⁷⁸

I find the record is insufficient to show that Respondent willfully violated 9 C.F.R. §§ 2.131(c)(1) and 2.131(d)(1). Ms. Seiler testified that “everything seems [sic] very structured . . . only limited time”¹⁷⁹ and the photos of the encounter (CX 8, 4-9; RX 28) show that Mr. Stearns, the handler, was present at all times and in control of the tiger. However, it is unclear whether a leash was used throughout the encounter as Ms. Seiler testified that the tiger was brought out on a leash,¹⁸⁰ but one cannot be seen in the photographs. Complainant offers no other evidence that additional barriers or distance were needed to assure the safety of the public or the tiger cub.

e) Handling of Animals: October 18, 2012

The Complaint alleges that on or about October 18, 2012, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) when, during a simulated “swim encounter” staged in New York and presented on the show “Fox and Friends”, Respondent kept a young tiger (“Tony”) in a pool despite the tiger’s obvious discomfort, as exhibited by the tiger’s repeated, consistent attempts to exit the pool.¹⁸¹ In support of this allegation, Complainant provides the video footage of the

¹⁷⁶ Tr. 6/27 at 38:12-22, 41:8-13.

¹⁷⁷ Tr. 6/27, 41:15-16, 54:8-11.

¹⁷⁸ Tr. 6/27 at 59:9-15.

¹⁷⁹ Tr. 6/27 37:16-17.

¹⁸⁰ Tr. 6/27 at 35:18-19.

¹⁸¹ Complaint at 4, para. 8d.

presentation¹⁸² and the affidavit of Dr. Gage who observed based on the video that “the animal did not appear to enjoy being in the water . . . it made numerous and consistent attempts to exit the water but was held in the pool by its handler holding the leash.”¹⁸³

Respondent, Brief at 11, states that at the time of the filming of Tony the tiger in New York for “Fox and Friends,” which took place one week after the filming of the “Good Morning America” segment, Tony was ten weeks and weighed about 22 pounds.¹⁸⁴ Respondent contends that during the filming “[c]ontrary to Respondent’s request, a kiddie pool had been provided” and the “tiger made noises indicating that he was excited by the cameras, and the flimsiness of the pool was a problem for him” but “after this swim, Tony was perfectly healthy.”¹⁸⁵

Based on the record, and particularly the video of the “Fox and Friends” segment (CX 5), I find that on or about October 18, 2012, Respondent willfully violated 9 C.F.R. § 2.131(b)(1) by allowing the exhibition of Tony in New York for a “Fox and Friends” segment despite the tiger cubs’ exhibited discomfort in the water and the tiger’s excitement/stress due to the cameras, crowd, and possibly other overstimulation. Mr. Stearns testified that he was not provided the type of pool he requested and that the cameras and camera men were too close to Tony¹⁸⁶ but did not explain why he allowed the exhibition to continue in the less than satisfactory circumstances.

¹⁸² CX 5.

¹⁸³ CX 6 at 2. *See also* Complainant’s Brief, 24 (citing *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 92 (2002)).

¹⁸⁴ Citing Tr. 6/30, 140. *But see* CX 5 at 1:20 (where Mr. Stearns tells the reporter that Tony “is about 15 pounds right now”); Tr. 6/30, 140:11-141:4 (stating that Mr. Stearns was aware of Tony’s weight at the time of filming as a “health certificate” was provided about two days before filming).

¹⁸⁵ Respondent’s Brief at 11 (citing Tr. 6/30 139, 140, 227, 228, 141-42). *But see* Respondent’s Brief at 11 noting “Dr. Gage noted that the tiger was not making any noises”; CX 5 (during the video no sounds are heard from the tiger until the very end).

¹⁸⁶ Respondent’s Brief at 11 (citing Tr. 6/30 139, 140, 227, 228, 141-42).

