

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 07-0083
)
D&H Pet Farms, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

On March 16, 2007, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a Complaint alleging that on seven occasions during the period October 12, 2005, through January 25, 2007, D&H Pet Farms, Inc. [hereinafter D&H], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards promulgated under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]. The Administrator sought assessment of a civil penalty against D&H, issuance of an order that D&H cease and desist from violating the Animal Welfare Act and the Regulations, and suspension or revocation of D&H's Animal Welfare Act license. D&H filed a timely answer denying it willfully violated the Regulations.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing in Tampa, Florida, on December 4, 2007. Frank Martin, Jr., and Heather M. Pichelman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Susin Tippie, one of the owners of D&H, represented D&H. The Administrator called three witnesses. Ms. Tippie was the only witness for D&H. The Chief ALJ received into evidence the Administrator's exhibits (CX 1-CX 97) and D&H's exhibits (RX 1-RX 82).

On November 26, 2008, the Chief ALJ issued a Decision and Order: (1) finding D&H committed numerous violations of the Animal Welfare Act and the Regulations; (2) assessing D&H a \$10,000 civil penalty; (3) suspending D&H's Animal Welfare Act license for 3 months; and (4) providing, if D&H takes certain corrective actions, the civil penalty assessed against D&H would be reduced to \$2,500 and the suspension of D&H's Animal Welfare Act license would not be implemented.

On February 5, 2009, the Administrator filed a Status Report Concerning Respondent's Continued Noncompliance With The Animal Welfare Act's Regulations and Standards [hereinafter the Status Report]. Copies of inspection reports are attached to the Status Report. The Administrator failed to seek permission to file the Status Report. Absent permission to file the Status Report, I find the filing of the Status Report an inappropriate effort to supplement the record. Therefore, the Status Report and its attachments are stricken from the record.

On April 13, 2009, D&H appealed the Chief ALJ's Decision and Order. On May 26, 2009, the Administrator responded to D&H's appeal petition and filed a cross-appeal. On July 22, 2009, D&H filed its opposition to the Administrator's cross-appeal. On July 30, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Statutory and Regulatory Background

The Animal Welfare Act includes among its purposes “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment[.]” (7 U.S.C. § 2131(1).) The Animal Welfare Act also authorizes the Secretary of Agriculture to license dealers of regulated animals and gives the Secretary of Agriculture authority to issue regulations (7 U.S.C. §§ 2133, 2151). The Secretary of Agriculture can deny a license if a dealer does not demonstrate that its facilities comply with the Secretary of Agriculture's standards (7 U.S.C. § 2133). The Regulations include standards for the humane handling, treatment, and transportation of hamsters and guinea pigs (9 C.F.R. §§ 3.25-.41). Failure to comply with these Regulations may lead to suspension or revocation of a dealer's Animal Welfare Act license, the issuance of an order to cease and desist violations of the Animal Welfare Act and the Regulations, and the assessment of a civil penalty in the amount of up to \$3,750 for each violation (7 U.S.C. § 2149(a)-(b); 7 C.F.R. § 3.91(b)(2)(ii)).

Factual Background

D&H is a Florida corporation located in Plant City, Florida. D&H is a licensed dealer under the Animal Welfare Act. D&H breeds and sells regulated animals—guinea pigs and hamsters—for use as pets. (CX 1-CX 3.) Susin A. Tippie and her husband, Gaynor L. Tippie, operate D&H. Ms. Tippie served as manager of D&H from 1998 until she purchased the facility with her husband in January 2003. (Tr. 151-52.) D&H is a family-run enterprise that employs between 10 and 17 individuals (Tr. 163-64).

Carol Porter, an animal care inspector for the Animal and Plant Health Inspection Service [hereinafter APHIS], testified with respect to seven inspections of D&H that she conducted during the period October 12, 2005, through January 25, 2007. She had conducted approximately 600 inspections by the date of the hearing, including 12 inspections involving D&H, four of which occurred after the time period that is the subject of this Decision and Order. Ms. Porter characterized D&H as “chronically noncompliant.” (Tr. 22-26.) However, Ms. Porter also testified about the many corrections D&H made after violations were cited and about D&H’s attempts to take corrective action with respect to other violations (Tr. 79-81, 89-90, 93-94).

