

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 02-0004
)
Heartland Kennels, Inc., a)
South Dakota Corporation; and)
Halvor Skaarhaug, an individual,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

Bobby R. Acord, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 3, 2001. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] committed numerous willful violations of the Animal Welfare

Act and the Regulations and Standards on March 24, 1998, October 21, 1998, February 9, 1999, October 19, 1999, and January 10, 2000 (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 15, 2001.¹ Respondents failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On December 4, 2001, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.² On January 24, 2002, Respondents filed a late-filed answer to the Complaint, which does not deny or otherwise respond to the allegations in the Complaint.

On May 15, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with

¹United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4584 8479 and Article Number 7099 3400 0014 4584 8462.

²Letter dated December 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Respondent Halvor Skaarhaug.

Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 24, 2002.³

On June 13, 2002, Respondents requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Respondents' request by extending Respondents' time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to July 1, 2002.⁴ On July 3, 2002, Respondents requested a second extension of time to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, which the Chief ALJ denied.⁵

On July 15, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and

³United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4581 8212 and Article Number 7099 3400 0014 4584 7878.

⁴Order Extending Time to File Response filed June 14, 2002.

⁵Order Denying Extension of Time to File Objections to Complainant's Motion for Adoption of Proposed Decision filed July 5, 2002.

Standards; (3) assessing Respondents jointly and severally a \$54,642.50 civil penalty; and (4) revoking Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062).

On August 13, 2002, Respondents requested an extension of time within which to appeal the Chief ALJ's Initial Decision and Order to the Judicial Officer. On August 30, 2002, I granted Respondents' request for an extension of time by extending the time for Respondents' filing their appeal petition to September 30, 2002. On September 16, 2002, Respondents appealed to the Judicial Officer. On October 1, 2002, Complainant filed Complainant's Response to Respondents' Motion to Set Aside Default Judgment. On October 3, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except for the Chief ALJ's conclusion that the allegations in paragraphs 4.l. and 4.m. of the Complaint constitute violations of the Regulations and the Chief ALJ's conclusion that Respondents willfully violated section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b)). Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusions of Law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7 AGRICULTURE

.....

**CHAPTER 54 TRANSPORTATION, SALE, AND HANDLING
OF CERTAIN ANIMALS****§ 2131. Congressional statement of policy**

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

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

§ 2132. Definitions

When used in this chapter

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

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

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

. . . .

(j) The term **carrier** means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise, which is engaged in the business of transporting any animals for hire[.]

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no

longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 2149. Violations by licensees

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

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person

involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

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

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

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(f), (j), 2146(a), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE

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PART VI PARTICULAR PROCEEDINGS

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CHAPTER 163 FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

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FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

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

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

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

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

- (1) allow for regular adjustment for inflation of civil monetary penalties;
- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

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

- (1) **agency** means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) **civil monetary penalty** means any penalty, fine, or other sanction that
 - (A)(i) is for a specific monetary amount as provided by Federal law; or
 - (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) **Consumer Price Index** means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

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

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

Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

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

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

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

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

ANNUAL REPORT

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

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

7 C.F.R.:

TITLE 7 AGRICULTURE

SUBTITLE A OFFICE OF THE SECRETARY OF AGRICULTURE

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PART 3 DEBT MANAGEMENT

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SUBPART E ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*

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

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

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9 ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A ANIMAL WELFARE

PART 1 DEFINITION OF TERMS

§ 1.1 Definitions.

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

....

Carrier means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire.

....

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

PART 2 REGULATIONS

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SUBPART D ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(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[.]

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SUBPART E IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class A dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

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

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

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

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

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

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(4) When any dealer has made a reasonable effort to affix an official tag to a cat, as set forth in paragraphs (a) and (b) of this section, and has been unable to do so, or when the cat exhibits serious distress from the attachment of a collar and tag, the dealer shall attach the collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain the identity of the cat in relation to the tag. Each primary enclosure shall contain no more than one weaned cat without an affixed collar and official tag, unless the cats are identified by a distinctive and legible tattoo or plastic-type collar approved by the Administrator.

