AGRICULTURE DECISIONS

Volume 79

Book Two

Part One (General)

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

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DEPARTMENTAL DECISION

In re: MIDDLESEX LIVESTOCK AUCTION, LLC.
Docket No. 18-0034.
Decision and Order.
Filed December 15, 2020.

AHPA.

Lauren C. Axley, Esq. for APHIS.
Lisa Scirpo, non-attorney representative of Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD (RULING GRANTING IN PART AND DENYING IN PART APHIS'S MOTION FOR SUMMARY JUDGMENT)

Decision Summary

1. Middlesex Livestock Auction, LLC, during 2014, 2015, and 2016, violated the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq*.) (frequently "AHPA") by failing to comply with a regulation (9 C.F.R. §§ 79 *et seq*.) that required specific recordkeeping for the transfer of ownership of three goats and APHIS immediate access to inspect records.

2. The $17,500 civil penalty, total, requested by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently "APHIS" or "Complainant"), reflects APHIS's need to rely on an auction's records in order to trace animals in the event of an outbreak of disease.

3. Middlesex Livestock Auction, LLC (frequently "Middlesex Livestock" or "Respondent") does not have the cash flow to withstand paying a $17,500 civil penalty.

Procedural History

4. Before me is APHIS's Motion for Summary Judgment filed on June 21, 2019, thoroughly and meticulously prepared and supported by declarations and exhibits and other attachments, requesting that a decision and order be issued. Middlesex Livestock Auction, LLC, the Respondent, filed a Response timely, on August 7 or 8, 2019. The Hearing Clerk greatly assisted, enhancing the legibility of the Response attachments. APHIS's Reply was timely filed on September 6, 2019. (Belatedly, I GRANT APHIS's Motion filed on August 9, 2019.)

5. This case had been scheduled to be heard in a two-day, in-person, face-to-face Hearing in or around Middletown, Connecticut, on July 31 and August 1, 2019. I CANCELED the scheduled Hearing to consider the Motion for Summary Judgment. Upon careful consideration, the written record removes all questions that could have been addressed in an in-person Hearing. Consequently, I issue this Decision and Order without an oral hearing, finding that the written record provides all the evidence and reliable information needed to issue a Decision and Order that is fair and proportionate.

6. I GRANT in part and DENY in part APHIS's Motion for Summary Judgment. The violations are proved and serious. But the dollar amount of civil penalty APHIS requested ($17,500) is more than Middlesex Livestock's cash flow can withstand.

7. Having carefully considered the written record, including evidence and authorities, pleadings and arguments, the following Findings of Fact, Conclusions, and Order are entered without an oral hearing or other procedure.

Findings of Fact

8. Middlesex Livestock Auction, LLC, the Respondent, has been owned and operated by the Scirpo family for longer than fifty-eight years. Middlesex Livestock adds value to the community (the community is Connecticut and surrounds), providing a livestock market for goats (the subject of this case) and other livestock: sheep, cattle, rabbits, fowl, and horses, for example.

9. The parents have both passed on: Sebastian ("Seb") Scirpo during the

summer of 2002; and Kathleen ("Kathy") Scirpo during the summer of 2020. Their daughters Lana and Lisa know and worked their family livestock auction operation for years. The responsibility for defending this administrative action falls to owner operator Lisa Scirpo, one of the two daughters.

10. Middlesex Livestock Auction, LLC, the Respondent, is a limited liability company with a mailing address of PO Box 404, Durham CT 06422; and a business location at 488 Cherry Hill Rd, Middlefield CT 06455, with auctions on Mondays and special sales.

11. Middlesex Livestock Auction, LLC committed serious offenses when it failed to make records immediately available for inspection when APHIS requested access. These failures occurred four to five years ago, on multiple dates in 2015 and 2016, including September 11, 2015; April 21, 2016; May 4, 2016; and October 28, 2016.

12. Middlesex Livestock Auction, LLC committed serious offenses when it failed to keep specified records relating to the transfer of ownership of three goats at issue in the Complaint, so that those three goats could be traced. Those recordkeeping failures happened five to six years ago. One of the three goats was sold in 2014 (on November 17, 2014); two of the three goats were sold in 2015 (on August 31, 2015).

13. APHIS requests a $17,500 civil penalty, total, for all the offenses.

14. Middlesex Livestock Auction, LLC does not have the cash flow to pay $17,500.

Conclusions

15. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

16. The specific recordkeeping required by the regulations at 9 C.F.R. §§ 79 *et seq*. for the transfer of ownership of three goats; and for APHIS immediate access to inspect records, is authorized under the Animal Health Protection Act. 7 U.S.C. §§ 8301 *et seq*.

17. Having the name and address of the buyer of each of the three goats in the records of Middlesex Livestock Auction, LLC is essential to APHIS being able to trace the goats in the event of an outbreak of disease. APHIS is vigilant to prevent the spread of Scrapie, a degenerative and eventually fatal disease affecting the central nervous systems of sheep and goats. Title 9 Code of Federal Regulations Part 79 is entitled "Scrapie in Sheep and Goats." 9 C.F.R. §§ 79 *et seq*.

18. Middlesex Livestock Auction, LLC failed to comply with records requirements of the regulations at 9 C.F.R. §§ 79 *et seq*. as stated in Findings of Fact, paragraphs 11 and 12.

19. Middlesex Livestock Auction, LLC does not have the cash flow to withstand the $17,500 civil penalty recommended by APHIS.

20. The following Order is authorized by the Act and warranted under the circumstances.

ORDER

21. APHIS's Motion for Summary Judgment is GRANTED in part and DENIED in part, as stated in paragraph 6.

22. Respondent Middlesex Livestock Auction, LLC shall pay a civil penalty totaling $7,000 (seven thousand dollars) within ninety (90) days after this Decision and Order becomes final and effective (see below, for when this Decision and Order becomes final and effective). The payment(s) shall be paid by certified checks, cashier's checks, or money orders, marked Docket No. 18-0034, payable to order of "US Department of Agriculture" and delivered to

U.S. Department of Agriculture
APHIS, U.S. Bank
PO Box 979043
St Louis MO 63197-9000

Finality

This Decision and Order shall be final and effective without further

proceedings 35 (thirty-five) days after service, unless appealed to the Judicial Officer by a party to the proceeding by filing with the Hearing Clerk within 30 (thirty) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). *See* Appendix A.

Copies of this "Decision and Order on the Written Record (Ruling GRANTING in part and DENYING in Part APHIS's Motion for Summary Judgment)" shall be sent by the Hearing Clerk to each of the parties.

The Hearing Clerk will use for the Respondent Middlesex Livestock Auction, LLC both certified mail and regular mail, and as a courtesy will email Ms. Lisa Scirpo at the email address she used to reach the Hearing Clerk.

Issued this 15th day of December 2020 at Washington, D.C.

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ANIMAL WELFARE ACT

COURT DECISION

TERRANOVA v. UNITED STATES DEPARTMENT OF AGRICULTURE.
Case No. 20-60003.
Court Decision.
Filed August 10, 2020.

AWA – Burden of proof – License, revocation of – Minimum standards – Sanction recommendation – Substantial evidence – Willful violations.

[Cite as: 820 F. App'x 279 (5th Cir. 2020)].

United States Court of Appeals,
Fifth Circuit.

BEFORE WEINER, HAYNES, AND COSTA, CIRCUIT JUDGES.

The Court denied a petition for review of the Judicial Officer's decision and order finding the petitioners committed numerous violations of the AWA and revoking the petitioners' AWA license. In so ruling, the Court held there was substantial evidence to support the Judicial Officer's findings of AWA violations, rejected the petitioners' argument that the Judicial Officer improperly shifted the burden of proof onto them, and found the Judicial Officer did not abuse her discretion in revoking the petitioners' exhibitor's license. Because petitioners were found to have committed more than one willful violation of the AWA, revocation of petitioners' license was not "unwarranted in law or without justification in fact."

OPINION

PER CURIAM[*]

Petitioners Douglas Keith Terranova and Terranova Enterprises, Inc. (collectively, "Petitioners") seek review of a decision and order of the Secretary of the United States Department of Agriculture ("USDA")

[*] Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

determining that they violated various provisions of the Animal Welfare Act ("AWA") and its implementing regulations, imposing civil penalties, and revoking the exhibitor license granted to Terranova Enterprises, Inc. We conclude that the Secretary's order was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and that it was supported by substantial evidence. We therefore deny the petition for review.

I.

Petitioners provide wild animals such as tigers and monkeys for movies, circuses, and other entertainment. Terranova Enterprises, Inc. holds an exhibitor license issued by the Animal and Plant Health Inspection Service ("APHIS"), an agency of the USDA. In January 2015 and January 2016, APHIS filed complaints against Petitioners, alleging that: (1) they willfully violated multiple provisions of the AWA and the regulations promulgated thereunder and (2) they knowingly violated a cease and desist order issued in 2011 ordering them to refrain from future violations of the AWA.

After consolidating the complaints and conducting a hearing, the Administrative Law Judge ("ALJ") issued a decision concluding that Petitioners committed four violations of the AWA, that three of those violations were willful, and that APHIS failed to prove the remainder of the alleged violations by a preponderance of the evidence. The ALJ issued a cease and desist order directing Petitioners to refrain from further violations of the AWA, suspending the exhibitor license issued to Terranova Enterprises, Inc. for thirty days, assessing a $10,000 penalty against Petitioners for their violations of the AWA, and imposing a $11,550 civil penalty for Petitioner's knowing failure to obey a prior cease and desist order.

Both parties appealed the ALJ's decision and order to a Judicial Officer of the USDA.[1] The Judicial Officer concluded that Petitioners committed each of the violations of the AWA alleged in the consolidated complaints. The Judicial Officer revoked the exhibitor license issued to Terranova

[1] The Judicial Officer has final authority to issue decisions on behalf of the Secretary in formal adjudicatory proceedings. *See* 7 C.F.R. § 2.35(a).

Enterprises, Inc., imposed a $35,000 joint and several penalty against Petitioners for their violations of the AWA, and imposed a $14,850 civil penalty against each of the Petitioners for their knowing failure to obey a prior cease and desist order.

After the Judicial Officer denied Petitioners' motion to reconsider, Petitioners timely petitioned this court for review of the Judicial Officer's decision and order. Petitioners complain that the determinations of the Judicial Officer that they violated the AWA are not supported by substantial evidence, that the Judicial Officer improperly shifted the burden of proof to them, and that the Judicial Officer abused her discretion in revoking the exhibitor license issued to Terranova Enterprises, Inc.

II.

We have jurisdiction to review the final order of the Secretary, as issued by a Judicial Officer, pursuant to 7 U.S.C. § 2149(c). Our review of "the decision of an administrative agency is narrow." *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 746 (5th Cir. 1999). We will uphold the Secretary's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E); *Cmty. Care, LLC v. Leavitt*, 537 F.3d 546, 548 (5th Cir. 2008). We will not substitute our own judgment for that of the Secretary, and we will only set aside the order if it is "unwarranted in law or without justification in fact." *Allred's Produce*, 178 F.3d at 746 (citations omitted). This deferential standard requires that Judicial Officer's factual findings be upheld as long as they are supported by substantial evidence. *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 453–54 (5th Cir. 2015) "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Ellis v. Liberty Life Assurance Co. of Bos.*, 394 F.3d 262, 273 (5th Cir. 2004) (internal quotation marks and citation omitted)). In making factual findings, the Judicial Officer may substitute her judgment for that of the ALJ. 5 U.S.C. § 557(b); *Knapp*, 796 F.3d at 454. However, when the Judicial Officer does not accept the findings of the ALJ, we must examine the evidence and findings of the Judicial Officer more critically than we would if the Judicial Officer and the ALJ were in agreement. *Id.*

We review the Judicial Officer's legal conclusions de novo but with the appropriate level of deference to her interpretations of the AWA and of USDA regulations. *Knapp*, 796 F.3d at 454. We review the Judicial Officer's choice of sanction for abuse of discretion. *Id.* We may overturn the sanctions only if they are "unwarranted in law or without justification in fact." *Id.* (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186, 93 S. Ct. 1455, 36 L.Ed.2d 142 (1973)).

III.

A.

Petitioners contend that the Judicial Officer improperly shifted the burden of proof to them, requiring them to disprove the allegations that they violated the AWA. Pursuant to 5 U.S.C. § 556(d), the USDA had the burden of proof to establish that Petitioners violated the AWA. The Judicial Officer did not shift the burden of proof to Petitioners when she weighed the evidence presented. Rather, she concluded that the preponderance of the evidence supported the conclusion that Petitioners committed the alleged violations.