IV. Housing of Animals

The Complaint, para. 12, alleges that on multiple occasions, Respondent willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum Standards promulgated in the Regulations under the AWA (9 C.F.R. Part 3) (“Standards”).

a) Housing of Animals: May 1, 2013

The Complaint alleges that on or about May 1, 2013, there was not a method to rapidly eliminate excess water from tiger enclosures, which had an accumulation of mud and water in violation of Standard 9 C.F.R. § 3.127(c)¹⁸⁷ and that Respondent’s enclosure for two baboons had a support pole that had detached from the side and front of the enclosure in violation of Standard 9 C.F.R. § 3.75(a).¹⁸⁸ In his May 1, 2013 Inspection Report, Dr. Luis Navarro, APHIS Veterinary Medical Officer, observed that:

[the] enclosure housing the 2 male babbon [sic] had a detached welded pole on the side and front panel area of the enclosure in which the primates are exhibited . . . [i]n order to protect the animals from injury, contain the animals securely, and restrict other animals from entering, housing facilities for nonhuman primates must be kept in good repair.”¹⁸⁹

Dr. Navarro testified that the baboon enclosure had detached poles because the primates “jump on this fence, and they push it towards the outside” and “that’s a danger for the animals to escape.”¹⁹⁰

Respondent contends that the allegation regarding the detached pole in the baboon enclosure “reflects a difference of opinion, not a violation.”¹⁹¹ Respondent avers that the baboon

¹⁸⁷ Complaint, ¶ 12a.

¹⁸⁸ *Id.*, ¶ 12c.

¹⁸⁹ CX 17 at 1. *See also* CX 17, 6-7 (photos of baboon enclosure).

¹⁹⁰ Tr. 6/28 at 128:15-129:12.

¹⁹¹ Respondents Brief at 17.

has been playing with the pole as an “enrichment item” to “startle visitors” and the pole did not provide structural support, but that Respondent attached the pole to the commercial pole at the insistence of Dr. Navarro.¹⁹²

Regarding the second allegation, Dr. Navarro in his Inspection Report observed “[a] few of the Tiger enclosure[s] had water and mud accumulation due to rainy weather during the night. The owner recognized the problem and started working on it by putting new substrate on the ground inside the enclosure.”¹⁹³ Dr. Navarro testified that “there’s bacteria on the ground that tigers can be soaked with mud. It can create infections of the skin. If they drink muddy water, they can get intestinal problems.”¹⁹⁴ Complainant contends that, even though Respondent claims to have corrected the drainage issue, subsequent correction cannot obviate violations.¹⁹⁵

Respondent contends that on the date of the inspection there had been an unusual amount of rain and “severe flooding” that halted Respondent’s efforts to cement the enclosures.¹⁹⁶ Respondent states that additional dirt was added to the enclosures to speed the drying, and within a few hours it was completely dry and Respondent proceeded to cement the enclosure.¹⁹⁷ Therefore, Respondent contends that “there was either no violation based on Respondent’s testimony that the excess water was eliminated, or else the violation was de minimus and

¹⁹² Respondent’s Brief at 17 (citing Tr. 6/30, 210-14).

¹⁹³ CX 17 at 1. See also CX 17, 2-5 (photographs of two muddy tiger enclosures).

¹⁹⁴ Tr. 6/28 at 131:13-131:19.

¹⁹⁵ Complainant’s Brief at 26 (citing *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff’d*, 411 F. App’x 866 (6th Cir. 2011); *Bond*, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff’d per curiam*, 275 F. App’x 547 (8th Cir. 2008); *Drogosch*, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); *Parr*, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff’d per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); *Huchital*, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); *Stephens*, 58 Agric. Dec. 149, 184- 85 (U.S.D.A. 1999).

¹⁹⁶ Respondent’s Brief at 16.

¹⁹⁷ Respondent’s Brief at 16 (citing Tr. 6/30, 204, 208).

resulted from an unusual amount of rain while Respondent was in the process of correcting it.”¹⁹⁸

I find that on or about May 1, 2013, Respondent willfully violated Standard 9 C.F.R. § 3.75(a) by failing to keep an enclosure for two baboons in good repair that had a detached support pole. I reject Respondent’s contention that the detached poles served merely as “enrichment items.” It is clear from the photographs (CX 17 at 6-7) that the detached poles were intended to provide structural support for the front and side panels of the enclosure.