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SUBPART G RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

- (v) The date a dog or cat was acquired or disposed of, including by euthanasia;
- (vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;
- (vii) A description of each dog or cat which shall include:
 - (A) The species and breed or type;
 - (B) The sex;
 - (C) The date of birth or approximate age; and
 - (D) The color and any distinctive markings;
- (viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;
- (ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

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SUBPART H COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

§ 2.126 Access and inspection of records and property.

- (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
 - (1) To enter its place of business;
 - (2) To examine records required to be kept by the Act and the regulations in this part;
 - (3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

PART 3 STANDARDS

SUBPART A SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

(c) *Surfaces* (1) *General requirements.* The surfaces of housing facilities including houses, dens, and other furniture-type fixtures and objects within the facility must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or

replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

- (i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and
- (ii) Be free of jagged edges or sharp points that might injure the animals.

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities including houses, dens, and other furniture-type fixtures and objects within the facility that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) *Cleaning.* Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

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(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

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§ 3.2 Indoor housing facilities.

(a) *Heating, cooling, and temperature.* Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50 °F (10 °C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50 °F (10 °C). The ambient temperature must not fall below 45 °F (7.2 °C) for more than 4 consecutive hours when dogs or cats are present, and must not rise above 85 °F (29.5 °C) for more than 4 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions in parts 2 and 3 of this chapter.

(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

(c) *Lighting.* Indoor housing facilities for dogs and cats must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs and cats. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs and cats from excessive light.

(d) *Interior surfaces.* The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be

impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

3.4 Outdoor housing facilities.

(a) *Restrictions.* (1) The following categories of dogs or cats must not be kept in outdoor facilities, unless that practice is specifically approved by the attending veterinarian:

(i) Dogs or cats that are not acclimated to the temperatures prevalent in the area or region where they are maintained;

(ii) Breeds of dogs or cats that cannot tolerate the prevalent temperatures of the area without stress or discomfort (such as short-haired breeds in cold climates); and

(iii) Sick, infirm, aged or young dogs or cats.

(2) When their acclimation status is unknown, dogs and cats must not be kept in outdoor facilities when the ambient temperature is less than 50 °F (10 °C).

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if

there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities including houses, dens, etc. that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

....

(c) *Additional requirements for dogs* (1) *Space.* (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

(ii) Each bitch with nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics, and in accordance with generally accepted husbandry practices as determined by the attending veterinarian. If the additional amount of floor space for each nursing puppy is less than 5 percent of the minimum requirement for the bitch, such housing must be approved by the attending veterinarian in the case of a research facility, and, in the case of dealers and exhibitors, such housing must be approved by the Administrator.

(iii) The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position: *Provided* That, prior to February 15, 1994, each dog must be able to stand in a comfortable normal position.

(2) *Compatibility.* All dogs housed in the same primary enclosure must be compatible, as determined by observation. Not more than 12 adult nonconditioned dogs may be housed in the same primary enclosure. Bitches in heat may not be housed in the same primary enclosure with sexually mature males, except for breeding. Except when maintained in

breeding colonies, bitches with litters may not be housed in the same primary enclosure with other adult dogs, and puppies under 4 months of age may not be housed in the same primary enclosure with adult dogs, other than the dam or foster dam. Dogs with a vicious or aggressive disposition must be housed separately.

(3) *Dogs in mobile or traveling shows or acts.* Dogs that are part of a mobile or traveling show or act may be kept, while the show or act is traveling from one temporary location to another, in transport containers that comply with all requirements of § 3.14 of this subpart other than the marking requirements in § 3.14(a)(6) of this subpart. When the show or act is not traveling, the dogs must be placed in primary enclosures that meet the minimum requirements of this section.

(4) *Prohibited means of primary enclosure.* Permanent tethering of dogs is prohibited for use as primary enclosure. Temporary tethering of dogs is prohibited for use as primary enclosure unless approval is obtained from APHIS.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.7 Compatible grouping.

Dogs and cats that are housed in the same primary enclosure must be compatible, with the following restrictions:

....