Petitioners also contend that the findings of the Judicial Officer that they violated various provisions of the AWA are not supported by substantial evidence. Both the ALJ and the Judicial Officer determined that Petitioners committed the following violations of the AWA:

(1) August 2, 2010 willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) by failing to have a responsible person available to provide access to APHIS officials to conduct compliance investigations;

(2) September 28, 2012 violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) by failing to provide access to allow APHIS officials to conduct an inspection;[2]

[2] The ALJ concluded that this violation of the AWA was not willful. However, only one violation of the AWA must be willful to revoke or suspend an exhibitor's license. *See* 7 U.S.C. § 2149; *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991) (noting only one willful violation is needed to revoke a license); *see*

(3) April 20, 2013 willful violations of 9 C.F.R. §§ 2.131(b)(1), (c)(1), and (d)(3) by failing to handle an adult tiger with sufficient distance and/or barriers between the tiger and the public and failing have the tiger under the direct control and supervision of a knowledgeable and experienced handler;[3] and

(4) November 14-19, 2015 willful violations of 9 C.F.R. § 2.126(c) by failing to timely submit an accurate travel itinerary for several animals.[4]

We agree that there is substantial evidence to support these violations.

The consolidated complaints also allege that petitioners committed numerous violations of the AWA by failing to meet the minimum standards promulgated under Part 3 of the Act. Those violations included the following:

(1) March 10, 2011 violations of 9 C.F.R. §§ 3.125(a) and 3.128 by failing to maintain the tiger enclosures properly;

(2) September 25, 2013 violations of 9 C.F.R. §§ 3.76(c), 3.125(a), and 3.131(c) related to facilities upkeep;

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also Pearson v. U.S. Dep't of Agric., 411 F. App'x 866, 872 (6th Cir. 2011) (same). Whether the September 28, 2012 violation was willful is not material.

[3] The ALJ treated this incident as a single violation of the AWA. The Judicial Officer concluded that this incident resulted in two violations of the AWA because Petitioners (1) failed to handle an adult tiger with sufficient distance and/or barriers between the tiger and the public, in violation of 9 C.F.R. § 2.131(c)(1) and (2) failed to have the tiger under the direct control and supervision of a knowledgeable and experienced handler, in violation of 9 C.F.R. § 2.131(d)(3).

[4] The ALJ treated this incident as a single violation of the AWA. The AWA provides that "[e]ach violation and each day during which a violation continues shall be a separate offense." 7 U.S.C. § 2149(b). The Judicial Officer concluded that this incident resulted in six violations of the AWA because each day of the November 14-19 travel itinerary violation constituted a separate violation of the Act.

(3) January 8, 2015 violation of 9 C.F.R. § 3.127(b) by failing to provide tigers with adequate shelter from inclement weather;

(4) May 13, 2015 violation of 9 C.F.R. § 2.126(c) by failing to timely submit an accurate travel itinerary for two groups of tigers;

(5) May 13, 2015 violations of 9 C.F.R. §§ 3.75(b), 3.75(c)(1)(i), 3.77(c), 3.125(a), and 3.131(c) related to minimum standards for housekeeping and housing;

(6) May 13, 2015 violation of 9 C.F.R. § 3.81 by failing to make an environmental enrichment plain available on request.

Petitioners maintain that there is not substantial evidence to support the aforementioned violations.[5] Even under the more critical standard employed when the ALJ and Judicial Officer disagree, *see Knapp*, 796 F.3d at 454, we conclude there is substantial evidence to support these violations.

B.

Petitioners also contend that the Judicial Officer abused her discretion in revoking the exhibitor license issued to Terranova Enterprises, Inc. The AWA authorizes the Secretary to revoke an exhibitor's license following a single, willful violation of the Act. *See* 7 U.S.C. § 2149; *Cox*, 925 F.2d at 1105; *see also Pearson*, 411 F. App'x at 872. Further, APHIS recommended that the exhibitor license issued to Terranova Enterprises, Inc. be revoked. Although the recommended sanction is not dispositive, "[t]he administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the

[5] The Complaints also alleged, and the Judicial Officer agreed, that Petitioners violated 9 C.F.R. § 2.40(a)(1) on May 13, 2015 by failing to have a complete written program of veterinary care. In their principal brief on appeal, Petitioners do not challenge the Judicial Officer's determination related to that violation. Any argument regarding the May 13, 2015 violation of 9 C.F.R. § 2.40(a)(1) is therefore waived. *See, e.g., Goodman v. Harris Cty.*, 571 F.3d 388, 399 (5th Cir. 2009) (concluding that issues not briefed on appeal are waived).

regulated industry." *See Knapp*, 796 F.3d at 466 (quoting *In re S.S. Farms Linn Cnty., Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991)). Petitioners committed more than one willful violation of the AWA, so we cannot say that revocation of the license issued to Terranova Enterprises, Inc. is "unwarranted in law or without justification in fact." *Knapp*, 796 F.3d at 454 (quoting *Butz*, 411 U.S. at 186, 93 S. Ct. 1455).

IV.

The petition for review is DENIED.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISION

In re: CARRIE LEO, an individual, doing business as CARING FOR COTTONTAILS WILDLIFE RESCUE & REHABILITATION, a New York State corporation.
Docket No. 20-J-0118.
Decision and Order.
Filed September 8, 2020.

AWA.

John V. Rodriguez, Esq., for APHIS.
Carrie Leo, *pro se* Respondent.
Decision and Order by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S CROSS-MOTION FOR DISMISSAL OF ORDER TO SHOW CASUE AND SUMMARY JUDGMENT

Preliminary Statement

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) ("AWA"); the regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules of Practice"). The matter initiated on April 21, 2020 with an Order to Show Cause Why Animal Welfare Act License 21-C-0435 Should Not Be Terminated ("Order to Show Cause") filed by the Administrator of the Animal and Plant Health Protection Service, United States Department of Agriculture ("APHIS" or "Complainant").

On June 19, 2020, Complainant filed a Motion for Summary Judgment against Carrie Leo, an individual doing business as Caring for Cottontails Wildlife Rescue & Rehabilitation Center, Inc., a New York State corporation ("Respondent"), including a Memorandum of Points and

Authorities, based on section 1.143(b) of the Rules of Practice (7 C.F.R. § 1.143(b)). On July 30, 2020, Respondent filed an answer to Complainant's Motion, wherein Respondent raised affirmative defenses and set forth counter-motions for dismissal of Complainant's Order to Show Cause and summary judgment. Complainant filed a response thereto on August 3, 2020.

Based on careful review of the pleadings and evidence before me, I find there are no issues of material fact to warrant a hearing in this matter. As set out further below, I find that Respondent's actions render her unfit to hold an AWA license as she (1) would be operating in violation or circumvention of State or local laws and (2) has been found to have violated State or local laws or regulations pertaining to the transportation ownership, neglect, or welfare of animals. Therefore, Complainant's Motion for Summary Judgment shall be granted, and Respondent's AWA license shall be terminated. For the same reasons, as also set forth below, Respondent's counter-motions for dismissal and summary judgment shall be denied.

This Decision and Order is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

Jurisdiction and Burden of Proof

The AWA vests the United States Department of Agriculture ("USDA") with the authority to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the AWA.[1] Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research for exhibition, must obtain a license or registration issued by the Secretary of Agriculture.[2] Further, the AWA authorizes the Secretary to promulgate appropriate regulations, rules, and

[1] *See* 7 U.S.C. §§ 2131, 2133; Pub. L. No. 99-198 § 1752, 99 Stat. 1354, 1645 (1985) (codified at 7 U.S.C. § 2143(a) (1994)); *Animal Legal Defense Fund, Inc. v. Perdue*, 872 F.3d 602, 607-08 (D.C. Cir. 2017).

[2] 7 U.S.C. § 2133.

orders to promote the purpose of the AWA.[3] The AWA and related Regulations fall within the enforcement authority of the Animal and Plant Health Inspection Service ("APHIS"), an agency of USDA.[4] APHIS is the agency tasked to issue licenses under the AWA.[5]

As noted above, APHIS filed its Order to Show Cause[6] pursuant to the Rules of Practice, which apply to the AWA and related Regulations. The case was assigned to me on June 9, 2020 and is properly before me for resolution.

APHIS, as the proponent of an order against Respondent in this proceeding, has the burden of proof.[7] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act, such as this one, is the preponderance of the evidence.[8]

Furthermore, the Judicial Officer has set forth the standard for

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[3] 7 U.S.C. § 2151.

[4] *See ALDF v. Perdue*, 872 F.3d at 607; Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42089, 42089 (July 14, 2004) (to be codified at 9 C.F.R. pts. 1, 2).

[5] *ALDF*, 872 F.3d at 607-08.

[6] *See* 7 C.F.R. § 1.132 ("*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.").

[7] 5 U.S.C. § 556(d).

[8] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *White*, 73 Agric. Dec. 114, 153 (U.S.D.A. 2014); *Tri-State Zoological Park of W. Md.*, 72 Agric. Dec. 128, 174 (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); *Schmidt*, 66 Agric. Dec. 159, 178 (U.S.D.A. 2007); *Lawson*, 57 Agric. Dec. 980, 1015 (U.S.D.A. 1998) ("The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence."); *Lawson*, 57 Agric. Dec. 980, 1098 (U.S.D.A. 1998) ("Complainant has the burden of proving a violation of the Animal Welfare Act and [the] Regulations [and Standards] by a preponderance of the evidence.") (citing *Lesser*, 52 Agric. Dec. 155, 166 (U.S.D.A. 1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994)).

summary judgment in a proceeding before a USDA Administrative Law Judge as follows:

> *The Summary Judgment Standard*
>
> The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance. A factual dispute of substance is present if sufficient evidence exists on each side so that a rational trier of fact could resolve the dispute either way and resolution of the dispute is essential to the proper disposition of the claim. The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the fact dispute must be material. The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.
>
> If the moving party supports its motion for summary judgment, the burden shifts to the non-moving party who may not rest on mere allegation or denial in the pleadings, but must set forth facts showing there is a genuine issue for trial. In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials. In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor.

Knaust, 73 Agric. Dec. 92, 98-99 (U.S.D.A. 2014) (footnotes omitted).

Statutory and Regulatory Authority

Congress enacted the AWA, in part, "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."[9] To achieve this purpose, Congress provided that the "Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe[.]"[10] The power to require and issue licenses under the AWA includes the power to terminate a license and to disqualify a person whose license has been terminated from becoming licensed.[11]

The AWA authorizes the Secretary of Agriculture to "promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]."[12] The Regulations specify certain bases for denying an initial application for an AWA license[13] and further state that an AWA license may be terminated for any reason that an initial license application may be denied.[14] Applicable here is section 2.11(a) of the Regulations (9 C.F.R. § 2.11(a)), which provides that a "license will not be issued to any applicant who . . . [i]s or was operating in violation or circumvention of any Federal, State, or local laws"[15] or "has been found to have violated any Federal, State, our local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act."[16]

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[9] 7 U.S.C. § 2131(1).

[10] 7 U.S.C. § 2133.

[11] *See Bauck*, 68 Agric. Dec. 853, 856, 862 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 105-06 (U.S.D.A. 2009); *Bradshaw*, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991).

[12] 7 U.S.C. § 2151.

[13] *See* 9 C.F.R. § 2.11.

[14] 9 C.F.R. § 2.12 ("A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.").

[15] 9 C.F.R. § 2.11(a)(5).

[16] 9 C.F.R. § 2.11(a)(6).

Procedural History

APHIS initiated this proceeding on April 21, 2020 by filing an order to show cause why Respondent's AWA license should not be terminated ("Order to Show Cause").[17] The Order to Show Cause states, in pertinent part:

> The Respondent pled guilty to two violations of the State law of New York pertaining to the welfare and ownership of animals, and maintaining accurate records involving animals. The Respondent's state LCPEE license has been revoked, based in part, on the two violations of State law pertaining to animals and maintaining accurate records involving the animals. The Respondent's actions render her unfit to hold an AWA license as she: 1. would be operating in violation or circumvention of State or local laws; 2. has been found to have violated State or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals; and 3. has refused to provide APHIS officials access for inspection. The Administrator has determined that the Respondent's continuous possession of an AWA license would be contrary to the purpose of the Act, and that said license should be terminated.