I find that the record is insufficient to show by a preponderance of the evidence that on or about May 1, 2013, Respondent violated Standard 9 C.F.R. § 3.127(c). Ms. Stearns testified that Respondent was in the process of cementing the floors of the enclosures and was delayed due to heavy rains.¹⁹⁹ Ms. Stearns also testified that Respondent’s method to deal with excess water in these tiger enclosures until they could be cemented was to “add quite a bit more dirt to it and build it up,” which work Respondent has already begun before the inspection, and that the enclosures dried out within a few hours.²⁰⁰ First, I note that the Regulations do not mention, set apart, define, or exclude a “de minimus violation” as Respondent suggests. However, although I agree with Complainant that subsequent correction cannot obviate an AWA violation, the regulation at issue only requires that Respondent has provided a suitable method to rapidly eliminate excess water. The preponderance of the evidence is that Respondent was in the process of applying a method to reduce the drainage problem (cementing the enclosure flooring) and, in the meantime, was actively utilizing a method to rapidly eliminate excess water (by placing dirt on top of the mud to hasten the drying process).²⁰¹

¹⁹⁸ *Id.*

¹⁹⁹ Tr. 6/30 at 206:14-19.

²⁰⁰ Tr. 6/30 at 205:12-13, 206:11-13, 208:20-209:2, 204:15-20.

²⁰¹ See *White, d/b/a Collins Exotic Animal Orphanage*, 73 Agric. Dec. 114, 130 (U.S.D.A. 2014) (“It is axiomatic that inspections of outdoor facilities conducted on rainy days will often reveal

b) Housing of Animals: September 6, 2012

The Complaint alleges that on or about September 6, 2012, there was a loose electric wire hanging inside the lion enclosure in violation of 9 C.F.R. § 3.125(a).²⁰² In the September 6, 2012 Inspection Report, Dr. Navarro observed that “[t]he electric wire inside the lion enclosure was hanging loose due to a tree limb that fell and hit the horizontal holding wire clamp . . . it was corrected while I was conducting the inspection.”²⁰³ Dr. Navarro testified that the wire was “hanging down, so it was too close to the chain-link; and if an animal decided to climb over it, it could walk over it because it didn’t have enough separation from the chain-link fence.”²⁰⁴

Respondent contends that “there either was no violation because the loose wire did not affect the integrity of the enclosure, or the violation was de minimus and corrected within minutes of it being pointed out.”²⁰⁵ Respondent states that the fallen wire was due to a storm, was twelve feet off the ground, was not required, and the electricity was still working despite the fallen wire. Respondent also claims that the wire was fixed when pointed out by Dr. Navarro.²⁰⁶

I find the record is not sufficient to show that on or about September 6, 2012, Respondent violated Standard 9 C.F.R. § 3.125(a) due to a loose electric wire hanging inside the lion enclosure. The regulation requires that the

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

pools of water; however, the issue is whether the exhibitor has provided a suitable method to rapidly eliminate excess water.”)

²⁰² Complaint, ¶ 12b.

²⁰³ CX 16 at 1. *See also* CX 16, 3-4 (photographs of bent “wire clamp and electric wire touching the wire mesh fence” and “electrical wire hanging inside the lion enclosure”).

²⁰⁴ Tr. 6/28 at 126:14-18.

²⁰⁵ Respondent’s Brief at 17.

²⁰⁶ Respondent’s Brief at 17 (citing Tr. 6/29, 198-202; CX 16).

9 C.F.R. § 3.125(a). Complainant failed to prove by a preponderance of evidence that the hanging wire would either weaken the structural soundness of the enclosure, or that it could potentially cause injury. Dr. Navarro testified that he did not know if the wire could serve its purpose as it was because he did not know if there was electricity running through it.²⁰⁷ Complainant did not allege, nor did Dr. Navarro indicate during his testimony, if the hanging wire, which was fixed during the inspection, could potentially injure the animals. Therefore, Complainant did not show by a preponderance of the evidence that the fallen clamp and wire in the tiger enclosure amounted to a violation of 9 C.F.R. § 3.125(a).

c) Housing of Animals: November 21, 2013

The Complaint alleges that on or about November 21, 2013, Respondent's enclosure for a pig contained a rusted jagged pipe/pole in violation of Standard 9 C.F.R. § 3.125(a)²⁰⁸ and Respondent failed to provide tigers with adequate shelter from inclement weather in violation of Standard 9 C.F.R. § 3.127(b).²⁰⁹

In support of these allegations, Complainant provides Dr. Navarro's testimony, corroborated by his November 21, 2013 Inspection Report and photographs.²¹⁰ Dr. Navarro testified that he "observed a rusted pipe" and "the jagged edges, along with the rust, if he [the pig] uses his snout, like some pigs do, he could cut his snout on the jagged edges."²¹¹ Dr. Navarro also testified that, regarding the tiger enclosures, "this particular enclosure had a small

²⁰⁷ Tr. 6/28 at 127:3-15.