(b) Any dog or cat exhibiting a vicious or overly aggressive disposition must be housed separately[.]

§ 3.9 Feeding.

....

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Sanitization is achieved by using one of the methods described in § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept

clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken to ensure that there is no molding, deterioration, and caking of feed.

§ 3.10 Watering.

If potable water is not continually available to the dogs and cats, it must be offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian. Water receptacles must be kept clean and sanitized in accordance with § 3.11(b) of this subpart, and before being used to water a different dog or cat or social grouping of dogs or cats.

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

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs or cats.

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if

necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

(i) Live steam under pressure;

(ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, as with a mechanical cage washer; or

(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.

(4) Pens, runs, and outdoor housing areas using material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as gravel, sand, grass, earth, or absorbent bedding, must be sanitized by removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

.....

§ 3.12 Employees.

Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise

others. The employer must be certain that the supervisor and other employees can perform to these standards.

9 C.F.R. §§ 1.1; 2.40(a)(1), (b)(2)-(3), .50(a), (b), .75(a)(1), .100, .126; 3.1(a)-(c), (e), .2, .4, .6(a)(1), (c), .7(b), .9(b), .10, .11(a)-(c), .12 (footnotes omitted).

**CHIEF ADMINISTRATIVE LAW JUDGE S
INITIAL DECISION AND ORDER
(AS RESTATED)**

STATEMENT OF THE CASE

Introduction

Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Further, Respondents late-filed answer does not deny or otherwise respond to the allegations in the Complaint.⁶ Section 1.136(c)

⁶Respondents filed a letter in response to the Complaint on January 24, 2002, 3 months 9 days after they were served with the Complaint. Respondents response states in its entirety:

To whom it may concern

I was not aware of the original correspondence untill [sic] the Post Master asked me to sign the enclosed paper they were dropped off at my 89 year old mothers [sic] place and she forgot to give them to me. As far as response I have not sold a pup or dog since 1999 - I surrendered my license in Jan 2000 and surrendered the dogs in the Fall of 2000. USDA inspectors told me that would be the end of it all - am surprised to see this now.

Halvor Skaarhaug
RR 1 Box 27
Greenville, SD
57239

of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Halvor Skaarhaug is an individual whose mailing address is Rural Route 1, Box 27, Greenville, South Dakota 57239, and is a principal of Respondent Heartland Kennels, Inc. At all times mentioned in this Decision and Order, Respondent Halvor Skaarhaug operated as a dealer as that term is defined in the Animal Welfare Act. Between August 1999 and March 11, 2001, Respondent Halvor Skaarhaug operated under Animal Welfare Act license number 46-B-062, issued under the name Halvor Skaarhaug dba: Heartland Kennels, Inc. In 1999, Respondent Halvor Skaarhaug grossed \$34,500 from sales of 450 animals. Respondent Halvor Skaarhaug previously operated under Animal Welfare Act license numbers 46-B-0061 and 46-A-0198.

2. Respondent Heartland Kennels, Inc., is a South Dakota corporation whose business mailing address is Rural Route 1, Box 27, Greenville, South Dakota 57239. The

registered agent for service of process of Respondent Heartland Kennels, Inc., is Respondent Halvor Skaarhaug, who is located at Rural Route 1, Box 27, Greenville, South Dakota 57239. At all times mentioned in this Decision and Order, Respondent Heartland Kennels, Inc., operated as a dealer as that term is defined in the Animal Welfare Act.

3. Animal and Plant Health Inspection Service personnel unsuccessfully attempted to inspect Respondents facility, animals, and records on March 24, 1998. On May 27, 1998, October 21, 1998, February 9, 1999, April 12, 1999, July 12, 1999, October 19, 1999, and January 10, 2000, Animal and Plant Health Inspection Service personnel conducted inspections of Respondents facility, animals, and records for the purpose of determining Respondents compliance with the Animal Welfare Act and the Regulations and Standards.