During the October 12, 2005, inspection, Ms. Porter observed a variety of violations. In her inspection report (CX 5), Ms. Porter cited D&H for noncompliances in the areas of veterinary care, storage of supplies, construction of interior surfaces, and sanitation. The veterinary care citation was triggered by the finding of a guinea pig that

was sick; and the storage of supplies citation was triggered by a bag of food which had split open and spilled onto the floor and leaking brake fluid from a tractor near the stacked bags of animal feed. In addition, the inspection report indicated that paint was peeling away from the floors in the main building, preventing the floors from being impervious to moisture and preventing proper cleaning and sanitation of the floors. Finally, the inspection report cited numerous problems with pest control.

During the February 13, 2006, inspection, Ms. Porter found approximately 200-250 dead hamsters in plastic buckets used as hamster cages in the main building. Many of the dead hamsters were cannibalized (apparently hamsters tend to devour their first litters). The inspection took place on a Monday. Employees told Ms. Porter the practice of D&H was only to check water bottles over the weekend and the buckets in which the hamsters reside did not get checked. Ms. Porter stated in her inspection report (CX 17) that the facility needed to have daily observations of the animals. Ms. Porter also documented a number of holes in various parts of the facility, the use of soiled bedding, a repeat failure to comply with the regulation concerning impervious surfaces (the paint was peeling off the floors), a violation of the feeding requirements, as evidenced by wet and moldy food pellets, a variety of sanitation violations, and an inadequate pest control program.

At the next inspection, on April 5, 2006, Ms. Porter again observed peeling paint on the floors and an ineffective pest control program, with numerous stray cats “wandering in and around the facility.” (CX 41.)

At the June 21, 2006, inspection, Ms. Porter again cited D&H for the peeling paint on the floors, pest control issues (particularly rodents, house flies, and roaches), an open bag of feed, and oats spilled on the feed room floor (CX 43).

Ms. Porter returned again on November 14, 2006, and cited D&H for additional violations (CX 51). Ms. Porter found two guinea pigs that appeared to be sick or injured and concluded that this finding meant that animals should be observed more frequently. She also, once again, cited D&H for failing to have floors impervious to moisture as evidenced by the paint peeling away from the concrete, for an inadequate pest control program as evidenced by cobwebs, fruit flies, and rodent droppings, and for not providing food consistent with the Regulations, since numerous hamster enclosures contained wet and moldy food. Ms. Porter observed black mold on the inside of numerous water bottles in the main hamster building. Ms. Porter also observed that buckets containing hamsters were stacked one inside another which she stated could cause crushing, impaired ventilation, or restricted movement of the hamsters.

On December 19, 2006, Ms. Porter observed a disoriented guinea pig and determined there was insufficient frequency of observation of animals and inadequate veterinary care (CX 72). Once again, Ms. Porter observed pest control violations,

including substantial rodent droppings, cobwebs, and living and dead rodents, and she observed that the floors in the main building had areas where the paint had peeled away from the concrete. She also observed mold growing on the inside of numerous water bottles, the stacking of occupied hamster cages, and out-of-place tubes of antibiotic ointment and suntan lotion.

The final inspection that is the subject of the instant proceeding occurred on January 25, 2007. Ms. Porter, once again, observed peeling paint on the floor of the main building, wet and moldy hamster food, rodent droppings, and a large concentration of fruit flies (CX 90).

Ms. Porter testified that, with respect to many of the alleged violations, D&H took prompt corrective action, including frequently repainting the floor. She also indicated that whenever she discovered a hole in the ceiling, the ceiling was repaired by the time of her next inspection. (Tr. 79-81, 89-90, 93-94.) With respect to the high number of dead hamsters during the February 2006 inspection, Ms. Porter stated that, even though she had been told by Ms. Tippie that hamsters frequently eat their first litters, she believed that the mortality rate was still unusually high. (Tr. 88-89.) Ms. Porter also had observed workers sanitizing the water bottles and believes the situation with respect to that violation had improved considerably, but she was still finding problems (Tr. 107).