²⁰⁸ Complaint, ¶ 12d.

²⁰⁹ *Id.*, ¶ 12e.

²¹⁰ See CX 19 1-2, 5 (photograph of rusted pole in pig enclosure), 6-7 (photographs of shelter for two tigers).

²¹¹ Tr. 6/28 134:13-16, 135:9-12.

shelter in there, and it was not high or tall enough for the animals to get in there in case there was rain and they wanted to get shelter from the elements.”²¹²

Respondent contends that the rusted pole in the pig enclosure was replaced immediately and “[t]here was no evidence that the pole cause an animal any harm, and so any violation would be de minimus.”²¹³ Respondent also avers that the tiger shelters had been in place for sixteen years and were not found non-compliant until the November 21, 2013 inspection.²¹⁴ Respondent states that the inspectors “were satisfied” when Respondent added a tarp to cover the enclosure.²¹⁵

I find that on or about November 21, 2013, Respondent willfully violated Standard 9 C.F.R. § 3.125(a) by failing to maintain housing facilities for a pig in good repair to protect the animal from injury where a rusted jagged pole/pipe was found in the enclosure. As earlier mentioned, subsequent correction does not obviate a violation.²¹⁶ Also as mentioned, the Regulations do not provide for a “de minimus” violation exception as Respondent suggests, and I would not consider this violation de minimus. Here, the regulation requires that enclosures be maintained in “good repair to protect the animals from injury” and does not require proof of

²¹² Tr. 6/28 135:22-136:4. *See also* Tr. 6/28 136:13-137:13.

²¹³ Respondent’s Brief at 17 (citing Tr. 6/30, 220).

²¹⁴ Respondent’s Brief at 17 (citing Tr. 6/30, 221).

²¹⁵ Respondent’s Brief at 17 (citing Tr. 6/30, 221-22).

²¹⁶ *See White, d/b/a Collins Exotic Animal Orphanage*, 73 Agric. Dec. 114, 155 (U.S.D.A. 2014) (“The correction of a violation of the Animal Welfare Act or the Regulations is to be encouraged and may be taken into account when determining the sanction to be imposed for the violation. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.”) (citing *Greenly*, 72 Agric. Dec. 603, 623, (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection), appeal docketed, No. 13-2882 (8th Cir. Aug. 23, 2013); *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff’d*, 411 F. App’x 866 (6th Cir. 2011); *Bond*, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff’d per curiam*, 275 F. App’x 547 (8th Cir. 2008)).

injury caused by the non-compliant structure.

I find that on or about November 21, 2013, Respondent willfully violated Standard 9 C.F.R. § 3.127(b) by failing to provide tigers with adequate shelter from inclement weather. Dr. Navarro testified that the shelter provided in the tiger enclosure was not tall enough for the tigers to seek shelter from the elements as needed. The photographs of the wooden shelter (CX 19 at 6-7) clearly show that the shelter only goes up to the tiger's neck and the tiger would have to crouch down to get inside. Respondent's contention that these shelters have been in place for sixteen years and not found non-compliant until 2013 does not obviate the violation.²¹⁷

V. Penalty Considerations

Complainant requests, Brief at 30, that "license 58-C-0883 be revoked" because "[t]he evidence establishes that . . . Stearns Zoo repeatedly handled animals in a manner that placed the animals (and people) at risk of harm, and repeatedly failed to provide access for inspection, in violation of the Regulations." Further, Complainant contends that "the evidence supports a finding that Stearns Zoo committed 23 violations. Complainant seeks the assessment of a civil penalty of \$23,000. (The maximum civil penalty that could be assessed under the Act is \$230,000.)"²¹⁸

Under the AWA, the appropriateness of the civil penalty should be determined "with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations."²¹⁹ Suspension or revocation of an

²¹⁷ See *Tri-State Zoological Park of W. Maryland, Inc.*, 72 Agric. Dec. 128, 138 (U.S.D.A. 2013) (where then Judicial Officer found that, although a squirrel monkey was housed in the same conditions for five years without the respondent being cited for violation, the violation was proved by a preponderance of the evidence).