- a. On May 27, 1998, Respondents had 85 dogs (64 adult dogs and 21 puppies).
- b. On October 21, 1998, Respondents had 102 dogs (59 adult dogs and 43 puppies).
- c. On February 9, 1999, Respondents had 78 dogs (62 adult dogs and 16 puppies).
- d. On April 12, 1999, Respondents had 82 dogs (54 adult dogs and 28 puppies).

- e. On October 19, 1999, Respondents had no fewer than 65 dogs.
- f. On January 10, 2000, Respondents had 100 dogs.

4. Respondents did not employ a full-time attending veterinarian. On three separate dates, Respondents failed to comply with the veterinary care requirements of the Regulations, as follows:

a. On October 21, 1998, Respondents failed to have a part-time or consulting attending veterinarian with whom Respondents maintained a formal arrangement, including an adequate written program of veterinary care, thereby depriving no fewer than 102 dogs of adequate veterinary care.

b. On October 21, 1998, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to employ an attending veterinarian under formal arrangements, including regularly scheduled visits by the veterinarian to Respondents premises, and Respondents had not had such a visit by a veterinarian to Respondents premises for more than 1 year, thereby depriving no fewer than 102 animals of adequate veterinary care.

c. On October 21, 1998, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent diseases, and specifically, Respondents failed to obtain timely veterinary care for no fewer than five dogs in need of preventive attention.

d. On February 9, 1999, Respondents failed to have a part-time or consulting attending veterinarian with whom Respondents maintained a formal arrangement, including an adequate written program of veterinary care, thereby depriving no fewer than 78 dogs of adequate veterinary care.

e. On February 9, 1999, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to employ an attending veterinarian under formal arrangements, including regularly scheduled visits by the veterinarian to Respondents premises, and Respondents had not had such a visit by a veterinarian to Respondents premises for more than 1½ years, thereby depriving no fewer than 78 animals of adequate veterinary care.

f. On February 9, 1999, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases, and specifically, Respondents failed to obtain timely veterinary care for a female Siberian Husky dog that exhibited visible hair loss and numerous areas of red and scaly skin, and had not received veterinary medical treatment.

g. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a juvenile Basset Hound dog that exhibited visible evidence of bilateral cherry eye.

h. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a juvenile Cocker Spaniel dog that exhibited visible evidence of bilateral cherry eye.

i. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a white Siberian Husky dog (identified as number 196), whose right eye was visibly sunken and dry.

j. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a white Siberian Husky dog (identified as number D114), who bore a chain collar that was so tight that the animal's skin had grown around it, and the animal bore bloody wounds.

k. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for 10 dogs housed in three enclosures in which there was bloody, mucous feces indicative of untreated disease.

l. On January 10, 2000, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, Respondents housed 60 dogs outside

in wet and cold conditions, without observing the animals, who were visibly cold, and without adequately assessing the animals well-being, or communicating the animals condition to Respondents attending veterinarian.

5. In 86 instances on three separate dates, Respondents failed to comply with the Regulations regarding the identification of animals, as follows:

a. On February 9, 1999, Respondents failed to identify seven puppies, as required.

b. On October 19, 1999, Respondents failed to identify 54 puppies, as required.

c. On January 10, 2000, Respondents failed to identify five puppies, as required.

d. On January 10, 2000, Respondents failed to identify 20 adult dogs, as required.

6. On two separate dates, Respondents failed to keep complete and accurate records, as follows:

a. On October 19, 1999, Respondents failed to maintain records that correctly disclosed required dates.

b. On October 19, 1999, Respondents failed to maintain records that fully disclosed all required information.

c. On October 19, 1999, Respondents failed to maintain records that identified each animal in Respondents possession and the disposition of each animal.

d. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose the animals sex.

e. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose each animal s date of birth or approximate age.

f. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose each animal s official USDA tag number or tattoo.

g. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the addresses of the persons from whom animals were acquired or to whom animals were sold.

h. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required vehicle or drivers license numbers of persons from whom Respondents acquired animals.

i. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the date when each animal was acquired.

j. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the date when each animal died, or was sold, donated, or euthanized.

k. On January 10, 2000, Respondents failed to maintain records that identified 20 dogs in Respondents possession.

l. On January 10, 2000, Respondents failed to maintain records that identified any information regarding 20 puppies in Respondents possession.

m. On January 10, 2000, Respondents failed to maintain records that fully disclosed all required information.