Dr. Elizabeth Goldentyer, a veterinarian who is the Eastern Regional Director for APHIS, testified as the sanction witness. She classified the case against D&H as

“serious,” pointing out that APHIS viewed D&H as a “chronic” non-complier, with two previous Consent Decisions with which D&H had not fully complied.¹ (Tr. 131-35.) She testified that many animals were impacted by D&H’s continued noncompliance with the Animal Welfare Act and the Regulations (Tr. 132).² Accordingly, Dr. Goldentyer recommended assessment of a \$10,000 civil penalty against D&H, issuance of a cease and desist order, and the suspension of D&H’s Animal Welfare Act license for 3 years (Tr. 137). Dr. Goldentyer testified that her sanction recommendation was based on the size of D&H’s business, the seriousness of D&H’s violations, D&H’s good faith (or lack of good faith), and D&H’s history of compliance with the Animal Welfare Act and the Regulations (Tr. 135).

Ms. Tippie testified the facility was already old when she purchased it and the previous owner had not been willing to commit to repairs (Tr. 151-52). She described several unfortunate personal circumstances, including the need to have surgery, being involved in an automobile accident, and being “out of it” for the year after the car

¹The record contains two Consent Decisions in which D&H agreed to pay a civil penalty and to comply with the Animal Welfare Act and the Regulations in the future. Administrative Law Judge Dorothea A. Baker issued a Consent Decision on July 19, 2001, which was signed on behalf of D&H by former owner, Chris A. Vorderburg (CX 97). Administrative Law Judge Victor W. Palmer issued a Consent Decision on August 23, 2005, which was signed by Ms. Tippie (CX 4).

²Ms. Porter had indicated that at the time of the November 14, 2006, inspection, D&H’s inventory included 6,975 hamsters and 109 guinea pigs, as well as over 1,000 nonregulated gerbils (CX 51).

accident due to medications. Ms. Tippie insisted D&H was trying to be compliant and D&H's violations of the Regulations were not "willful." (Tr. 152-57.)

The record contains little dispute as to the existence of the facts to support the allegations regarding pest control. With respect to the floors, Ms. Tippie testified that repair of the floors was impossible without tearing down the facility. Ms. Tippie stated that by scrubbing the floors with bleach, the floors would be sanitized. (Tr. 178-79.) D&H uses between 150 and 350 gallons of bleach per month for cleaning purposes (RX 75). Ms. Tippie cited a letter from D&H's veterinarian, who was not available to testify, as support that bleaching would suffice and that painting the floors would not matter as long as the floors were vigorously scrubbed on a regular basis. (Tr. 175-79; RX 71.) However, Dr. Goldentyer testified on rebuttal that disinfection of a facility with peeling paint over concrete would be impossible (Tr. 252).

D&H also submitted a large number of receipts, dated both before and after the dates of the inspections at issue, indicating D&H had been involved in an ongoing effort to comply with the Regulations. In addition to the receipts for bleach, D&H submitted evidence of expenditures for paint, a water pump with chlorination system, water bottles, and other materials used for repairs. (RX 72-73, RX 75, RX 78.)

D&H also submitted a report of an on-site visit conducted by Dr. William White at APHIS' request. Dr. White is a recognized expert in husbandry and health of the type of animals D&H raises. (RX 77; Tr. 254-55.)

Discussion

Veterinary Care

Section 2.40(b)(3) of the Regulations requires dealers to assess the health and well-being of their animals, as follows:

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

....

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

....

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

9 C.F.R. § 2.40(b)(3). On October 12, 2005, Ms. Porter observed an adult guinea pig that was very thin, was blind in the left eye, was unable to move properly, and had a hair coat in poor condition (CX 5 at 3; Tr. 29-30). On November 14, 2006, Ms. Porter observed an adult guinea pig that refused to move and appeared to have paralyzed hind legs and a juvenile guinea pig that was lying on its back and exhibited labored breathing (CX 51 at 1, CX 52-CX 53; Tr. 57-58). On December 19, 2006, Ms. Porter observed a guinea pig that appeared to be disoriented, had an unsteady gait, and was reluctant to move (CX 72 at 1, CX 73; Tr. 67-68). I infer, based upon the descriptions of these four guinea pigs, that the condition of each of the guinea pigs did not develop immediately prior to the relevant inspection and that D&H did not observe the guinea pigs to assess their health

and well-being on a daily basis. I find the Administrator established that D&H did not provide adequate veterinary care, in that D&H failed to observe these four guinea pigs daily, in violation of 9 C.F.R. § 2.40(b)(3).