Order to Show Cause at 4. Moreover, the Order to Show Cause requested "this proceeding be decided based upon the written record, or by summary judgment; or, alternatively, following an oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and that such order or orders be issued as are authorized by the Act and warranted under

[17] The Order to Show Cause included five attachments: (1) New York State Department of Environmental Conservation, License to Collect or Possess – Education/Exhibition: License Information/Conditions; (2) New York State Arrest Records for Carrie M. Leo; (3) Certificate of Conviction in Case No. 16080141 (State of New York, Wayne County, Macedon Town Court); (4) July 20, 2018 Hearing Report of Richard A. Sherman, Administrative Law Judge (DEC Case No. OHMS 2017-72265); (5) November 7, 2018 Order of the Commissioner (DEC Case No. OHMS 2017-72265).

the circumstances."[18]

On June 2, 2020, Respondent filed an answer that admitted some allegations of the Order to Show Cause, denied other allegations of the Order to Show Cause, and raised thirteen "affirmative defenses."[19]

On June 16, 2020, I issued an order ("Exchange Order") setting deadlines for prehearing submissions by each party.[20]

On June 19, 2020, APHIS filed a Motion for Summary Judgment "based on section 1.143(b) of the Rules of Practice that govern proceedings under the Animal Welfare Act (7 C.F.R. § 1.143(b)), on all of the pleadings and papers on file herein and on [an] attached memorandum of points and authorities."[21] On July 30, 2020, following two extensions of time,[22] Respondent filed an "Answer to Complainant's Motion for

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[18] Order to Show Cause at 4-5.

[19] *See* Answer at 1-7. The Answer also included an attachment: "Answer to Commissioner Seggos' Final Determination of November 7, 2018" ("Attachment 1").

[20] Pursuant to the Exchange Order, Complainant had until August 17, 2020 to file with the Hearing Clerk a list of exhibits and witnesses and to send copies of its exhibits and list to Respondent. Respondent was given until October 16, 2020 to do the same. *See* Exchange Order at 1-2. Complainant filed its Witness and Exhibit List on August 17, 2020. Respondent has not filed a list of witnesses and exhibits, but her deadline for doing so has yet to pass. On August 18, 2020, Respondent filed a "Request to Produce Documents" and "Notice of Objection to Complainant's Exhibit List." Given the herein ruling of summary judgment against Respondent, however, it is unnecessary for me to reach a determination on Respondent's Request and Objection.

[21] Motion for Summary Judgment at 1. The Motion includes a "MEMORANDUM OF POINTS AND AUTHORITIES and an "ATTACHMENT 1," composed of Respondent's AWA license documents.

[22] *See* Order Granting Respondent's Unopposed Request for Extension of Time to Respond to Complainant's Motion for Summary Judgment (filed July 14, 2020); Order Granting Respondent's Second Request for Extension of Time to Respond to Complainant's Motion for Summary Judgment (filed July 24, 2020).

Summary Judgment & Counter-Motion" that included several exhibits.[23] Respondent's Counter-Motion asserted that "Complainant's Order to Show Cause Should be Dismissed in its entirety upon summary judgment in favor of the Respondent."[24]

On August 3, 2020, Complainant filed a "Response to Respondent's Answer to Complainant's Motion for Summary Judgment" that "move[d] for immediate summary judgment to have the Respondent's AWA license 21-C-0435 terminated without a hearing" and "move[d] for denial of Respondent's counter-motion."[25] Respondent filed an Exhibit 5 on August

[23] The "Exhibit List" included with Respondent's Answer and Counter-Motion identified the following: (1) "Respondent's Letter to USDA General Counsel, Steve Vaden," dated 04/22/2019; (2) "Email Thread between Rodriguez and Leo," dated 03/26/2020; (3) "Email from Respondent to Complainant," dated 04/03/2020; (4) "Letters indicating incomplete and/or inaccurate paperwork," dated "various"; (5) "Email between state and federal staff members," dated "*pending*"; and (6) "Images of Opossum Bacterial Infections," dated 8/17/2019. However, the cover pages for Exhibits 4 and 5 were marked "*pending*" with no actual documents to follow.

[24] Respondent's Answer to Complainant's Motion for Summary Judgment ("Answer to MSJ") at 21.

[25] Response to Respondent's Answer to Complainant's Motion for Summary Judgment ("Response to Answer to MSJ") at 7. The Response included two attachments: (1) print-out of U.S. DEP'T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERVS., ENFORCEMENT SUMMARIES, https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-panels/enforcement-summaries; and (2) print-out of N.Y. ENVTL. CONSERV. LAW § 71-4001 (McKinney 2019). In the Response, Complainant requested that "Respondent be denied from supplementing her Answer MSJ and filing and further motions as to the MSJ after 4:30 p.m. Eastern on Friday, July 31, 2020." *Id.* at 6 (noting that Respondent "failed to file Exhibits [4 and 5] to her Answer MSJ"). I did not grant Complainant's request, as Complainant failed to show how it would be prejudiced by supplementation.

5, 2020 and Exhibits 4A, 4B, 4C, and 5 on August 10, 020[26].[27]

Summary of the Evidence[28]

Admissions

In her Answer to APHIS's Order to Show Cause, Respondent failed to deny—and therefore admitted[29]—that she is an individual doing business

[26] The "Exhibit 5" filed on August 5, 2020 includes two emails—one from William V. Powell and one from Andrea D'Ambrosio—as well as Respondent's explanations regarding said emails. The August 10, 2020 exhibits include: documents relating to the denial of Respondent's LCPEE application (Exhibit 4A); documents relating to the renewal application of a different licensee (Exhibit 4B); a letter that purportedly serves as an "example [of] many wildlife rehabilitators who turn in annual rehabilitation logs grossly late for submission" (Exhibit 4C); and emails from William V. Powell and Andrea D'Ambrosio, as well as Respondent's explanations regarding said emails (Exhibit 5) (same as Exhibit 5 filed on August 5, 2020).

[27] On August 25, 2020, Complainant filed a "Motion to Strike Respondent's Answer to Complainant's Motion for Summary Judgment Exhibits 4 & 5." However, the Motion fails to demonstrate how Complainant would be prejudiced by my admitting Respondent's exhibits to the record, and Complainant's sole reason for objecting appears to be that the exhibits were filed after Respondent's deadline to answer Complainant's Motion for Summary Judgment had passed. *See* Motion to Strike at 2-3; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* [party], however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (internal quotations omitted). Therefore, Complainant's Motion to Strike Respondent's Exhibits 4 and 5 is DENIED.

[28] This Decision and Order relies upon the pleadings and upon declarations and documentary evidence attached to APHIS's Order to Show Cause, Respondent's Answer to Notice to Show Cause, APHIS's Motion for Summary Judgment, Respondent's Answer to Motion for Summary Judgment and Counter-Motion, APHIS's Response to Respondent's Answer to Motion for Summary Judgment and Counter-Motion, and the exhibits filed by Respondent on August 5, 2020 and August 10, 2020.

[29] *See* 7 C.F.R. § 1.136(b)(1),(c); Answer at 1-2.

as Caring for Cottontails Wildlife & Rescue Rehabilitation, Inc.; that she operated as an exhibitor, as that term is defined in the Act and Regulations; and that she held AWA license 21-C-0435. Respondent further admitted she was convicted of two offenses in the State of New York, Wayne County: (1) failing to provide proper caging facilities for opossums in violation of Condition #10 of her New York State License to Collect or Possess – Education/Exhibition ("LCPEE"); and (2) failing to submit an accurate and complete inspection report in violation of Condition #22 of her LCPEE.[30] In addition, Respondent admitted that on or about November 7, 2018, the Commissioner of the New York State Department of Environmental Conservation issued an order revoking Respondent's New York State LCPEE (DEC Case No. OHMS 2017-72265).[31]

Documentary Evidence

APHIS Exhibits[32]

CX-1	New York State Department of Environmental Conservation, License to Collect or Possess – Education/Exhibition: License Information/Conditions
CX-2	New York State, Arrest Records for Carrie M. Leo
CX-3	Certificate of Conviction in Case No. 1608141 (State of New York, Wayne County, Macedon Town Court)
CX-4	July 20, 2018 Hearing Report of Richard A. Sherman, Administrative Law Judge (DEC Case No. OHMS

[30] *See* Answer at 1.

[31] *Id.* at 2.

[32] Official notice is taken of CX-3 (Certificate of Conviction in Case No. 1608131, State of New York, Wayne County, Macedon Town Court), CX-4 (Hearing Report of ALJ Richard A. Sherman, DEC Case No. OHMS 2017-72265), and CX-5 (Order of the Commissioner, DEC Case No. OHMS 2017-72265). 7 C.F.R. § 1.141(h)(6).

	2017-72265)
CX-5	November 7, 2018 Order of the Commissioner (DEC Case No. OHMS 2017-72265)
CX-6	AWA Class C Exhibitor License Documents (No. 21-C-0435)[33]
CX-7	Print-out of APHIS's "Enforcement Summaries" webpage from USDA.gov
CX-8	Print-out of McKinney's Consolidated Laws of New York Annotated § 71-4001

Respondent Exhibits

RX-1	Answer to Commissioner Seggos's Final Determination of November 7, 2018
RX-2	April 22, 2019 Letter from Respondent to Secretary Sonny Perdue (CC to Steven Vaden, General Counsel)
RX-3	March 2020 email thread between Respondent and John V. Rodriguez

[33] These documents include: Application for License Renewal dated 7/23/19; AWA License Certificate No. 21-C-0435 (Expiration Date: August 25, 2020); Application for License Renewal dated 8/17/18; AWA License Certificate No. 21-C-0435 (Expiration Date: August 25, 2019); Application for License Renewal dated 7/31/17; AWA License Certificate No. 21-C-0435 (Expiration Date: August 25, 2018); Application for License Renewal dated 8/19/16; AWA License Certificate No. 21-C-0435 (Expiration Date: August 25, 2017); Application for License Renewal dated 8/1/15; AWA License Certificate No. 21-C-0435 (Expiration Date: August 25, 2016); Application for License (New License) dated 1/4/13; AWA License Certificate No. 21-C-0409 (Expiration Date: February 28, 2014).

RX-4	April 3, 2020 email from Respondent to John V. Rodriguez
RX-5A	New York State Department of Environmental Conservation, Notices of Application/License Denial
RX-5B	Documents from renewal application of unidentified licensee, with explanation by Respondent
RX-5C	September 25, 2005 letter from Elise Able of Fox Wood Wildlife Rescue, Inc., with explanation by Respondent
RX-6	Images of bacterial infections in the Virginia opossum
RX-7	May 12, 2017 email from William V. Powell and March 29, 2017 email from Andrea D'Ambrosio, with explanations by Respondent

I hereby admit to the record all of the exhibits identified herein above.

Discussion

As previously noted, an administrative law judge may enter summary judgment if the pleadings, affidavits, or other materials show there is no genuine issue as to any material fact.[34] An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim.[35] The

[34] *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); *see also Livingston Care Ctr. v. Dep't of Health & Human Servs.*, 108 F. App'x 350, 354 (6th Cir. 2004) ("This Court recently determined that the rule which allows administrative law judges to grant a summary judgment without an in-person haering is legally enforceable.").

[35] *Wallace v. Leidos Innovations Corp.*, 805 F. App'x 389, 392 (6th Cir. 2020);

mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment, as the factual dispute must be "material to an issue affecting the outcome of the case."[36]

If the moving party supports its motion, the burden then shifts to the non-moving party.[37] The non-moving party may not rely upon the mere allegations or denials of her pleading; rather, must offer specific facts showing there is a genuine issue for hearing.[38] The non-moving must identify such facts by reference to affidavits, depositions, transcripts, or specific exhibits.[39] The non-moving party may not rest upon ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at hearing.[40] However, all evidence must viewed in the light most favorable to the non-moving party.[41]

I. No Genuine Issue of Material Fact

The material facts are not in dispute in this case, and a hearing is therefore unnecessary. As previously discussed, sections 2.11 and 2.12 of the Regulations (9 C.F.R. §§ 2.11 and 2.12) authorize the Department to terminate the AWA license of any person, at any time, who "[i]s or was operating in violation or circumvention of any Federal, State or local

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Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998);

[36] *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (citing *Anderson*, 477 U.S. at 247-49; *Spencer v. Zimmerman*, 873 F.2d 256, 257 (11th Cir. 1989)); *see Schwartz v. Bhd. of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

[37] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

[38] *Celotex Corp.*, 477 U.S. at 324; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993).

[39] *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988)

[40] *Id.* at 793-94.

[41] *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); *Anderson*, 477 U.S. at 242-43; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

laws"[42] or "has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act."[43] As set out herein, the record is undisputed that Respondents have "been found to have violated . . . Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals . . ."[44] Thus, Complainant has met its burden of showing that Respondent's actions render her unfit to hold an AWA license as she (1) would be operating in violation or circumvention of State and local laws and (2) has been found to have violated State or local laws or regulations related to the ownership and welfare of animals.