²¹⁸ Brief at 31.

²¹⁹ 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "the title of a statute and

AWA license are provided for under 7 U.S.C. § 2149 (a). As discussed *supra* pp. 20-21, the finding of only one willful violation is needed to justify AWA license revocation. It is well settled that the “Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Act, and the Act has no requirement that there by uniformity in sanctions among violators.”²²⁰ As set out herein, I recognize that Respondent has not been subject to a previous administrative action, and is not found to have a history of violations or to have acted in bad faith. Thus, I find that the issuance of a cease and desist order and suspension of Respondent’s AWA license, as opposed to revocation, is appropriate considering Respondent’s history as a licensee.

In consideration of each of these factors, as well as the number of violations,²²¹ I find that the amount of the civil penalty should be \$16,000, a cease and desist order is proper, and AWA license number 58-C-0883 should be suspended for not less than ninety (90) days.

a) Penalty Considerations: Size of Business

I find that Respondent’s business size is moderate to large due to the number of animals on the property, size of property, and business activity.²²² Complainant contends that:

Respondent operates a zoo exhibiting domestic, wild, and exotic animals. In 2011, respondent represented to APHIS that it held 61 animals, in 2012, respondent represented to APHIS that it held 97 animals, in 2013, respondent

the heading of a section cannot limit the plain meaning of the text.” *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519, 528–29 (1947).

²²⁰ *Terranova*, 2019 WL 4580195, at *44 (U.S.D.A. 2019) (citing *ZooCats, Inc.*, 68 Agric. Dec. at 1079 n.5 (citing *Morgan*, 65 Agric. Dec. 849, 874-75 (U.S.D.A. 2006); *Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (U.S.D.A. 1997), *aff’d*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Cir. R. 206), printed in 58 Agric. Dec. 85 (U.S.D.A. 1999)).

²²¹ Herein I have found sixteen (16) willful violations of the AWA and Regulations.

²²² See *Terranova Enterprises, Inc., A Texas Corp., d/b/a Animal Encounters, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (finding Respondent Terranova to be a large-sized business); *Yost*, 2019 WL 2345417, at *7 (U.S.D.A. 2019) (finding Respondent to be at least a moderately-sized business based on the number and type of exhibitions).

represented to APHIS that it held 126 animals, in 2014, respondent represented to APHIS that it held 98 animals, and in 2015, respondent represented to APHIS that it held 139 animals.²²³

Respondent states that its zoo is operated over “22 acres with approximately 300 animals . . . [,] has been in business for 16 years and has grown from nothing to being open six days a week.”²²⁴

b) Penalty Considerations: Gravity of Violations

I find the gravity of violations to be great. Complainant contends that “[t]he gravity of the violations alleged in this complaint is great, involving multiple failures to handle animals carefully and to provide access for inspection.”²²⁵ Respondent contends that “Complainant failed to show that any of the alleged violations involved any harm to an animal or a person” and, regarding Complainant’s request to revoke Respondent’s AWA license, that the “alleged violations fall short of the violations that have resulted in such a severe penalty.”²²⁶

²²³ Complaint ¶ 2. *See also* Complainant’s Brief at 30 (stating that “Stearns Zoo operates a large business exhibiting animals” and citing *Huchital*, 58 Agric. Dec. 763, 816-17 (U.S.D.A. 1999); *Browning*, 52 Agric. Dec. 129, 151 (U.S.D.A. 1993) *aff’d per curiam*, 15 F.3d 1097 (11th Cir. 1994).

²²⁴ Respondent’s Brief at 18 (citing Tr. 6/30, 6-9, 13).

²²⁵ Complaint ¶ 3. *See also* Complainant’s Brief at 30 (stating “Stearns Zoo’s violations put both people and animals at risk of injury or death. Stearns Zoo’s actions-and inaction-demonstrate a callous disregard for the welfare of the animals that they acquire and use for financial gain. Stearns Zoo has not shown good faith.”); Complaint ¶ 4 (stating “On May 31, 2012, APHIS issued an Official Warning to respondent with respect to violations documented on May 4, 2010 (perimeter fence), September 21, 2010 (veterinary care, facilities, and drainage), May 17, 2011 (non-human primate enclosure), September 14, 2011 (careful handling of a tiger), [footnote omitted] and February 23, 2012 (serval enclosure). The Official Warning stated: “After providing you with an opportunity for a hearing, we may impose civil penalties of up to \$10,000, or other sanctions, for each violation described in this Official Warning. Although we generally pursue penalties for this type of violation(s), we have decided not to pursue penalties in this instance so long as you comply, in the future, with laws that APHIS enforces.”).