On February 13, 2006,³ Ms. Porter inspected D&H discovering approximately 200-250 dead hamsters (CX 17). Ms. Tippie argued that the death of these hamsters was caused by the adult hamsters who have a propensity to devour their first litters. The February 13, 2006, inspection occurred on a Monday. The record establishes that D&H did not observe its guinea pigs and hamsters over the weekend. (Tr. 87-89, 215-16, 220.) I hold D&H's failure to conduct daily observations of its guinea pigs and hamsters to assess their health and well-being over the weekend violates 9 C.F.R. § 2.40(b)(3). Ms. Tippie's explanation of the cause of death of the hamsters is not relevant to D&H's failure to observe its animals daily.

Housing Facilities

Section 3.25(a) of the Regulations requires that housing facilities for guinea pigs and hamsters be structurally sound and maintained in good repair, as follows:

§ 3.25 Facilities, general.

(a) *Structural strength.* Indoor and outdoor housing facilities for guinea pigs or hamsters shall be structurally sound and shall be maintained in good repair, to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

³The inspection report (CX 17) is signed and dated on February 14, 2006, but indicates that the inspection took place on February 13, 2006.

9 C.F.R. § 3.25(a). On February 13, 2006, Ms. Porter observed two holes in the ceiling in the gerbil and dwarf hamster room, both of which leaked water during storms. In addition, Ms. Porter observed a hole in the bottle-washing room directly over the tub used to wash water bottles and another hole in the back of the gerbil and dwarf hamster room around the HVAC duct work. (CX 17 at 1, CX 27-CX 30; Tr. 38-39, 45-46.) The evidence clearly establishes that D&H violated 9 C.F.R. § 3.25(a) on February 13, 2006. D&H failed to rebut the evidence of its violations of 9 C.F.R. § 3.25(a).

Food and Bedding Storage

Section 3.25(c) of the Regulations requires storage of food and bedding in a manner that protects the food and bedding against spoilage or deterioration and infestation or contamination, as follows:

§ 3.25 Facilities, general.

.....

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against spoilage or deterioration and infestation or contamination by vermin. Food supplies shall be stored in containers with tightly fitting lids or covers or in original containers as received from commercial sources of supply. Refrigeration shall be provided for supplies of perishable food.

9 C.F.R. § 3.25(c). On October 12, 2005, and June 21, 2006, Ms. Porter observed opened bags of food in the feed room (CX 5 at 3, CX 8-CX 9, CX 43 at 1, CX 44, CX 46; Tr. 30-31, 34, 54-55), and, during the February 13, 2006, inspection, Ms. Porter found pine shavings used for hamster, gerbil, and guinea pig bedding opened and littered with cat feces (CX 17 at 2; Tr. 39-40). The evidence clearly establishes that D&H violated

9 C.F.R. § 3.25(c) on October 12, 2005, June 21, 2006, and February 13, 2006. D&H failed to rebut the evidence of its violations of 9 C.F.R. § 3.25(c).

Substantially Impervious Surfaces

Section 3.26(d) of the Regulations requires interior building surfaces to be substantially impervious to moisture, as follows:

§ 3.26 Facilities, indoor.

. . . .

(d) *Interior surfaces.* The interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are substantially impervious to moisture and may be readily sanitized.

9 C.F.R. § 3.26(d). The Regulations do not define the key operative term “substantially impervious to moisture.” The Regulations do not require an “impervious surface” but rather a “substantially impervious” surface. The Administrator did not address whether the floors at D&H were “substantially impervious” to moisture as 9 C.F.R. § 3.26(d) requires. Instead, the testimony and the inspection reports lead to the conclusion that the surfaces are not totally impervious to moisture. (Tr. 31, 252; CX 5 at 4, CX 17 at 2, CX 41, CX 43 at 1, CX 51 at 1, CX 72 at 1, CX 90.)