7. On March 24, 1998, Respondents failed to allow Animal and Plant Health Inspection Service personnel access to their facility, animals, and records.

8. In numerous instances on three occasions, Respondents failed to comply with the facilities and operations Standards, as follows:

a. Section 3.1 of the Standards (9 C.F.R. § 3.1).

i. On January 10, 2000, Respondents housed five dogs in an outdoor enclosure that was not in good repair and did not protect the animals from injury, and specifically, the dogs in the enclosure were exposed to broken wire with sharp points, loose wire, and sharp pieces of metal.

ii. On January 10, 2000, Respondents exercise area for 10 dogs was not in good repair and did not protect the animals from injury, and specifically, the dogs in the exercise area were exposed to barbed wire.

iii. On January 10, 2000, Respondents exercise area for 10 dogs was not structurally sound and in good repair, and did not contain the animals securely, and specifically, the wire used to enclose the area was loose, and there was an insufficient number of fence posts.

iv. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not designed and constructed so that it contained the animals securely, and specifically, animals have been able to leave the area.

v. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not free from accumulations of waste material and clutter, and specifically, the whelping area contained accumulations of compacted dried fecal matter.

vi. On January 10, 2000, Respondents stored open supplies of food, which allowed for spoilage, contamination, and vermin infestation.

vii. On January 10, 2000, Respondents stored empty feed sacks no longer in use throughout the food storage area.

b. Section 3.2 of the Standards (9 C.F.R. § 3.2).

i. On February 9, 1999, Respondents south small dog building (housing 10 dogs) was not sufficiently ventilated to minimize ammonia levels.

ii. On January 10, 2000, Respondents south small dog building (housing 15 dogs) was not sufficiently ventilated to minimize ammonia levels.

iii. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals.

iv. On January 10, 2000, Respondents puppy holding area (used by 18 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals.

v. On January 10, 2000, the material used on the ceiling of Respondents south small dog facility (used by 15 dogs) was not impervious to moisture, and specifically, the material was wet and soft.

vi. On January 10, 2000, the food and water receptacles and whelp boxes (used by 60 dogs) were not impervious to moisture, and specifically, the food and water receptacles and whelp boxes had been chewed.

vii. On January 10, 2000, the flooring of Respondents transport vehicle was not impervious to moisture.

viii. On January 10, 2000, Respondents housed three Siberian Husky puppies in a whelp area without dry bedding when the ambient temperature was below 50 degrees Fahrenheit.

c. Section 3.4 of the Standards (9 C.F.R. § 3.4).

i. On February 9, 1999, Respondents housed no fewer than 20 dogs in outdoor enclosures with shelter structures that did not have a floor.

ii. On February 9, 1999, Respondents housed 41 dogs in outdoor enclosures with shelter structures that contained no bedding or insufficient bedding when the ambient temperature was below 50 degrees Fahrenheit.

iii. On February 9, 1999, Respondents housed no fewer than 10 dogs in outdoor enclosures with three shelter structures that did not have a wind break or a rain break at the entrance.

iv. On October 19, 1999, three of Respondents outdoor shelters (housing seven large-breed puppies) that contained three small pet taxis as shelters, did not provide sufficient shelter for all of the puppies.

v. On October 19, 1999, one of Respondents outdoor shelters (housing two adult large-breed dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

vi. On October 19, 1999, one of Respondents outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

vii. On October 19, 1999, none of Respondents outdoor shelters (housing 65 dogs) provided the dogs with adequate protection from the cold, and specifically, none of the outdoor shelters contained sufficient bedding material.

viii. On October 19, 1999, three of Respondents outdoor shelters (housing eight dogs) did not have a floor.