²²⁶ Respondent’s Brief at 18 (citing *White*, 2014 WL 4311058 (U.S.D.A. 2014) (revoking license due to multiple violations including failure to develop and follow a plan for veterinary care that led to multiple deaths of animals); *Pearson*, 2009 WL 2134028 (U.S.D.A. 2009) (revocation warranted for 281 violations and animals kept in “appalling conditions”)).

I take into account that the record demonstrates that Respondent's first failure to have someone available for inspection was not an outright refusal to allow entry, but instead a failure to have a responsible adult present. I also take into account that many of the housing violations were immediately corrected during or after inspections. However, of the sixteen (16) established violations, several were of a serious nature including willfully refusing access to APHIS officials to inspect facilities, animals, and records during normal business hours (7 U.S.C. § 2146(a); 9 C.F.R. § 2.50(c)); and the handling violations (9 C.F.R. §§ 2.131(b)(1), (b)(2)(i), (c)(1)).

c) *Penalty Considerations: Good Faith and History of Previous Violations*

Typically a lack of good faith and a history of previous violations is found where the respondent was involved in a formal disciplinary proceeding and continued to violation the AWA.²²⁷ However a lack of good faith and history of previous violation can be found “where a petitioner receives notice of his violations yet continues” to violate the AWA.²²⁸ Further, “under departmental precedent the JO has held that a respondent's ongoing pattern on noncompliance is sufficient to establish a history of violations, for purposes of 7 U.S.C. § 2149(b).”²²⁹

Complainant contends that “Respondent has not shown good faith. Despite having

²²⁷ See *Horton*, 73 Agric. Dec. 77, 88 (U.S.D.A. 2014) (citing *Mitchell*, 2010 WL 5295429, at *8 (Dec. 21, 2009); *Ramos v. U.S. Dep't of Agric.*, 68 Agric. Dec. 60, at *8 (Apr. 7, 2009); *Shepherd*, 66 Agric. Dec. 1107, 1116 (Nov. 29, 2007)).

²²⁸ *Id.* at 89 (citing *Richardson*, 66 Agric. Dec. 69, 88-89 (June 13, 2007) (“I have consistently held under the Animal Welfare Act that an ongoing pattern of violations over a period of time establishes a violator's ‘history of previous violations,’ even if the violator has not been previously found to have violated the Animal Welfare Act.”); *Howser*, 68 Agric. Dec. 1141, 1143 (Oct. 15, 2009) (where the Secretary found a history of previous violations in the absence of formal complaints or penalties); *Mazzola*, 68 Agric. Dec. 822, 827 (Nov. 24, 2009) (where the petitioner's choice to disregard a clear warning, even in the absence of prior formal disciplinary proceedings, was sufficient to establish a history of previous violations and a lack of good faith)).

²²⁹ *Yost*, 2019 WL 2345417, at *11 (U.S.D.A. 2019) (citing *Staples*, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014); *Perry*, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013)).

received multiple inspection reports identifying noncompliance with the Regulations and failures to comply with the Standards, and the receipt of an Official Warning, respondent has continued to mishandle animals, particularly infant and juvenile tigers, exposing these animals and the public to injury, disease, and harm. Respondent held or participated in events that included allowing members of the public to handle young and juvenile tigers, to paint the fur of young and juvenile tigers, and to force young and juvenile tigers to ‘swim’ and to ‘play’ with members of the public.”²³⁰

Respondent contends that Ms. Stearns has not acted in bad faith as evidenced by her history of working with animals, participation in conferences and compliance trainings, membership in the Florida Fish and Wildlife Conservation Commission Technical Advisory Group, and her activities in genome research and philanthropy for endangered species.²³¹ Respondent also avers that Complainant can show no previous violations.²³²

As mentioned previously, Respondents received written inspection reports providing notice of only eleven (11) of the twenty-four (24) alleged violations. Out of the sixteen (16) violations of the AWA established, only eight (8) were included in those inspection reports and most, if not all, were corrected during or immediately following the inspection. Complainant has not provided evidence to show that Respondent was made aware in writing of the complaints filed against its handling of the tiger swim sessions. Therefore, Complainant has not established that Respondent has shown bad faith or has a history of repeated violations.