The Administrator treats the absence of paint on the concrete floor as evidence that the floor violates 9 C.F.R. § 3.26(d). I found no evidence that, absent paint, a concrete floor is not substantially impervious to moisture. Furthermore, the Regulations do not require cement floors to be painted. In order to prove this violation against D&H, the Administrator must show this particular floor was not substantially impervious to

moisture. The Administrator did not present any evidence concerning whether the floor at D&H was substantially impervious to moisture, all he showed is that some areas of the floor no longer had paint. Therefore, I hold the Administrator failed to meet his burden of proof to show that D&H violated 9 C.F.R. § 3.26(d).

Stacked Containers

Section 3.28(a)(1) of the Regulations requires primary enclosures for guinea pigs and hamsters be structurally sound and maintained in good repair, as follows:

§ 3.28 Primary enclosures.

All primary enclosures for guinea pigs and hamsters shall conform to the following requirements:

(a) *General.* (1) Primary enclosures shall be structurally sound and maintained in good repair to protect the guinea pigs and hamsters from injury. Such enclosures, including their racks, shelving and other accessories, shall be constructed of smooth material substantially impervious to liquids and moisture.

9 C.F.R. § 3.28(a)(1). On November 14, 2006, and December 19, 2006, Ms. Porter cited D&H for stacking hamster containers in a manner that could cause the hamsters to be injured (CX 51, CX 72). Ms. Porter testified that this stacking of hamster containers violated 9 C.F.R. § 3.28(a)(1) because of “the possibility of these buckets falling in on each other, they could crush live animals in them, and also they were restricting ventilation.” (Tr. 59.) This testimony creates a prima facie case for the Administrator. Ms. Tippie testified that these buckets contained “hamsters to be retired out.” (Tr. 217.)

In other words, these hamsters were no longer going to breed and were scheduled to be euthanized. Ms. Tippie further testified that:

The reason we leave them in their individual buckets until it's actually time to euthanize them is to keep them from getting stressed anymore than they will be when they're actually euthanized.

When they're stacked on top of each other there is no chance of that bucket dropping down and hitting the animal inside. Those buckets are made, the shape of them, there is at least four inches head room, plus when the water bottle is still on there, there's almost seven inches of headroom between the bucket that's stacked inside and the next bucket down.

There's a wire opening on the front for breeding them so they get air. They're not being stressed out by other animals, and we feel this is the best way to handle it, to keep them from getting stressed, to keep them from getting hurt until they're euthanized.

Tr. 217-18. Ms. Tippie's testimony shows that the stacked buckets would not injure the hamsters, even if the buckets fell in on each other. Ms. Tippie's testimony overcame the Administrator's prima facie case and the Administrator did not rebut her testimony. Therefore, the Administrator failed to meet his burden of proof with respect to the allegations that D&H violated 9 C.F.R. § 3.28(a)(1) on November 14, 2006, and December 19, 2006.

Food Contamination

Section 3.29(a) of the Regulations sets forth feeding requirements for guinea pigs and hamsters, as follows:

§ 3.29 Feeding.

(a) Guinea pigs and hamsters shall be fed each day except as otherwise might be required to provide adequate veterinary care. The food shall be free from contamination, wholesome, palatable and of sufficient quantity and nutritive value to meet the normal daily requirements for the condition and size of the guinea pig or hamster.

9 C.F.R. § 3.29(a). On February 13, 2006, November 14, 2006, and January 25, 2007, Ms. Porter observed numerous hamster enclosures that contained wet and moldy food pellets (CX 17 at 2, CX 33-CX 36, CX 51 at 2, CX 59-CX 61, CX 90). Ms. Tippie indicated hamsters like to moisten their food. However, Ms. Porter observed that many of the pellets she saw were moldy. (Tr. 46-47, 64.) If the food had just been wet, I would have given more consideration to Ms. Tippie's argument. However, because the food was moldy, I find D&H violated 9 C.F.R. § 3.29(a).