It is undisputed that on or about December 12, 2017, the State of New York, Wayne County, in Case No. 1608141, convicted Respondent of the offenses cited in Arrest Records BF0195322 and BF0195333.[45] In fact, Respondent pleaded guilty to both offenses,[46] each of which pertains to the transportation, ownership, neglect, or welfare of animals: (1) failing to provide proper caging facilities for opossums in violation of LCPEE #623 Condition 10 and (2) failing to submit an accurate and complete exhibition report in violation of LCPEE #623 Condition 22.[47] Respondent's guilty pleas and convictions meet the standard imposed by 9 C.F.R. § 2.11(a)(6).[48]

Further, Complainant has established that Respondent's LCPEE (New York State License to Collect or Possess – Education/Exhibition) was

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[42] 9 C.F.R. § 2.11(a)(5).

[43] 9 C.F.R. § 2.11(a)(6).

[44] 9 C.F.R. § 2.11(a)(5).

[45] *See* CX-3.

[46] *See id.*

[47] *See* CX-2; CX-3.

[48] *See* 9 C.F.R. § 2.11(a)(6) ("A license will not be issued to an applicant who . . . has pled *nolo contendre* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals[.]").

revoked. There is no dispute that on or about July 20, 2018, after an administrative hearing, DEC Administrative Law Judge Sherman ("ALJ Sherman") recommended that DEC Commissioner Basil Seggos ("Commissioner Seggos") issue an order revoking Respondent's LCPEE.[49] The recommendation was based in part on Respondent's failure to submit timely reports to the DEC (the conviction of Arrest Record BF0195333) and failure to comply with the terms and conditions of LCPEE #623 (the conviction of Arrest Record BF0195322).[50] There also is no dispute that on or about November 7, 2018, Commissioner Seggos, in *In re Carrie Leo*, DEC Case No. OHMS 2017-72265, issued a decision upon ALJ Sherman's recommendation and revoked Respondent's New York State license, LCPEE #623.[51] There is no question that allowing Respondent to maintain her AWA license would empower her to circumvent the revocation of her New York State LCPEE in violation of 9 C.F.R. § 2.11(a)(5).[52]

Complainant has proven by a preponderance of the evidence that Respondent qualifies for license termination pursuant to both 9 C.F.R. §§ 2.11(5) and 2.11(6).[53] Accordingly, I find that summary judgment—in favor of Complainant—is appropriate in this case.[54]

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[49] *See* CX-4.

[50] *See id.*

[51] *See* CX-5.

[52] *See* 9 C.F.R. § 2.11(a)(5) ("A license will not be issued to an applicant who . . . [i]s or would be operating in violation or circumvention of any Federal, State, or local laws[.]"); *Ludwig*, 71 Agric. Dec. 449, 454 (U.S.D.A. 2012) (finding the petitioner's failure to maintain a state license met the standards imposed in 9 C.F.R. § 2.11(a)(5)).

[53] *See Ash*, 71 Agric. Dec. 900, 913-14 (U.S.D.A. 2012) (holding that termination was the appropriate sanction where the "proceeding was instituted under the authority of the Secretary of Agriculture to terminate an Animal Welfare Act license and the Administrator consistently sought termination of [Respondent's] Animal Welfare Act license").

[54] *See Bauck*, 68 Agric. Dec. 853, 858 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010) ("I have repeatedly held summary judgment

II. Respondent's Defenses

Respondent raises several defenses in response to both the Order to Show Cause and Complainant's Motion for Summary Judgment. As discussed below, however, these arguments—for which Respondent fails to cite any supporting legal authority—are without merit or are immaterial to the summary disposition of this case. Moreover, Respondent's filings are devoid of the type of supporting documentation necessary to establish a genuine issue for hearing.

First, Respondent denies that "both allegations [in the Arrest Records] were true 'offenses.'"[55] I reject this argument, as the record shows that the convictions resulting from those Arrest Records were substantiated numerous times. First, the offenses were substantiated on or about December 12, 2017, when the State of New York, Wayne County, in Case No, 16080141, convicted Respondent of the two offenses.[56] The offenses were also substantiated on or about July 20, 2018, in *In re Carrie Leo*, DEC Case No. OHMS 2017-72265, where Respondent admitted to pleading guilty to the two offenses and DEC met its burden to establish that Respondent violated Condition 10 of her LCPEE by failing to provide proper caging facilities for opossums[57] and Condition 22 of her LCPEE by failing to submit the LCPEE report form.[58] The offenses were again substantiated on or about November 7, 2018, in *In re Carrie Leo*, DEC Case No. OHMS 2017-72265, when Commissioner Seggos issued a decision upon the recommendation of ALJ Sherman and revoked

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appropriate in cases involving the termination of an Animal Welfare Act license and disqualification from becoming licensed under the Animal Welfare Act based upon prior criminal convictions. Hearings are futile where, as in the instant proceeding, there is no factual dispute of substance.") (citing *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 81 (U.S.D.A. 2009); *Vigne*, 67 Agric. Dec. 1060, 1060-61 (U.S.D.A. 2008); *Levinson*, 65 Agric. Dec. 1026, 1028 (U.S.D.A. 2006)).

[55] Answer at 1 ¶ 5.

[56] *See supra* note 44 and accompanying text.

[57] CX-4 at 12.

[58] CX-4 at 9.

Respondent's New York State LCPEE #623 based in part on the two offenses.[59] Finally, the offenses were substantiated on or about June 2, 2020, in Respondent's Answer to the Order to Show Cause.[60] Even assuming, *arguendo*, that Respondent's convictions of the Arrest Records were not qualifying offenses, to allow Respondent to continue holding her AWA license would nonetheless allow her to circumvent the revocation of LCPEE #623.[61]

Second, Respondent contends that the Order to Show Cause "is purposely vague."[62] As Complainant correctly points out,[63] the Rules of Practice simply require that a complaint or order to show cause "state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought."[64] I find that the Order to Show Cause satisfies each of these requirements, and is therefore not impermissibly vague.[65] Therefore, Respondent's contention that summary judgement should be denied because the Order to Show Cause is "purposely vague" is rejected.

Third, Respondent asserts that her New York State LCPEE #623 was improperly revoked for numerous reasons.[66] The issue to be determined in this AWA license-termination proceeding before me is whether Respondent has been found to have violated State or local laws or regulations related to the ownership and welfare of animals. Respondent does not deny that she has been so found but posits that those findings

[59] *See supra* note 50 and accompanying text.

[60] Answer at 1 ¶ 5.

[61] *See supra* note 51 and accompanying text.

[62] Answer at 3.

[63] *See* Motion for Summary Judgment at 9.

[64] 7 C.F.R. § 1.135(a).

[65] *See* Order to Show Cause at 1-5.

[66] Answer at 4.

were improper, which is, in essence, a collateral attack on the state proceedings, which is something beyond the scope of this AWA license-termination proceeding, and, therefore, will not be entertained. If Respondent wishes to contest her LCPEE revocation she must turn to the State Courts of New York, as that is the proper forum in which to direct her argument.[67]

Fourth, Respondent states it is her "understanding she pled with Alford Pleas therefore not allowing the citations to be able to be used against her again in another proceeding such as this administrative proceeding."[68] This argument lacks merit. While Respondent offers no actual evidence that an *Alford* plea was made, Complainant's evidence shows that Respondent pleaded guilty to two offenses.[69] An *Alford* plea allows a defendant to plead guilty to and to accept a guilty verdict and conviction as to criminal charges, while maintaining innocence as to them.[70] Even if Respondent were able to show that her convictions were indeed based on *Alford* pleas, an *Alford* plea is nonetheless a guilty plea and the conviction a conviction;[71] it would not change the fact that Respondent was found by the State of New York, Wayne County, to have violated a law or regulation relating to the transportation, ownership, neglect, or welfare of animals.[72] Further, if a *nolo contendre* plea would have been adequate grounds to terminate Respondent's license,[73] a guilty plea certainly suffices. And as Complainant correctly states: "In the end it really doesn't matter because Respondent's state LCPEE license has been revoked and to allow her to

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[67] *Bauck*, 68 Agric. Dec. at 863.

[68] Answer at 4; *see also* Respondent's Answer to MSJ at 18.

[69] *See* CX-3.

[70] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *see United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011); *United States v. Mancinas-Flores*, 588 F.3d 677, 681 (9th Cir. 2009).

[71] *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004); *see also United States v. Ramirez-Gonzalez*, 755 F.3d 1267, 1273 (11th Cir. 2014); *United States v. King*, 673 F.3d 274, 281 (4th Cir. 2012).

[72] *See* CX-3; *King*, 673 F.3d at 282-83 ("A court's acceptance of an *Alford* plea, like an acceptance of a guilty plea, indisputably qualifies as an 'adjudication.'").

[73] 9 C.F.R. §§ 2.11(a)(4), 2.12.

maintain AWA license 21-C-0435 would allow the Respondent to operate in violation or circumvention of State or local law."[74]

Fifth, Respondent contends that Complainant did "not sufficiently establish[] the element of willfulness required to revoke Respondent's license."[75] In its Answer to Complainant's Motion for Summary Judgment, Respondent states:

> [T]he willfulness factor was discussed in the *Answer* of the Respondent to the Complainant's *Order to Show Cause* because it can be considered one of the factors which comprise the egregiousness actions which the government finds offensive. Willfulness indicates good-faith v. bad-faith and an egregious error or offense lacks any good faith effort.

Answer to MSJ at 19. The applicable Regulations do not require a showing of willfulness.[76] Section 1.133(b)(3) of the Rules of Practice, however, states:

> As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, with a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the

[74] Complainant's Response to Respondent's Answer to MSJ at 5.

[75] Answer at 5; *see* Respondent's Answer to MSJ at 19.

[76] *See* 9 C.F.R. §§ 2.11 and 2.12.

> regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3). Although Complainant does use the term "willful" in its Order to Show Cause when alleging violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a),[77] Complainant's Motion for Summary Judgment is not based upon those allegations; they are immaterial to the outcome of this case.[78] Therefore, willfulness is not an element that Complainant need establish, and neither prior written notice nor an opportunity to demonstrate compliance were required. Nonetheless, Respondent's criminal convictions both evidence willfulness and implicate the ownership and well-being of animals.[79] Respondent's willfulness argument is therefore rejected.

The remainder of Respondent's "defenses" contend that the Secretary has treated Respondent unfairly and differently than other AWA licensees. Respondent contends the instant proceeding is a "shadow trial or judgment" wherein USDA "staff is able to accuse and convict Respondent of anything they desire and manipulate the law and people in order to achieve such ends."[80] Respondent provides no evidence that would support these contentions. Here the Respondent has indisputably been found to have violated State or local laws or regulations related to the ownership and welfare of animals. The AWA and regulations provide that

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[77] *See* Order to Show Cause at 2 ¶ 6, 4 ¶ 11.

[78] *See supra* note 36 and accompanying text.

[79] *See Bauck*, 68 Agric. Dec. at 861 (U.S.D.A. 2009) ("In a number of proceedings, I have terminated an Animal Welfare Act license based upon a licensee's criminal conviction without any written notice or opportunity to demonstrate or achieve compliance prior to the institution of the proceeding. The United States Court of Appeals for the District of Columbia Circuit has also held that criminal convictions fall within the willfulness exception of 5 U.S.C. § 558(c) and, thus, has upheld license terminations based on criminal convictions without any prior written notice and opportunity to demonstrate or achieve compliance.") (citing *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 691 (D.C. Cir. 2007), *cert. denied sub nom. Hirsch v. Dep't of Agric.*, 128 S. Ct. 1748 (2008); *Coosemans Specialties, Inc. v. U.S. Dep't of Agric.*, 482 F.3d 560, 567-78 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 628 (2007)).

[80] Respondent's Answer to MSJ at 6.

in such circumstances Respondent is thereby in violation of the AWA. Nothing herein demonstrates any untoward actions by USDA "staff" and certainly no ability by USDA staff to convict Respondent of anything USDA staff might desire or to in any respect manipulate the law or people. The Secretary has the authority to investigate or inspect "as he deems necessary to determine whether any . . . exhibitor . . . has violated or is violating any provision of [the AWA] or any regulations or standard issued thereunder."[81] Through this authority, delegated to him through 7 C.F.R. § 2.80(6), the Administrator of APHIS has determined that Respondent is in violation of the AWA and her continued possession of an AWA license would be contrary to the purposes of the Act. As found herein, I agree. The Administrator's determination as to other AWA licensees is not relevant to these proceedings.[82]

III. Respondent's Counter-Motion to Dismiss Order to Show Cause

Respondent submits that "Complainant's Order to Show Cause Should be Dismissed in its entirety upon summary judgment in favor of the Respondent."[83] Respondent's request is a motion to dismiss on the pleadings, which is prohibited by section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)).[84] Even if the Rules allowed for such a motion, dismissal of Complainant's Order to Show Cause would be

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[81] 7 U.S.C. § 2146.