ix. On October 19, 1999, three of Respondents outdoor shelters (housing seven large-breed puppies) that contained pet taxis as shelters, did not provide shelter structures that provided the puppies with adequate protection from the cold, in that each of the pet taxis had holes allowing the entry of cold air, snow, wind, and rain.

x. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure measuring 30 inches by 34 inches, which provided insufficient space for both of the dogs.

xi. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat.

xii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not have a wind break and rain break at the entrance of the shelter.

xiii. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with an outdoor shelter without a floor.

xiv. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xv. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xvi. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xvii. On January 10, 2000, Respondents housed 35 dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xviii. On January 10, 2000, Respondents housed three Beagle dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xix. On January 10, 2000, Respondents housed three Beagle dogs (which breed is short-haired and does not tolerate cold climates) outdoors when the ambient temperature was below 50 degrees Fahrenheit.

xx. On January 10, 2000, Respondents housed 40 dogs in outdoor enclosures with shelter structures that did not have any wind break and rain break at the entrance of the shelters or did not have an adequate wind break and rain break.

xxi. On January 10, 2000, one of Respondents outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

xxii. On January 10, 2000, Respondents housed 12 dogs in outdoor enclosures with four shelter structures, none of which had a floor.

xxiii. On January 10, 2000, Respondents housed 20 dogs in outdoor enclosures with shelter structures that did not provide the animals with adequate protection and shelter from the cold and heat, in that the shelter roof had holes that allowed snow and rain inside.

xxiv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure measuring 30 inches by 34 inches, which did not provide sufficient shelter for both animals.

xxv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that did not have any wind break and rain break at the entrance of the shelter.

xxvi. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single

shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xxvii. On January 10, 2000, Respondents used the cover for a truck bed as a shelter structure for five dogs.

xxviii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure measuring 22 inches by 27 inches, which provided insufficient space for both of the dogs.

xxix. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat.

d. Section 3.6 of the Standards (9 C.F.R. § 3.6).

i. On October 19, 1999, Respondents housed five adult dogs (each of which required at least 4 square feet of floor space - for a total of 20 square feet) in a primary enclosure that measured 2 feet by 4 feet, providing a total of only 8 square feet of floor space for all five animals (which allotted each dog 1.6 square feet of floor space), which did not provide sufficient floor space for each animal, and specifically did not allow each animal to turn about freely, and to stand, sit, and lie in a comfortable position.

ii. On January 10, 2000, Respondents housed two adult Collie dogs (requiring 32 square feet of floor space) in a primary enclosure that only provided 25 square feet of floor space, which was insufficient floor space for each animal.

iii. On January 10, 2000, Respondents housed seven 23-inch Lhasa Apso dogs (requiring over 40 square feet of floor space) in a primary enclosure that only provided 30 square feet of floor space, which was insufficient floor space for each animal.

iv. On January 10, 2000, Respondents housed two 15-inch Pomeranian dogs (requiring over 6 square feet of floor space) in a primary enclosure that only provided 4 square feet of floor space, which was insufficient floor space for each animal.

v. On January 10, 2000, Respondents housed four 22-inch Corgi dogs (requiring over 21 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal.

vi. On January 10, 2000, Respondents housed four 23-inch Bichon Frise dogs (requiring over 23 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal.

vii. On January 10, 2000, Respondents housed two French Poodle dogs and one Cocker Spaniel dog (requiring over 16 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal.

viii. On January 10, 2000, Respondents housed six puppies in a primary enclosure that only provided 3 square feet of floor space, which was insufficient floor space for each animal.