Sanitized Watering Receptacles

Section 3.30 of the Regulations requires that watering receptacles must be sanitized when dirty, follows:

§ 3.30 Watering.

Unless food supplements consumed by guinea pigs or hamsters supply them with their normal water requirements, potable water shall be provided daily except as might otherwise be required to provide veterinary care. Open containers used for dispensing water to guinea pigs or hamsters shall be so placed in or attached to the primary enclosure as to minimize contamination from excreta. All watering receptacles shall be sanitized when dirty: *Provided, however,* That such receptacles shall be sanitized at least once every 2 weeks.

9 C.F.R. § 3.30. During the November 14, 2006, and December 19, 2006, inspections, Ms. Porter observed numerous water bottles located in the main hamster building had mold or algae growing on the inside of the bottles (CX 51 at 2, CX 62-CX 63, CX 72 at 2, CX 79-CX 80; Tr. 60, 64). D&H has taken substantial steps to eliminate mold or algae from the inside of water bottles, including the purchase of a water pump with chlorination system and establishing a regular program of cleaning water bottles. The fact that these violations were corrected does not nullify the existence of the violations. Therefore, I hold D&H violated 9 C.F.R. § 3.30 on November 14, 2006, and December 19, 2006.

Care of Premises

Section 3.31(b) of the Regulations requires the premises to be clean and in good repair, follows:

§ 3.31 Sanitation.

.....

(b) *Housekeeping*. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in [9 C.F.R. §§ 3.25-.41]. Premises shall remain free of accumulations of trash.

9 C.F.R. § 3.31(b). On February 13, 2006, Ms. Porter observed that the office, in which animal medications and supplements are kept, contained a large fish aquarium filled with soiled shavings and that a cat had been using the aquarium as a litter box. In addition, Ms. Porter observed that the cabinets, in which animal medications, supplements, unused syringes, and unused needles are kept, contained cobwebs and were littered with rodent droppings. (CX 17 at 2-3, CX 37-CX 38; Tr. 41-42.) The evidence clearly establishes

that D&H violated 9 C.F.R. § 3.31(b) on February 13, 2006. D&H failed to rebut the evidence of its violation of 9 C.F.R. § 3.31(b).

Pest Control

Section 3.31(c) of the Regulations requires dealers to establish and maintain an effective pest control program, as follows:

§ 3.31 Sanitation.

.....

(c) *Pest control.* An effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. § 3.31(c). The evidence demonstrates the presence of rat and mice droppings and a general pest infestation (CX 5, CX 90); spiders, fruit flies, and cobwebs (CX 17, CX 51); numerous feral cats (CX 41); and excessive numbers of houseflies and a large concentration of roaches (CX 43). D&H argues that “by act of nature we are unable to completely eradicate every and all pest [sic] at all given times.” (Respondent’s Petition for Appeal at 10.) Perfection is not the standard and all agreed that the surrounding environment made pest control difficult. However, photographic evidence entered into the record indicates a level of infestation that demonstrated that the pest control program was not effective at the time of the inspections. (CX 11-CX 16, CX 34, CX 38-CX 40, CX 45-CX 46, CX 48-CX 50, CX 60, CX 64-CX 71, CX 82-CX 89, CX 92-CX 96.) D&H offered evidence, with which the Administrator agreed, that D&H has attempted to improve its pest control program. These efforts include hiring a professional pest control

company. These efforts to improve pest control are commendable and should continue. However, post-violation correction efforts do not negate the fact that a violation occurred. Therefore, I hold that D&H violated 9 C.F.R. § 3.31(c) on October 12, 2005, February 13, 2006, April 5, 2006, June 21, 2006, November 14, 2006, and January 25, 2007.

Willfulness

D&H argues that its violations of the Animal Welfare Act and the Regulations were not willful (Tr. 231-32). However, that argument ignores my long-held position that a willful act is an act in which the violator “(1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.” *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff’d sub nom. Arab Stock Yard v. United States*, 582 F.2d 39 (5th Cir. 1978). Therefore, I hold that D&H’s violations of the Animal Welfare Act and the Regulations were willful.