[82] *See Terranova*, 78 Agric. Dec. 248, 342 (U.S.D.A. 2019) ("[N]othing in the Act, Regulations, or case law requires that the violations in one case must parallel those in another to justify license revocation."); *see also Koretoff v. Vilsack*, 614 F.3d 532, 543 n.3 (D.C. Cir. 2010) (Henderson, J., dissenting in part) (stating that "case-by-case determinations are the hallmark of administrative and judicial adjudications").

[83] Respondent's Answer to MSJ at 21.

[84] *See* 7 C.F.R. § 1.143(b)(1) ("Any motion will be entertained other than a motion to dismiss on the pleading."); *Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1647-48, 1650-51 (U.S.D.A. 1997) (Remand Order); *see also* 7 C.F.R. § 1.132 ("*Complaint* means the formal complaint, *order to show cause*, or other document by virtue of which a proceeding is instituted.") (emphasis added).

inappropriate under the circumstances. Other than a few general statements regarding her opinion of APHIS's actions, Respondent has failed to offer any support for her motion.[85] As found herein, APHIS has demonstrated that Respondent is in violation of the AWA. Therefore, Respondent's Cross-Motion to Dismiss Complainant's Order to Show Cause must be DENIED.

IV. Respondent's Counter-Motion for Summary Judgment

Respondent contends: "If summary judgment is granted at all, it should be granted in favor of the Respondent."[86] However, Respondent offers no evidence in support thereof and has failed to meet her burden as the moving party.[87] Furthermore, summary judgment is proper in cases where there is "no genuine issue as to any material fact."[88] That Respondent spends the majority of her Answer to Complainant's Motion for Summary Judgment arguing "there *are* issues of material fact" in this case completely undermines her argument.[89] Accordingly, Respondent's Counter-Motion for Summary Judgment must be DENIED.

Findings of Fact

1. Respondent Carrie Leo is an individual who does business as Caring for Cottontails Wildlife Rescue & Rehabilitation, Inc., whose mailing address is in New York. (Order to Show Cause at 1; Answer at 1).

2. At all times material herein, Respondent operated as an exhibitor, as that term is defined in the Act and Regulations, and held AWA license 21-C-0435. (Order to Show Cause at 1; Answer at 1).

3. On or about May 10, 2016, the State of New York cited

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[85] *See* Respondent's Answer to MSJ at 21.

[86] *Id.*

[87] *See Knaust*, 73 Agric. Dec. at 98-99 (footnotes omitted).

[88] *Anderson*, 477 U.S. at 255.

[89] Respondent's Answer to MSJ at 6 (emphasis added).

Respondent in Arrest Record BF0195322 for the offense of failing to provide proper caging facilities for opossums in violation of License to Collect or Possess – Education/Exhibition # 623 ("LCPEE #623") Condition 10 and in Arrest Record BF0195333 for the offense of failing to submit an accurate and complete exhibition report in violation of LCPEE #623 Condition 22. (CX-1; CX-2).

4. The State of New York initiated a proceeding before the Department of Environmental Conservation ("DEC") to revoke Respondent's New York State License to Collect or Possess – Education/Exhibition ("LCPEE # 623"). The bases, in part, for the State of New York's revocation proceeding were the offenses cited in Arrest Records BF0195322 and BF0195333. (CX-2; CX-4).

5. On or about December 12, 2017, the State of New York, Wayne County, in Case No. 1608141, convicted Respondent of the offenses cited in Arrest Records BF0195322 and BF019533. (CX-2; CX-3).

6. On or about July 20, 2018, DEC Administrative Law Judge Richard A. Sherman, in *In re Carrie Leo*, DEC Case No. OHMS 2017-72265, after a hearing, concluded and recommended the following:

> As detailed above, I conclude that Department staff has met its burden to establish that, as alleged in the notice of intent, respondent Carrie M. Leo (i) possessed wildlife without a proper license from the Department; (ii) failed to submit timely reports to the Department; (iii) failed to comply with the terms and conditions of LCPEE #623; and (iv) failed to comply with the terms of a federal license directly related to the activity authorized by LCPEE #623.
>
> Accordingly, I recommend that the Commissioner issue an order revoking LCPEE #623. I further recommend that the Commissioner direct respondent to transfer or otherwise dispose of all wildlife held at the facility without proper authorization from the Department within 60 days of service of the Commissioner's order.

(CX-4).

7. On or about November 7, 2018, DEC Commissioner Basil Seggos, in *In re Carrie Leo*, DEC Case No. OHMS 2017-72265, issued a decision upon the recommendation of Judge Sherman and revoked Respondent's New York State LCPEE #623. (CX-5). Commissioner Basil found that Respondent committed the following DEC violations:

> A. Failed to comply with License Conditions 6 (Addition or Replacement of Animals Without Written Authorization Prohibited), 10 (Providing Care for Animal[s]) and 22 (Education/Exhibition Reporting Requirement) of a License to Collect or Possess Certain Species of Wildlife for Education/Exhibition Purposes (LCPEE) #623;
>
> B. Failed to comply with the terms of a federal license directly related to the activity authorized by LCPEE #623[;]
>
> C. Possessed wildlife without a proper license from the Department of Environmental Conservation; and
>
> D. Failed to keep accurate records and submit timely reports to the Department.

(CX-5).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in Complainant's favor is appropriate.

3. Respondent has been found to have violated a State or local law or regulation pertaining to the transportation, ownership, neglect, or welfare

of animals, as provided in 9 C.F.R. § 2.11(a)(6).

4. Respondent's convictions of the offenses set forth in Arrest Records BF0195322 and BF0195333 involve the ownership and welfare of animals.

5. Respondent's convictions of the offenses set forth in Arrest Records BF0195322 and BF0195333 demonstrate that Respondent is unfit to hold Animal Welfare Act license 21-C-0435.

6. The Administrator of APHIS has shown good cause to grant the relief requested in the "Order to Show Cause Why Animal Welfare Act License 21-C-0435 Should Not Be Terminated" filed against Respondent on April 21, 2020.

7. To allow Respondent to maintain her AWA license would enable her to operate in circumvention of a State or local law in violation of 9 C.F.R. § 2.11(a)(5).

8. The termination of Respondent's AWA license pursuant to 9 C.F.R. §§ 2.11(a)(5), 2.11(a)(6), and 2.12 is appropriate, promotes the remedial purposes of the Animal Welfare Act, and is supported by the evidence of record.

ORDER

1. Complainant's Motion for Summary Judgment is GRANTED.

2. Respondent's Cross-Motion to Dismiss Complainant's Order to Show Cause is DENIED.

3. Respondent's Cross-Motion for Summary Judgment is DENIED.

4. Respondent's AWA license, 21-C-0435, is hereby TERMINATED in accordance with 9 C.F.R. § 2.12.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondent unless an

appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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FEDERAL MEAT INSPECTION ACT

DEPARTMENTAL DECISIONS

In re: SANDHILLS BEEF COMPANY; AND JACOB WINGEBACH.
Docket Nos. 20-J-0043; 20-J-0044.
Decision and Order.
Filed September 1, 2020.

FMIA.

Ciarra A. Toomey, Esq.; Tracy McGowan, Esq.l and Matthew Scott Weiner, Esq., for FSIS.
Jacob Wingebach, *pro se* Respondent.
Decision and Order by Tierney Carlos, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Preliminary Statement

This is an administrative proceeding to deny Federal inspection services to Sandhills Beef Company and Jacob Wingebach. This proceeding was instituted by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, alleging that Sandhills Beef Company and Jacob Wingebach ("Respondents") are unfit to receive Federal inspection services under Title I of the Federal Meat Inspection Act.

For the reasons discussed herein, I affirm the Administrator's refusal to grant Respondents' application for Federal inspection services.

Procedural History

This proceeding initiated with a complaint filed on February 21, 2020 by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture ("Complainant" or "FSIS"). The Complaint alleges Respondents are unfit to receive

Federal inspection services under Title I of the Federal Meat Inspection Act, as amended, ("FMIA"), 21 U.S.C. §§ 601 *et seq.*

Respondents filed an answer to the Complaint on March 2, 2020, which admitted the jurisdictional allegations in paragraph 1 of the Complaint and that the Secretary has jurisdiction in this matter. Respondents denied the remaining allegations. During subsequent telephone conferences with the parties, Respondents waived the right to be represented by counsel, waived the right to an oral hearing, and agreed the matter could be decided upon written submissions of both parties.

On May 8, 2020, I issued an order setting a briefing schedule for the parties.[1] In accordance therewith, Complainant filed its Opening Brief, List of Exhibits, Exhibits, List of Declarants, and Declarations on July 8, 2020. Respondents filed their Opening Brief, List of Exhibits, and Exhibits on August 7, 2020. On August 17, 2020, Complainant filed a Reply Brief thereto. Respondents also filed a Reply Brief on August 24, 2020.[2]

Written submission for both parties were reviewed, and the case is ready for decision.

Jurisdiction and Burden of Proof

[1] *See* Summary of May 7, 2020 Telephone Conference and Order Setting Briefing Schedule at 1-2.

[2] On August 25, 2020, Complainant filed a Motion to Strike Respondents' Reply Brief. *See* Motion to Strike at 2 ("Complainant requests that the 'Respondent's Reply Brief' filed on 8/24/2020 be stricken from the record to be considered in this proceeding. . . . In the event that this motion is denied, Complainant requests 10 days from the ALJ's decision to file a sur-reply."). On August 26, 2020, Respondent filed a response "request[ing] that the Court *not* strike 'Respondents' Reply Brief' filed on August 24." Response at 1 (emphasis added). Although the Rules of Practice do not grant Respondents the "*right* to reply to the response," the Judge may, in his or her discretion, order that a reply be filed. 7 C.F.R. § 1.143(d)) (emphasis added). Further, Complainant has not shown how it would be prejudiced by my admitting the Reply Brief to the record. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed[.]"). Therefore, Complainant's Motion to Strike Respondents' Reply Brief, including Complainant's request to submit a sur-reply, is DENIED.

This is a proceeding under the Federal Meat Inspection Act (21 U.S.C. §§ 601.1 *et seq.*) and the regulations promulgated thereunder (9 C.F.R. Subchapter E) ("Regulations"). FSIS filed its Complaint pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice") and the Rules of Practice that govern proceedings under the FMIA (9 C.F.R. §§ 500.1 through 500.8). The case was assigned to my docket on March 12, 2020 and is properly before me for resolution.

As the proponent of an order in this proceeding, Complainant FSIS has the burden of proof.[3] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[4] such as this one, is the preponderance of the evidence.[5] I find that a preponderance of the evidence supports the findings that Respondents have failed to comply with the FMIA and Regulations as alleged in the Complaint, and Respondents should therefore be denied Federal inspection services.

Discussion

The Federal Meat Inspection Act ("FMIA") governs the slaughtering of livestock and the processing and distribution of meat products in the United States.[6] In accordance with sections 603 and 621 of the FMIA, among other provisions, the Secretary is authorized to make rules and regulations setting national standards for meat inspection. To that end, the Secretary has promulgated 9 C.F.R. Subchapter A, Part 301 *et seq.*, which regulates meat inspection.

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[3] 5 U.S.C. § 556(d).

[4] 5 U.S.C. §§ 551 *et seq.*

[5] *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *Pearson*, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *Havana Potatoes of N.Y. Corp.*, 56 Agric. Dec. 1017, 1021 (U.S.D.A. 1997) (Order Den. Pet. for Recons.).

[6] *See Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455-56 (2012); *Levine v. Vilsack*, 587 F.3d 986, 988-89 (9th Cir. 2009); *Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (U.S.D.A. 1979), *aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981).

For federally inspected plants, the FMIA and Poultry Products Inspection Act (21 U.S.C. §§ 451 *et seq.*) charge the Secretary with a number of responsibilities, including ante- and post-mortem inspection of the livestock and carcasses, sanitation inspection in the establishments, enforcement of record-keeping requirements, and the training and supplying of inspectors to carry out these responsibilities. *See* 21 U.S.C. §§ 602-06; 21 U.S.C. §§ 455-57, 463. The Secretary in turn has established standards, including facilities requirements, inspection requirements, sanitation requirements, and record-keeping requirements. 9 C.F.R. §§ 301-35, 381; *see Dailey v. Veneman*, No. 01-3146, 2002 WL 31780191, at *2 (6th Cir. Dec. 3, 2002).

An establishment seeking Federal inspection services under FMIA must apply to the FSIS Administrator for a grant of inspection. 9 C.F.R. § 304.1(a). The granting of inspection services requires the submission of a Sanitation Standard Operating Procedures ("SSOP") Plan in compliance with 9 C.F.R. part 416 and a Hazard Analysis and Critical Control Point ("HACCP") Plan in compliance with 9 C.F.R. part 417.