²³⁰ Complaint ¶ 5.

²³¹ See Respondent’s Brief at 19.

²³² Respondents Brief at 20 (quoting *Hansen*, 57 Agric. Dec. 1072 (U.S.D.A. 1998) (“It bears repeating that an inspector is only an evidence gatherer. The inspector has no authority to find that anyone violated the Animal Welfare Act or the Regulations and Standards, but merely presents evidence, first to the agency and the agency’s counsel, and then before an administrative law judge.”)).

FINDINGS OF FACT

- 1) Stearns Zoological Rescue & Rehab Center, Inc. (Stearns Zoo), is a Florida corporation (N07000007224) that does business as Dade City Wild Things, and whose registered agent for service of process is Kathryn P. Stearns, 36909 Blanton Road, Dade City, Florida 33523. Complaint at ¶ 1; Answer at ¶ 1; CX 1; CX 2. Stearns Zoo exhibits domestic, wild, and exotic animals at its Blanton Road facility, and off-site. CX 1; CX 2; CX 5; Stipulations as to Facts. Witnesses and Exhibits (Stipulations) at ¶ 1.E.
- 2) Randall (Randy) Stearns is a director and the President of Stearns Zoo, and Kathryn Stearns is a director and the Secretary of Stearns Zoo. CX 2.
- 3) At all times mentioned in the complaint, Stearns Zoo was an exhibitor, as that term is defined in the AWA and the Regulations, and held AWA license number 58-C-0883. Complaint at ¶ 1; Answer at ¶ 1; CX 1; CX 2.
- 4) In 2011, Stearns Zoo represented to APHIS it held sixty-one animals; in 2012, Stearns Zoo represented that it held ninety-seven animals; in 2013, Stearns Zoo represented that it held 126 animals; in 2014, Stearns Zoo represented that it held ninety-eight animals; and in 2015, Stearns Zoo represented that it held 139 animals. Complaint at ¶ 2; CX 1.
- 5) On May 31, 2012, APHIS issued an Official Warning to Stearns Zoo regarding noncompliance documented during five inspections: May 4, 2010 (perimeter fence); September 21, 2010 (veterinary care, facilities, drainage); May 17, 2011 (non-human primate enclosure); September 14, 2011 (handling of a tiger); and February 23, 2012 (serval enclosure). Answer at ¶ 4; CX 3; Transcript (Vol. 2), 101: 12-116: 15 (Navarro); 157: 18-163:17 (Brandes); 173:6-179:18 (Gaj).
- 6) On November 21, 2013, Veterinary Medical Officer (YMO) Dr. Luis Navarro conducted a compliance inspection of Stearns Zoo's facilities, equipment, and animals, found that

- Stearns Zoo had failed to identify a dog as required, and documented his observations in a contemporaneous inspection report. CX 19 at 1; Stipulations, ¶ 1.C.; Tr. 6/28, 132:16-134:6.
- 7) On January 26, 2012, Dr. Navarro attempted to conduct a compliance inspection at Stearns Zoo's facility, but no one was available to provide access or to accompany him. VMO Navarro prepared a contemporaneous inspection report. CX 15; Stipulations, ¶ I.A.; Tr. 6/28, 122:14-124:12.
- 8) On September 9, 2013, VMO Dr. Robert Brandes attempted to conduct an inspection at Stearns Zoo's facility. No one from Stearns Zoo was available to provide access or to accompany him. He prepared a contemporaneous inspection report. CX 18; Stipulations, ¶ I.B; Tr. 6/28, 163:18-167:6.
- 9) On September 30, 2011, Stearns Zoo exhibited a young tiger (Rory or Rajah) to the public, including Barbara Keefe, a lay person, in a pool, without any distance and/or barriers between the tiger and the public, despite the tiger's obvious discomfort, as exhibited by the tiger's vocalizing and repeated attempts to exit the pool. CX 9; CX 10; CX 11; CX 12; Tr. 6/28, 25:22-32:2 (Keefe).
- 10) On October 10, 2012, Stearns Zoo exhibited a young tiger (Tony) in a pool, with a member of the public (a television reporter), who was permitted to handle the tiger directly. CX 4; CX 6; Tr. 6/28, 192:12-194:14; 202:9-203:2; 205:21-208:1 (Gage); Stipulations, ¶ D.
- 11) On October 18, 2012, Stearns Zoo exhibited a juvenile tiger (Tony) in a pool outdoors in New York City, as part of a television show, with no barrier, and scant distance, between the tiger and a television reporter, and despite the tiger's repeated, consistent attempts to exit the pool. CX 5; CX 6; Tr. 6/28, 213:18-22; 217:13-219:5 (Gage); Stipulations, ¶ E.