Sanctions

The Administrator seeks an order: (1) requiring D&H to cease and desist from violating the Animal Welfare Act and the Regulations; (2) suspending D&H’s Animal Welfare Act license for a period of 3 years; and (3) assessing D&H a \$10,000 civil penalty (Tr. 135-37; Complainant’s Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 15).

The United States Department of Agriculture's sanction policy provides that the administrative law judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991).

I find D&H committed 20 violations of the Regulations. Each violation also violates the July 19, 2001, Consent Decision and the August 23, 2005, Consent Decision in each of which D&H agreed to the entry of an order requiring D&H to comply with the Animal Welfare Act and the Regulations (CX 4, CX 97). Under the circumstances, I agree with the Administrator that the issuance of a cease and desist order, the assessment of a \$10,000 civil penalty against D&H, and a 3-year suspension of D&H's Animal Welfare Act license are appropriate.

With respect to the monetary civil penalty, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous

violations.⁴ The regulated aspects of D&H's business generated gross income of over \$386,000 in 2003, over \$420,000 in 2004, and over \$443,000 in 2005, as stated in D&H's applications for renewal of its Animal Welfare Act dealer's license (CX 1-CX 3). In 2005, D&H sold over 211,000 animals, although that figure appears to include all animals it sold rather than just regulated animals.⁵ Based on the number of animals at D&H and D&H's gross income, I find D&H operates a large business. Moreover, I find a large number of D&H's 20 violations of the Regulations posed a threat to the health and well-being of D&H's animals and are, therefore, grave violations of the Regulations. An ongoing pattern of violations, as displayed by D&H, establishes a history of previous violations. D&H's efforts to comply with the Regulations indicate some level of good faith, and I have taken those efforts into account with regard to the amount of the civil penalty. D&H could be assessed a maximum civil penalty of \$75,000 for its 20 violations of the Regulations.⁶

⁴See 7 U.S.C. § 2149(b).

⁵D&H raises and sells unregulated animals including gerbils, rats, mice, lizards, and snakes (RX 77 at 1).

⁶The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from \$2,500 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii)).

After examining all the relevant circumstances in the instant proceeding, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), I conclude a cease and desist order, assessment of a \$10,000 civil penalty, and a 3-year suspension of D&H's Animal Welfare Act license are appropriate and necessary to ensure D&H's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Findings of Fact and Conclusions of Law

1. D&H is a Florida corporation located in Plant City, Florida.
2. During the time period material to the instant proceeding, D&H has been licensed as a dealer under the Animal Welfare Act. D&H holds Animal Welfare Act license number 58-B-0406.
3. D&H raises and sells guinea pigs and hamsters, which are regulated animals under the Animal Welfare Act, as well as several types of non-regulated animals.
4. D&H has been operating for more than 35 years.
5. Susin A. Tippie had been manager of D&H, under its previous owner, from 1998 until Ms. Tippie and her husband, Gaynor L. Tippie, purchased D&H.
6. Since 2003, D&H has been owned by Susin Tippie and Gaynor Tippie.

7. On seven occasions during the period October 12, 2005, through January 25, 2007, APHIS inspector Carol Porter inspected D&H. At the conclusion of each of these seven inspections, Ms. Porter issued an inspection report stating D&H had violated the Regulations.

8. On and about October 12, 2005, D&H failed to provide adequate veterinary care to an adult guinea pig that was very thin, was blind in the left eye, was unable to move properly, and had a hair coat in poor condition, in willful violation of 9 C.F.R. § 2.40(b)(3).

9. On and about February 13, 2006, D&H failed to observe all of its hamsters and guinea pigs daily to assess their health and well-being, in willful violation of 9 C.F.R. § 2.40(b)(3).

10. On and about November 14, 2006, D&H failed to provide adequate veterinary care to an adult guinea pig that refused to move and appeared to have paralyzed hind legs, in willful violation of 9 C.F.R. § 2.40(b)(3).