FSIS Regulations authorize the Administrator to refuse to grant Federal inspection services if the applicant fails to submit a SSOP in compliance with 9 C.F.R. part 416 or a HACCP in compliance with C.F.R. part 417. *See* 9 C.F.R. § 500.7. In addition, 9 C.F.R. § 304.2(b) provides that "any application for inspection may be refused in accordance with the Rules of Practice in part 500 of this chapter." Under FSIS Rules of Practice, the FSIS Administrator may refuse to grant Federal inspection if an applicant: "(1) Does not have a HACCP plan as required by part 417 of this chapter; [or] (2) Does not have Sanitation Standard Operating Procedures as required by part 416 of this chapter[.]" 9 C.F.R. § 500.7(a)(1) and (2).

After review of the application submitted by Respondents and the written submissions of the parties, I find Respondents failed to submit a SSOP that meets the requirement of 9 C.F.R part 416 and a HACCP that meets the requirements of 9 C.F.R. part 417 and that the Administrator of FSIS was correct in denying Respondents Federal inspection services.

Respondents' application fails to provide a SSOP that meets the requirements of 9 C.F.R part 416.

Before being granted Federal inspection services, an establishment must develop written S SOPs, as required by 9 C.F.R. part 416 (9 C.F.R. § 304.3(a)). Pursuant to 9 C.F.R. § 416.12, an establishment's SSOPs "shall describe all procedures an official establishment will conduct daily, before and during operations, sufficient to prevent direct contamination or adulteration of product(s)." Procedures in the SSOPs that are to be conducted prior to operations shall be identified as such and shall address, at a minimum, the cleaning of food contact surfaces of facilities, equipment, and utensils. 9 C.F.R. § 416.12(c).

To begin with, Respondents acknowledge that 9 C.F.R. part 304 requires the submission of written procedures, SSOPs, recall procedures, and a HACCP; however, they argue that 9 C.F.R. part 304 does not require them to demonstrate the ability to implement any of the procedures contained in the documents, nor or are they required to "assuage" FSIS concerns over the implementation of those procedures. Respondents are mistaken. As previously noted, FSIS Regulations authorize the Administrator to refuse to grant Federal inspection services if the applicant fails to submit a SSOP in compliance with 9 C.F.R. part 416 or a HACCP in compliance with C.F.R. part 417. *See* 9 C.F.R. § 500.7. Inherent in the authority to refuse to grant Federal inspection services is the authority to review an establishment's ability to implement the procedures it has submitted in its application. Respondents' argument that they can submit any written documents and be entitled to a conditional grant of inspection without any review or critique by FSIS ignores the statutory authority of FSIS, the purpose behind 9 C.F.R., and common sense. According to Respondents' logic, they could submit a piece of paper entitled "SSOP" or "HACCP" with procedures they have no ability or intention of following, yet FSIS would be required to issue a conditional grant of inspection. FSIS has the statutory obligation and authority to review the written documents to insure they meet the requirements of 9 C.F.R. parts 416 and 417. Inherent in that authority is the authority to require establishments to prove the ability to implement the submitted procedures and the requirements of 9 C.F.R. parts 416 and 417 are met. To hold otherwise would render the Regulations meaningless and unenforceable.

The SSOPs submitted by Respondents in their application define a "food contact surface" as "the surface of a facility, equipment, or utensils intentionally, routinely and purposefully placed in direct contact with edible tissue" (CX-13 at 57). The SSOPs then "differentiate between edible and inedible tissue based on the status of the tissue as US Inspected and Passed, or not US Inspected and Passed, respectfully[sic]" (CX-13 at 57). Respondents' SSOPs also specify that "[s]urfaces intentionally, routinely and purposefully placed in direct contact[sic] edible tissues prior to FSIS postmortem inspection are non-food contact surfaces," and "[s]urfaces intentionally, routinely and purposefully placed in direct contact[sic] edible tissues after FSIS postmortem inspection are food contact surfaces" (*Id.* at 57-58). The food contact surfaces listed in the SSOPs include slaughter knives, slaughter hand saws, slaughter tables, and slaughter lugs/totes that "directly contact US Inspected & Passed carcasses and parts" (*Id.* at 59).

During the application process, FSIS repeatedly informed Respondents that their definition of "food contact surface" was not acceptable. Respondents refuse to accept FSIS's determination and insist that they are allowed to define "food contact surface" how they choose (CX-12; CX-15; CX-17). Respondents, a meat process plant and owner/operator, argue that since "food contact surfaces" is not defined in the statue, they, Respondents, can use their own definition of "food contact surfaces."[7] Respondents argue that food does not become food until it is edible and that food does not become edible until it is inspected and passed by FSIS.[8] Respondents' definition of "food" and thereby "food contact surface" is contrary to the common meaning of "food," contrary to common sense,

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[7] Respondents switch their arguments regarding definitions to suit their needs. Regarding the definition of "food," they argue that since the term is not defined in the regulations, they, Respondents, get to define "food," completely ignoring the dictionary definition and common sense and logic and instead defines it by differentiating between edible and inedible to somehow determine that something is not "food" until it is inspected and passed by FSIS inspectors. When defining "occur," they argue that when a word is not defined in the regulation it is appropriate to use the standard definition in the dictionary; however, even when using the dictionary use of occur they ignore the first definition in the dictionary and use only the second definition.

[8] *See* Respondents' Opening Brief at 18-19.

contrary to industrywide standards, and contrary to the regulatory purpose of the FMIA.

To begin with, Respondents' arguments in both their brief and reply brief consist largely of their interpretation of the relevant C.F.R. parts. However, Respondents' interpretation of the regulations is just that—Respondents' interpretation—and as such is entitled to little to no deference. It is well settled that an agency's interpretation of the statute which it is charged with administering, and especially an agency's interpretation of its own regulation, is entitled to great deference unless it is clearly erroneous or inconsistent with the language it interprets. *See Chem. Mfrs. Ass'n v. Nat. Resources Defense Council*, 470 U.S. 116, 125-126 (1985); *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969); *see also Chevron, U.S.A., Inc. v. Nat. Resources Defense Council*, 467 U.S. 837, 844 (1984); *Bailey v. Fed. Intermediate Credit Bank*, 788 F.2d 498, 499-500 (8th Cir. 1986), *cert. denied*, 479 U.S. 915 (1986). FSIS's interpretation of the meaning of "food" and thus, "food contact surface," and its interpretation of 9 C.F.R part 416 are not clearly erroneous or inconsistent with the language of C.F.R part 416 and are entitled to controlling weight. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Stanisic*, 395 U.S. at 72; *Udall v. Tallman*, 380 U.S. 1, 16, 17 (1965).

Moreover, Respondents' argument that it is reasonable to define "food" and thus "food contact surface" by differentiating between edible and inedible and the status of whether or not it has been inspected fails for several reasons. First, there is no need to define "food" and "food contact surface." As discussed below, there is no confusion as to the meaning of "food" or "food contact surface" and certainly no need to define it by such a convoluted method. Second, Respondents' differentiating between edible and inedible largely ignores the definition of edible, *i.e.*, "intended for use as human food." The whole point of the slaughter/inspection process is to process carcasses for use as human food. While the carcasses may be inedible for the purposes of sale, transport, or being placed in commence because they have not been inspected, they are still edible because they are "intended for use as human food"; as such, anything they contact during the slaughter process is a food contact surface. By insisting on defining "food" and "food contact surface" by differentiating between

edible and inedible and when it is inspected, Respondents have purposely created confusion where there is none.

Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *See Bilski v. Kappos*, 561 U.S. 593, 603 (2010) (citing *Diamond v. Diehr*, 450 U.S. 175, 182 (1981).

The plain and ordinary meaning of "food" is something that is capable of being eaten. Its status as food does not depend on whether or not it has been inspected by a Federal inspector. According to Respondents' definition of "food," an apple on a tree, a tomato grown in a backyard garden, and a fish caught by a recreational fisherman would not be edible and thus, not food, because they were never inspected by a FSIS inspector.

Respondents allege that in the absence of a definition, they are unable to differentiate between "food contact surface" and "non-food contact surface." A simple internet search would determine that the USDA defines "food contact surface" as any surface that may come in direct contact with exposed meat or poultry products; examples include conveyor belts, table tops, saw blades, augers, and suffers (CX-24). This definition is in accordance with common sense and logic, especially when used in the context of meat processing procedures. It is also in accordance with industry standards; for example, *Emerging Methods and Principles in Food Contact Surfaces Decontamination/Prevention* states that "food contact surfaces" comprise all surfaces that may come into contact with food products during production, processing and packing. Torstein Skara & Jan T. Rosnes, *Emerging Methods and Principles in Food Contact Surfaces Decontamination/Prevention*, INNOVATION & TRENDS IN FOOD MANUFACTURING & SUPPLY CHAIN TECHNOLOGIES 151 (C.E. Leadley ed., 2016) .

The ordinary, common definition of "food" is also consistent with the definitions used by PDS, Office of Policy and Program Development when it reviewed Respondents' application. PDS used the term "meat food product" as defined in 21 U.S.C. § 610(k) ("any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep swine or goat") and the term "capable of use as human food" as defined in 9 C.F.R. § 301.2 ("applies to any carcass, or part, or product of a carcass, of any animal, unless it is

denatured or otherwise identified as required by the regulations prescribed by the Secretary to deter is use as human food or is naturally inedible to humans (such as hoof, horns, and hides in their natural state"). *See* Linville Decl. ¶ 11.

Respondents' definition of "food contact surface" is also inconsistent with the definition of "food" in *Merriam-Webster Dictionary*, American Standard Version, which defines "food" as "material consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair, and vital processes and to furnish energy" or more simply "nutriment in solid form" (CX-26). Meat product satisfies this definition of "food" regardless of its location on the slaughter line. The same meat that qualifies as food once it receives the mark of Federal inspection is food prior to receiving the mark. Indeed, under Respondents' definition of "food," the meat products they prepare in their custom exempt slaughter operation would not be considered food at all because those products are not subject to Federal inspection.

Respondents' definition of "food contact surface" is also inconsistent with 9 C.F.R. § 416.12, which states that the SSOPs that are to be conducted prior to operations shall address at a minimum the cleaning of food contact surfaces of facilities, equipment, and utensils. Thus, 9 C.F.R. § 416.12 recognizes that the cleaning of food contact surfaces shall be conducted prior to the start of operations. Under Respondents' definition of "food contact surface," it would be impossible to have food contact surfaces prior to beginning operations since food would not become food until after it had processed, inspected, and passed by FSIS inspectors.

Respondents' claim that the phrase "food contact surface" is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to their application" and thus violates "due process" deserves little discussion. 9 C.F.R. part 416 and the phase "food contact surface" have been in use for over twenty years. I have been unable to find any ligation over the definition or meaning of "food" or "food contact surface." Apparently, men of common intelligence have had no problem understanding the terms for over twenty years. The food processing industry has used and adopted the term in its publications and training without any confusion. There is no need to define "food" or "food contact

surface" because any person of common intelligence knows what food means and understands that food contact surface means a surface that food comes into contact with. Respondents' claim of confusion and lack of understating of this basic and universal acceptable phase is simply not credible; rather, it is an attempt to avoid the regulatory requirements of 9 C.F.R. part 314.[9]

By ignoring the ordinary and plain meaning of "food" and instead restricting the definition of "food contact surface" to only those surfaces that come into contact with carcasses and parts that have been "U.S. Inspected and Passed," Respondents have purposely excluded sanitation procedures for equipment and utensils that come into contact with carcasses and parts prior to the point of final post-mortem inspection by FSIS. As a result, the SSOPs do not address sanitation procedures for equipment and hand tools used in the slaughter steps prior to post-mortem inspection, where contamination is likely to occur (CX-25; Sidrak Decl. ¶¶ 2, 3, 7; Linville Decl. ¶ 14).

Respondents argue that their definition of "food contact surface" does not exclude sanitation procedures for equipment and utensils throughout the slaughter process but rather cause such procedures to be addressed in their sanitation performance standards, which are not required to be provided prior to granting of a conditional grant of inspection. This argument fails for the simple reason that their definition of "food contact surface" is wrong. Respondents do not get to choose where to address sanitation procedures for food contact surfaces by using their own self-serving, illogical, and convoluted definition of "food contact surface." The cleaning of food contact surfaces of facilities, equipment, and utensils must be addressed in written SSOPs. 9 C.F.R. § 416(12).

FSIS's refusal to grant inspection services to an establishment that does not consider the meat it is processing to be food until it is inspected and passed by the FSIS is entirely reasonable. The self-serving, illogical definition of "food contact surface" and the refusal to provide an SSOP for equipment and utensils that contact edible carcasses and parts prior to post-

[9] Respondents' "due process" claim is also dismissed because they are receiving "due process" by the hearing process specified in 9 C.F.R § 500.7(b)).

mortem inspection by FSIS are sufficient grounds to deny Respondents' application for Federal inspection services.