- 12) On October 10, 2012, during exhibition, Stearns Zoo's employees or agents lowered a young tiger into a pool by the tiger's tail, pulled the tiger's tail to restrain it while it was in the pool, and pulled the young tiger out of the pool by the tiger's right front leg. CX 4; CX 6.
- 13) On October 13, 2012, during exhibition, Stearns Zoo's principal, Randy Stearns, handled or worked a young tiger (Tony) by pulling the tiger's tail,. CX 7; CX 8 at 2, 7; Tr. 6/27 35:14-36:3; 39:8-13; 38:9-39:9; 40:14- 19; 52:12-53:5; 55:1-19; 57:18-58:5; 90:14-91 :3 (Seiler).
- 14) On May 1, 2013, VMO Navarro conducted a compliance inspection at Stearns Zoo. CX 17. He observed and documented in an inspection report that the enclosure for two baboons had a support pole that had detached from the side and front of the enclosure. CX 17; Tr. 6/28, 129:130:10 (Navarro); Stipulations at 1 ¶ G.
- 15) On November 21, 2013, Dr. Navarro conducted a compliance inspection at Stearns Zoo. CX 19. He observed and documented in an inspection report that Stearns Zoos enclosure for a pig contained a rusted jagged pipe, and there was inadequate shelter from inclement weather for tigers. CX 19; Tr. 6/28, 132: 16-137:19 (Navarro); Stipulations at 1 ¶ C.

LEGAL CONCLUSIONS

- 1) The Secretary of Agriculture has jurisdiction in this AWA administrative enforcement matter. 7 U.S.C. § 2149(a), (b).
- 2) On November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog as required. 9 C.F.R. § 2.50(c).
- 3) On or about January 26, 2012, and September 9, 2013, Stearns Zoo willfully violated the AWA and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals and records during normal

business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

- 4) On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(b)(1), by failing to handle tigers as carefully as possible in a manner that would not cause behavioral stress, physical harm, or unnecessary discomfort.
- 5) On October 10 and 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131 (b)(2)(i), by using physical abuse to handle or work young tigers.
- 6) On September 30, 2011, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle tigers during public exhibition with minimal risk of harm to the animals and the public, and with sufficient distance and/or barriers between the animals and the public.
- 7) On October 13, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(3), by exposing young or immature tigers to rough or excessive handling and/or exhibiting them for periods of time that would be detrimental to their health or well-being.
- 8) In five instances on the following dates, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum Standards promulgated under the AWA (9 C.F.R. Part 3) (Standards), as follows:
 - a. May 1, 2013. Detached support pole for enclosure housing two baboons. 9 C.F.R. § 3.75(a).
 - b. November 21, 2013. Rusted pipe with jagged edges in pig enclosure. 9 C.F.R. § 3.125(a).
 - c. November 21, 2013. Inadequate shelter from inclement weather for tigers. 9 C.F.R. § 3.127(b).

ORDER

It is therefore ordered that:

1. Stearns Zoo, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the AWA and the Regulations.
2. AWA license number 58-C-0883 is hereby suspended for ninety (90) days.
3. Stearns Zoo is assessed a civil penalty of \$16,000, to be paid by check, including reference to the Docket No. 15-0146, made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to:

USDA, APHIS
Miscellaneous
P.O. Box 979043
St. Louis, MO 63 197-9000

or by overnight delivery addressed to:

US Bank
Attn: Govt Lockbox 979043
1005 Convention Plaza
St. Louis, MO 63101.

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

Issued this 7th day of February 2020, in Washington, D.C.



Channing D. Strother
Chief Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776
SM.OHA.HearingClerks@USDA.GOV