11. On and about November 14, 2006, D&H failed to provide adequate veterinary care to a juvenile guinea pig that was lying on its back and exhibited labored breathing, in willful violation of 9 C.F.R. § 2.40(b)(3).

12. On and about December 19, 2006, D&H failed to provide adequate veterinary care to a guinea pig that appeared to be disoriented, had an unsteady gait, and was reluctant to move, in willful violation of 9 C.F.R. § 2.40(b)(3).

13. On February 13, 2006, D&H's facility had two holes in the ceiling in the gerbil and dwarf hamster room, both of which leaked water during storms, a hole in the bottle-washing room directly over the tub used to wash water bottles, and a hole in the back of the gerbil and dwarf hamster room around the HVAC duct work, in willful violation of 9 C.F.R. § 3.25(a).

14. On October 12, 2005, D&H maintained opened bags of food in the feed room, in willful violation of 9 C.F.R. § 3.25(c).

15. On June 21, 2006, D&H maintained opened bags of food in the feed room, in willful violation of 9 C.F.R. § 3.25(c).

16. On February 13, 2006, D&H maintained pine shavings used for hamster, gerbil, and guinea pig bedding, opened and littered with cat feces, in willful violation of 9 C.F.R. § 3.25(c).

17. On February 13, 2006, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a).

18. On November 14, 2006, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a).

19. On January 25, 2007, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a).

20. On November 14, 2006, D&H failed to sanitize numerous water bottles located in the main hamster building that had mold or algae growing on the inside of the bottles, in willful violation of 9 C.F.R. § 3.30.

21. On December 19, 2006, D&H failed to sanitize numerous water bottles located in the main hamster building that had mold or algae growing on the inside of the bottles, in willful violation of 9 C.F.R. § 3.30.

22. On February 13, 2006, D&H's office, in which animal medications and supplements are kept, contained a large fish aquarium that a cat had been using as a litter box, and D&H's cabinets, in which animal medications, supplements, unused syringes, and unused needles are kept, contained cobwebs and rodent droppings, in willful violation of 9 C.F.R. § 3.31(b).

23. On October 12, 2005, rat and mice droppings, spiders, and cobwebs were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

24. On February 13, 2006, rodent droppings, spiders, fruit flies, cobwebs, and numerous feral cats were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

25. On April 5, 2006, numerous feral cats were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

26. On June 21, 2006, excessive numbers of house flies, rodents, and roaches were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

27. On November 14, 2006, an excessive amount of cobwebs, fruit flies, and rodent droppings were present at the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

28. On January 25, 2007, an excessive amount of fruit flies and rodent droppings were present at the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

For the foregoing reasons, the following Order is issued.

ORDER

1. D&H shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:
 - a. failing to observe all animals daily to assess their health and well-being;
 - b. failing to provide housing facilities for guinea pigs and hamsters that are structurally sound and maintained in good repair;
 - c. failing to store food and bedding in facilities that adequately protect the food and bedding against spoilage or deterioration and infestation or contamination by vermin;
 - d. failing to provide guinea pigs and hamsters food that is free from contamination;
 - e. failing to sanitize watering receptacles when dirty;

f. failing to keep premises clean to protect guinea pigs and hamsters from injury and to facilitate the husbandry practices prescribed in 9 C.F.R. §§ 3.25-.41; and

g. failing to establish and maintain an effective program for the control of insects, ectoparasites, and avian and mammalian pests.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on D&H.

2. Animal Welfare Act license number 58-B-0406 issued to D&H is suspended for 3 years.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on D&H.

3. D&H is assessed a \$10,000 civil penalty. The civil penalty shall be paid by certified check or money order and made payable to the Treasurer of the United States and sent to:

Frank Martin, Jr.
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Mail Stop 1417 South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Mr. Martin within 60 days after service of this Order on D&H. D&H shall state on the certified check or money order that payment is in reference to AWA Docket No. 07-0083.

RIGHT TO JUDICIAL REVIEW

D&H has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. D&H must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁷ The date of entry of the Order in this Decision and Order is October 19, 2009.

Done at Washington, DC

October 19, 2009

William G. Jenson
Judicial Officer

⁷28 U.S.C. § 2344.