The application fails to provide a HACCP that meets the requirements of 9 C.F.R. part 417.

Part 417 of 9 C.F.R. provides:

> Every official establishment shall conduct or have conducted for it, a hazard analysis to determine food safety hazards reasonably likely to occur in the production process and identify the preventive measures the food establishment can apply to control those hazards. The hazard analysis shall include food safety hazards that can occur before, during and after entry into the establishment. A food safety hazard that is reasonably likely to occur is one for which a prudent establishment would establish controls because it historically has occurred or because that is a reasonably likely to occur in the particular type of product being processed, in the absence of those controls.

9 C.F.R. § 417.2. Thus, 9 C.F.R. part 417 requires a HACCP plan that identifies food safety hazards ("FSHs") reasonably likely to occur ("RLTO") in the production process and preventive measures to control those hazards. In their application, Respondents determined that FSHs were RLTO at the Restrain/Stun/Bleed step in the processing procedure. However, their HACCP plan then determined that FSHs are NRLTO at any subsequent steps, including dehiding and evisceration.

Respondents argue that because they identified the restrain/stun/bleed steep as an area where FSHs are RLTC, they do not need to identity any other subsequent steps because those are not new FSHs but merely continuing FSHs from the restrain/stun/bleed step. Respondents argue that while 9 C.F.R. requires they determine FSHs RLTO in the production process, this language does not require them to identify every process or step in the production process where FSHs occur.

Respondents again argue that because the word "occur" is not defined in the Regulation, they can choose the definition. However, this time instead of making up a definition that suits their needs, Respondents argue they can choose the definition from the dictionary they deem appropriate.

Respondents rely on the American Standard Dictionary's definition of the term "occur," which is (1) to be found or met with or (2) to come into existence. Respondents claim they can choose which definition to apply when developing their HACCP, and they choose the second definition: "to come into existence." They use this definition to support their claim that they are not required to identify FSHs at any step subsequent to restrain/stun/bleed because the FSHs came into existence at the restrain/stun/bleed step, and any FSHs after that step is a continuing hazard and not one that "comes into existence" at a subsequent step in the process.

This argument fails for several reasons. First, Respondents do not get to pick and choose the definition that suits their purposes; second, it ignores the first definition of "occur" in the American Standard Dictionary; and third, it ignores the language of 9 C.F.R. and standard industry practices.

As previously pointed out, when words are not defined in a regulation they are assigned their ordinary, contemporary common meaning. *See Bilski v. Kappos*, 561 U.S. 593, 130 S. Ct. 3218, 3211 (2010). The definition of "occur" in the American Standard Dictionary is (1) to be found or met with or (2) to come into existence. Respondents cannot simply ignore the first meaning in the dictionary, especially when used in the context of FSHs and given that the purpose behind the Regulation is food safety for the American public. The common, plain meaning of the word "occur" is to be found or to come into existence. The common, everyday plain meaning of the word "occur" requires establishments to deal with FSH that are found or that come into existence during any stage in the production process. Using Respondents' definition of "come into existence" while ignoring "to be found" defeats the entire purpose of the Regulation. Under Respondents' definition, a meat processing plant would not need to identify any FSHs found after the restrain/stun/bleed step in the process.

Food safety hazards are found at various stages or steps throughout the meat processing production (Sidrak Decl. ¶ 7). 9 C.F.R. part 417 states the requirement to identify food safety hazards **in the production process**. *See* 7 C.F.R. § 417.2(a)(1). The requirement to identify FSH and preventive measure at each stage of the process is clear from the language. Raw meat products may become contaminated with pathogenic or disease-causing microorganisms such as salmonella, campylobacter, and shiga toxin producing Escherichia coli ("STES") throughout slaughter, sanitary dressing, and additional processing and handling steps. Once introduced, microorganisms may multiply and some cases produce toxins if the environmental conditions such as warm temperatures, allow. For this reason, establishments often have strict procedures to ensure that carcasses are dressed and processed in a cold environment and that the product is moved in a timely manner for storage in a cooler or freezer, as colder temperatures will inhibit growth of many microorganisms. (Sidrak Decl. ¶ 7). By failing to identify and address those additional hazards, FSIS determined that Respondents' HACCP failed to meet 9 C.F.R. part 417.

FSIS's interpretation of 9 C.F.R part 417 is not clearly erroneous or inconsistent with the language of 9 C.F.R part 417 and is entitled to controlling weight. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16, 17 (1965).

Respondents' HACCP Plan fails to provide any supporting rationale for determining that FSHs are NRLTC at any steps subsequent to Restrain/Stun/Bleed.

Respondents' HACCP plan determines that FSHs are RLTC at the Restrain/Stun/Bleed step of the production process. At all subsequent steps, including remove hair/hide, remove Head/Viscera, Harvest Variety Meats, Split carcass, Trim, Wash, Antimicrobial Treatment, Refrigerated Storage, and Ship steps in the application, Respondents determined that FSHs are NRLTO. In support of their determination Respondents repeat the following seemingly contradictory statement:

> Establishment grounds, facilities, equipment, utensils, sanitary operations and employee hygiene are potential

> sources of biological, chemical, or physical properties that may cause a food to be unsafe for human consumption. Since 2015, Sandhills Beef Company has slaughtered livestock under provisions of 9 CFR 303.1(a)(2). **Historically, biological, chemical, or physical properties that cause a food to be unsafe for human consumption have not been identified with establishment grounds, facilities, equipment, utensils, sanitary operations and employees. As a prudent establishment, Sandhills Beef Company would not establish preventive measures for establishment grounds, facilities, equipment, utensils, sanitary operations and employee hygiene.**[10]

(CX-13 at 44, 45, 46, 47) (emphasis added).

The above statement acknowledges that the establishment grounds, facilities, equipment, utensils, sanitary operations, and employee hygiene are potential sources of biological, chemical, and physical properties that may cause a food to be unsafe for human consumption, yet Respondents refuse to establish preventive measures because Sandhills Beef Company has not "historically" had problems. According to Respondents' logic, because they have operated a custom exempt facility since 2015 and no food safety hazards have been identified, that means they are exempt from the 9 C.F.R. part 417 provisions requiring written procedures for all operations in the future.

Apparently, Respondents believe that because something hasn't occurred in past, it will not occur in the future. This rational ignores the

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[10] This not only contradictory statement in the application. In the "Trim" section of his application, Respondents acknowledge that "[t]rimming is the only means of removing feces, ingest, and milk contamination from beef carcasses based upon the judgement that trimming is more effective for removing fecal contamination than alternative approaches. . . . As a prudent establishment Sandhills Beef Company would not establish preventive measures for visible fecal material" (CX-13 at 46).

language "or because there is a reasonable possibility that it will occur in the particular type of product being processed, in the absence of those controls."

FSIS has acknowledged that Respondents' determination that FSHs are NRLTO at subsequent steps in the production process may be a reasonable determination if Respondents can reference a prerequisite program in place to prevent or address the potential hazard (Linville Decl. ¶ 6). However, Respondents' application does not contain or reference any supporting prerequisite programs for the determinations that FSH are NRLTO at any steps subsequent to Restrain/Stun/Bleed and Respondents have repeatedly refused requests by FSIS for changes or additional documents in support of their application.

In addition, the statement in Respondents' application that they will "not establish preventive measures for establishment grounds, facilities, equipment, utensils, sanitary operations, and employee hygiene" (CX-13 at 44) because they have not had problems in the past is alone sufficient grounds to deny Federal inspection services, as it ignores the language "or because that is a reasonably likely to occur in the particular type of product being processed, in the absence of those controls" and does not identify food safety hazards ("FSHs") reasonably likely to occur in the production process and preventive measures to control those hazards.

The FSIS Administrator's determination that Respondents' HACCP was not in compliance with 9 C.F.R. part 417 was proper.

Respondents have not incorporated written Specified Risk Materials (SRMs) procedures into their HACCPs, SSOPs, or other prerequisite programs.

"Specified Risk Materials" ("SRM") are defined as material or tissue that can harbor bovine spongifourm encephalopathy ("BSE"), including brain, skull, eyes, trigeminal ganglia, spinal cord, vertedral couumn from cattle thirty months or older. *See* 9 C.F.R. § 310.22(a). 9 C.F.R § 310.22(e) requires establishments to implement written SRM procedures and incorporate those procedures into their HACCP, SSOPs or other prerequisite programs. Respondents have acknowledged the requirement

to submit written SRM procedures but stated they will not do so until FSIS inspection services are granted. The Regulations require establishments to implement written SRM procedures into their HACCP, SSOP, or other prerequisite program. 9 C.F.R. § 310.22(e)(1). Respondents did not provide any prerequisite programs. Again, Respondents acknowledge the requirement but refuse to comply until they deem it appropriate. That is not how the process works. Accordingly, the FSIS Administrator's denial of inspection services due to the refusal to provide written SRM procedures was proper.

In sum, Respondents' application for inspection services is deficient in several areas. Their illogical and self-serving definition of "food contact surfaces," their convenient definition of "occur" while ignoring the most obvious definition, and Respondents' refusal to provide a HACCP and SSOP in compliance with 9 C.F.R. parts 416 and 417 justifies denial of inspection services. Respondents' refusal to provide written SRMs in their HACCP, SSOP, or prerequisite programs also justifies denial of inspection services.

Findings of Fact

1. Sandhills Beef Company, Respondents' business, is and at all times material herein is a small meat slaughter and processing facility located in Mullen, Nebraska, and whose mailing address is Sandhills Beef Company, P.O. Box 513, Mullen, Nebraska 69152.

2. Respondent Jacob Wingebach is the applicant and a responsibly connected individual to Sandhills Beef Company.

3. Respondents currently operate a custom exempt slaughter facility under the name of "Hooker County Meat and Packing Company" (CX-01; Sprouls Decl. ¶ 4). A custom exempt facility slaughters livestock owned by someone else and prepares the meat for the exclusive use of the livestock owner. It does not sell the meat. Custom exempt facilities are exempt from FMIA provisions requiring carcass-by-carcass inspection and daily presence of inspectors during slaughter and processing operations, but they must comply with the FMIA's adulteration, misbranding, and humane handling provisions, as well as certain sanitation and recordkeeping requirements (Sprouls Decl. ¶ 4). FSIS

periodically reviews custom exempt operations to verify the facilities are being operated and maintained in accordance with FMIA requirements (Sprouls Decl. ¶ 4; CX-22).

4. On March 20, 2019, FSIS Consumer Safety Inspector Virgil Hagel visited the facility to conduct an inspection of Hooker County Meat's custom exempt operations. During that visit Respondents expressed interest in applying for Federal inspection services at the facility. Inspector Hagel provided Respondents with the contact information for Dr. Leo Anderson, a frontline supervisor working out of FSIS's Office of Field Operations, Denver District Office ("DDO") (Sprouls Decl. ¶ 4; CX-01).

5. On April 10, 2019, Dr. Anderson visited Respondents' facility to discuss the Federal inspection application process with Respondents. Dr. Anderson directed Respondents to the FSIS website and other resources available to Respondents and sent a follow-up email attaching an on-site survey checklist (Sprouls Decl. ¶ 5; CX-02).

6. On or about September 3, 2019, Respondents submitted an application for Federal inspection services, dated August 30, 2019, to FSIS (CX-04).

7. Dr. Elizabeth Prigge, a FSIS supervisory Public Health Veterinarian, reviewed the application with input from other staff. On October 18, 2019, Dr. Prigge sent an email to Respondents providing details on the deficiencies with the application, including multiple instances where Respondents' HACCP plan failed to identity and control food safety hazards ("FSH") and noting that while the plan acknowledged that FSHs were reasonable likely to occur ("RLTO") at the receiving step, it did not identify any FSHs at subsequent steps in the process (CX-07). Dr. Prigge offered to meet with Respondents to explain the deficiencies further and answer any questions (Sprouls Decl. ¶ 8; CX-07).

8. On October 23, 2019, Dr. Prigge and Dr. Anderson spoke with Respondents and reviewed the issues raised by Dr. Prigge. Following that conversation, Dr. Prigge sent Respondents reference material for their review (CX-08).

9. On October 29, 2019, Respondents sent an email to Dr. Prigge responding to the issues raised by Dr. Prigge's review of their application (CX-09).

10. On October 31, 2019, Respondents provide an updated version of their operational plan to Dr. Prigge (CX-11).

11. On November 7, 2019, a conference call was held with Dr. Prigge, Dr. Anderson, Respondents, and Respondents' consultant, Dr. Michael Fisher, to discuss Respondents' application (Sprouls Delc. ¶ 12). Dr. Prigge and Dr. Anderson restated their concerns with the application, while Respondents argued the application met all regulatory requirements. Another call was scheduled for November 26, 2019 (Sprouls Decl. ¶ 12).

12. On November 26, 2019, a telephone conference was held with Dr. Prigge, Dr. Anderson, DDO supervisor Dr. Sarah Patillo, DDO supervisor Dr. Robert Reeder, Respondents, and Dr. Fisher. The parties discussed Respondents' application and Respondents' determination that safety hazards were not reasonably likely to occur ("NRLTO") at all steps subsequent to receive of livestock step. At the end of call, Dr. Reeder agreed that he would further review Respondents' application. (Sprouls Decl. ¶ 13; Reeder Decl. ¶ 3).

13. Dr. Reeder reviewed the application and identified multiple deficiencies, including Respondents' conclusion that a food surface contact does not exist until after FSIS inspection. In addition, Dr. Reeder noted the HACCP failed to consider that FSHs may occur at additional stages of slaughter, sanitary dressing, and additional processing steps (Reeder Decl. ¶¶ 3-5).

14. To ensure his review was consistent with FSIS regulatory policy, Dr. Reeder consulted with Policy Development Staff ("PDS") in FSIS's Office of Policy and Development. Consistent with Dr. Reeder's review, PDS disagreed with Respondents' definition of "food contact surface" (Reeder Decl. ¶¶ 6-7). Applying the definition of "meat food product" found in 21 U.S.C. § 601(j) and "capable of use as human food" found in 9 C.F.R § 301.2, PDS concluded that equipment and surfaces that contact the carcass or parts of carcass throughout the slaughter process are food contact surfaces (Linville Decl. ¶¶ 9-11).

15. On December 10, 2019, Dr. Sprouls, Acting District Manager for DDO, sent a letter via email to Respondents detailing the deficiencies in the application, including the HACCP plan's failure to identify food safety hazards throughout the slaughter and processing process and Respondents' definition of "food contact surface" (CX-12).

16. On or about December 23, 2019, Respondents emailed a response to Dr. Sprouls's email of December 19, 2019 and attached a new application, which included a new HACCP plan and new SSOPs (CX-13). In the email, Respondents stated that any documentation submitted prior to December 21, 2019 was withdrawn and did not constitute their official application for Federal inspection. The HACCP and SSOPs submitted in the December 21, 2019 application differed from the application submitted on August 30, 2019. While the previous operation plan included prerequisite programs for Specified Risk Materials ("SRM"s), Procedures, Residue Control Good Manufacturing Practices ("GMP"), Trim, Prerequisite Procedure, and Cold Chain GMPs and controls for the relevant hazards, the December 21, 2019 HACCPs and SSOPs did not (Clay Decl. ¶ 6).

17. On January 1, 2020, Ms. Valerie Clay assumed the position of District Manager for DDO, and Dr. Sprouls returned to serving full time as District Manager for the Des Moines District Office (Clay Decl. ¶ 3). During the turnover process, Dr. Sprouls briefed Ms. Clay on Respondents' application. Ms. Clay spoke to Respondents several times between January 13 and January 15, 2020 (Clay Decl. ¶ 4). On January 13, 2020, Ms. Clay sent an email to Respondents listing the deficiencies with Respondents' application (CX-15). Respondents responded to the email on January 14, 2020 (CX-15).

18. During this timeframe, Ms. Clay consulted with FSISs PDS office and Risk Management Innovations Staff ("RMIS") to determine whether Respondents' December 21, 2019 applications met regulatory requirements (Clay Decl. ¶ 6). During a January 22, 2020 telephone call between PDS and RMIS it was noted that the new application did not contain any prerequisite programs that were contained in the withdrawn October 13, 2019 application. Both PDS and RMIS opined that

Respondents' HACCP and SSOPs did not comply with the requirements of 9 C.F.R. parts 416 and 417.

19. On January 24, 2020, Respondents visited DDO and spoke to Ms. Clay regarding their application. Respondents told Ms. Clay that they believed their application met the regulatory requirements to receive a conditional grant of inspection and that they would not make any changes to the HACCP or SSOP (Clay Decl. ¶ 7).

20. On January 28, 2020, FSIS Office of Investigation, Enforcement and Audit ("OIEA") requested PDS to review Respondents' December 21, 2019 response to Dr. Sprouls's December 10, 2019 letter regarding the deficiencies in Respondents' application (Linville Decl. ¶ 13). Upon review, PDS determined that Respondents' HACCP: (1) failed to identity any biological hazards at the hide dressing and evisceration steps; (2) failed to identify outgrowth of pathogens after the hot carcasses leave the slaughter floor and enter refrigerated storage; and (3) failed to adequately address specified risk material ("SRM"s). PDS also determined that Respondents' definition of "food contact surfaces" in the SSOP excluded procedures for equipment and utensils that contact edible carcasses and parts prior to post-mortem inspection by FSIS inspection in violation of 9 C.F.R. part 416 (Linville Decl. ¶ 14).

21. On January 29, 2020, Ms. Clay sent an email to Respondents again stating FSIS's position regarding the deficiencies in Respondents' application, including Respondents' incorrect definition of "food contact surfaces" and the failure of the HACCP to address the biological hazards during the dehiding and slaughter process (CX-17) (Linville Decl. ¶ 14).

22. On January 29, 2020 Respondents responded to Ms. Clay's email, affirming their belief that their definition of "food contact surface" was appropriate and repeating their positions on the other issues raised by FSIS (CX-18).

23. On February 5, 2020, FSIS personnel conducted a conference call with Respondents and Dr. Fisher. FSIS reviewed the areas of noncompliance with Respondents and Dr. Fisher. Respondents were informed: (1) the SSOPs did not identify "food contact surfaces" vs. "non-food contact surfaces" and thus did not contain all procedures necessary to prevent the

direct contamination or adulteration of product, as required by 9 C.F.R. § 416.12(a); and (2) the HACCP did not identify all hazards RLTO in slaughter operations, as required by 9 C.F.R. § 417.2(a)(1) (Clay Decl. ¶ 9; Safian Decl. ¶ 6). Both Respondents and Dr. Fisher were given the opportunity to respond and to make changes or submit additional material to the application. Respondents stated they would not be making any changes to their application.

24. On February 14, 2020, Respondents sent an email requesting a written decision from FSIS on their application for inspection services (CX-20).

25. On or about February 18, 2020, FSIS notified Respondents that FSIS was refusing to grant Federal inspection services at Sandhills Beef Company (CX-21) and listed four reasons: (1) the SSOPs did not meet the requirements of 9 C.F.R. part 416, because the definition of "food contact surfaces" excluded procedures for equipment contacting edible carcasses and parts prior to post-mortem inspection contrary to 9 C.F.R. § 416.12(a), which requires that SSOPs describe all procedures the establishment will conduct before and during operations sufficient to prevent direct contamination or adulteration of meat product; (2) the Hazard Analysis did not identify all hazards RLTO in slaughter operations, as required by 9 C.F.R. § 417.2(a)(1), because it recognized biological hazards from fecal, ingesta, and milk contamination but failed to recognize such hazards at the hide dressing and evisceration production steps; (3) the Hazard Analysis did not identify all hazards RLTO in slaughter operations, as required by 9 C.F.R. § 417.2(a)(1), because its determination that biological hazards are NRLTO at the refrigerated storage and subsequent steps is unfounded and fails to recognize hazards from the outgrowth of pathogens after hot carcasses leave the slaughter floor and enter refrigeration or as a result of temperature abuse; and (4) the Hazard Analysis did not adequately address SRMs, a known hazard in beef slaughter operations, as required by 9 C.F.R. § 417.2(a)(1), and the firm did not incorporate SRM procedures in its HACCP plan, SSOPs or any prerequisite programs as required by 9 C.F.R. § 310.22(e)(1) (CX-21).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents' application for inspection services was properly denied due to failure to submit an application in compliance with 9 C.F.R parts 416 and 417.

ORDER

Federal inspection services to Respondents Sandhills Beef Company and Jacob Wingebach are hereby DENIED.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondents, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at https://www.usda.gov/oha/services/decisions-and-determinations.

ANIMAL WELFARE ACT

In re: CARRIE LEO, an individual, d/b/a CARING FOR COTTONTAILS WILDLIFE RESCUE & REHABILITATION, INC., a New York State corporation.
Docket No. 20-J-0118.
Miscellaneous Order of the Judicial Officer.
Filed October 9, 2020.

AWA – Extension to file appeal.

John V. Rodriguez, Esq., for APHIS.
Carrie Leo, *pro se* Respondent.
Initial Decision by Channing D. Strother, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING RESPONDENT'S REQUEST TO EXTEND THE TIME TO FILE AN APPEAL TO THE JUDICIAL OFFICER

On October 8, 2020, Respondent filed a request for an Extension of Time to file its Appeal to the Judicial Officer. Complainant opposes Respondent's Motion.

For good reason shown, Respondent's motion to extend the time for filing an Appeal tothe Judicial Officer is granted, and is extended to, and including, November 8, 2020, thirty (30) days from the date of this Order.

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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://www.usda.gov/oha/services/decisions-and-determinations.

ANIMAL HEALTH PROTECTION ACT

In re: FCCTX, LLC, d/b/a FCCTX, LLC, GTCO SERIES, and FCCTX, LLC, APB SERIES.
Docket No. 20-J-0151.
Default Decision and Order.
Filed October 19, 2020.

DAIRY PRODUCT STABILIZATION ACT

In re: DAKIN DAIRY FARMS, INC.
Docket No. 19-J-0147.
Default Decision and Order.
Filed August 11, 2020.

MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

In re: COLORADO MUSHROOM FARM, LLC.
Docket No. 20-J-0133.
Default Decision and Order.
Filed September 1, 2020.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

In re: TERRILL AL-SAIHATI, an individual, d/b/a THE CAMEL FARM.
Docket No. 20-J-0147.
Consent Decision and Order.
Filed August 27, 2020.

In re: MICHAEL TODD, an individual; ALL THINGS WILD, INC., an Illinois corporation d/b/a ALL THINGS WILD COUNTY LINE FARMS & PONIES; and MICHAEL TODD, an individual, d/b/a ALL THINGS WILD COUNTY LINE FARMS & PONIES.
Docket Nos. 18-0067; 18-0068; 18-0069.
Consent Decision and Order.
Filed September 18, 2020.

FEDERAL CROP INSURANCE ACT

In re: SCOTT V. TILBERG.
Docket No. 20-J-0106.
Consent Decision and Order.
Filed July 21, 2020.

In re: MARY K. TILBERG.
Docket No. 20-J-0107.
Consent Decision and Order.
Filed July 21, 2020.

FEDERAL MEAT INSPECTION ACT

In re: NELSON'S MEAT PROCESSING, LLC.
Docket No. 20-J-0128.
Consent Decision and Order.
Filed July 10, 2020.

CONSENT DECISIONS

In re: LIGHT HILL MEATS, LLC.
Docket No. 20-J-0161.
Consent Decision and Order.
Filed September 22, 2020.

In re: HAMZAH SLAUGHTER HOUSE, LLC; and IMAD RABABE.
Docket Nos. 21-J-0007; 21-J-0008.
Consent Decision and Order.
Filed December 31, 2020.

HORSE PROTECTION ACT

In re: HERBERT DERICKSON, an individual.
Docket Nos. 14-0199; 17-0163.
Amended Consent Decision and Order.
Filed July 7, 2020.

In re: BRAD BEARD, an individual, a/k/a WILLIAM BRADLEY BEARD.
Docket No. 17-0096.
Amended Consent Decision and Order.
Filed July 8, 2020.

In re: GWAIN WILSON, an individual.
Docket No. 17-0073.
Amended Consent Decision and Order.
Filed July 20, 2020.

In re: BILL CANTRELL STABLES, INC., an Alabama corporation.
Docket No. 17-0107.
Amended Consent Decision and Order.
Filed July 21, 2020.

In re: BILL CANTRELL, an individual.
Docket No. 17-0108.
Second Amended Consent Decision and Order.
Filed July 21, 2020.

In re: LARRY HARRELL, an individual.
Docket No. 17-0110.
Amended Consent Decision and Order.
Filed July 21, 2020.

In re: TIMOTHY LEE SMITH, an individual.
Docket Nos. 14-0057; 17-0194.
Amended Consent Decision and Order.
Filed August 11, 2020.

In re: PHILIP TRIMBLE, an individual.
Docket No. 15-0097.
Amended Consent Decision and Order.
Filed August 21, 2020.

In re: JEFFREY L. GREEN.
Docket No. 17-0205.
Consent Decision and Order.
Filed November 4, 2020.

PLANT PROTECTION ACT

In re: PORTS AMERICA CHESAPEAKE, LLC.
Docket No. 20-J-0149.
Consent Decision and Order.
Filed September 3, 2020.

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