9. In numerous instances on three occasions, Respondents failed to comply with the animal health and husbandry Standards, as follows:

a. Section 3.7 of the Standards (9 C.F.R. § 3.7).

i. On January 10, 2000, Respondents housed seven incompatible dogs together, and specifically, one of the dogs exhibited an overly-aggressive disposition and dominance with respect to food.

b. Section 3.9 of the Standards (9 C.F.R. § 3.9).

i. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized.

ii. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

iii. On February 9, 1999, Respondents self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing.

iv. On February 9, 1999, Respondents self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing.

v. On January 10, 2000, Respondents self-feeder for two dogs was not protected from rain and snow, in that the top was missing.

vi. On January 10, 2000, Respondents self-feeder for three dogs was not protected from rain and snow, in that the top was stuck open.

vii. On January 10, 2000, Respondents food receptacles for 10 dogs in three outdoor enclosures were not protected from rain and snow.

viii. On January 10, 2000, Respondents food receptacles for 60 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized.

ix. On January 10, 2000, Respondents food receptacles for 60 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

c. Section 3.10 of the Standards (9 C.F.R. § 3.10).

i. On January 10, 2000, Respondents water receptacles for 60 dogs were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

d. Section 3.11 of the Standards (9 C.F.R. § 3.11).

i. On October 21, 1998, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 30 dogs.

ii. On October 19, 1999, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 64 dogs.

iii. On October 19, 1999, Respondents failed to remove excreta and waste from an enclosure housing two dogs.

iv. On February 9, 1999, Respondents inside facilities for dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents inside facilities had large accumulations of cobwebs, indicative of lack of cleaning.

v. On February 9, 1999, Respondents failed to remove excreta from primary enclosures housing 78 dogs in the south small dog building.

vi. On January 10, 2000, Respondents inside facilities for 58 dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents inside facilities had large accumulations of cobwebs, indicative of lack of cleaning.

vii. On January 10, 2000, Respondents failed to keep premises free of trash, junk, and discarded matter around animal enclosures housing 40 dogs.

viii. On January 10, 2000, Respondents failed to remove excreta in a primary enclosure housing one Malamute dog.

ix. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 20 dogs.

x. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures (whelp pens) housing 40 dogs.

xi. On January 10, 2000, Respondents failed to remove accumulated excreta in a primary enclosure (transport vehicle).

xii. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 60 dogs.

e. Section 3.12 of the Standards (9 C.F.R. § 3.12).

i. On January 10, 2000, Respondents did not have sufficient employees to carry out the required animal husbandry practices for 100 dogs.

10. The violations Respondents committed are very serious and represent a failure by Respondents to comply with the Animal Welfare Act and the Regulations and Standards, and in some of the instances, represent neglect of and cruelty to the animals in Respondents custody.

Conclusions of Law

By reason of the Findings of Fact set forth in this Decision and Order, *supra*, I conclude that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in these Conclusions of Law.

1. Respondents willful violations of section 2.40 of the Regulations (9 C.F.R. § 2.40).

a. On October 21, 1998, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40)(a)(1)).

b. On October 21, 1998, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent diseases, and specifically, Respondents failed to obtain timely veterinary care for no fewer than five dogs in need of preventive attention in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

c. On February 9, 1999, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40)(a)(1)).

d. On February 9, 1999, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases, and specifically, Respondents failed to

obtain timely veterinary care for a female Siberian Husky dog that exhibited visible hair loss and numerous areas of red and scaly skin, and had not received veterinary medical treatment in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

e. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for: (i) a juvenile Basset Hound dog that exhibited visible evidence of bilateral cherry eye ; (ii) a juvenile Cocker Spaniel dog that exhibited visible evidence of bilateral cherry eye ; (iii) a white Siberian Husky dog (identified as number 196), whose right eye was visibly sunken and dry; (iv) a white Siberian Husky dog (identified as number D114), who bore a chain collar that was so tight that the animal's skin had grown around it, and the animal bore bloody wounds; and (v) 10 dogs housed in three enclosures in which there was bloody, mucous feces, indicative of untreated disease, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

f. On January 10, 2000, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, Respondents housed 60 dogs outside in wet and cold conditions, without observing the animals, who were visibly cold, and without adequately assessing the animals' well-being, or communicating the animals

condition to Respondents attending veterinarian in willful violation of section 2.40(b)(3) of the Regulations (9 C.F.R. § 2.40(b)(3)).

2. Respondents willful violations of section 2.50 of the Regulations (9 C.F.R. § 2.50).

a. On February 9, 1999, Respondents failed to identify seven puppies in willful violation of section 2.50(a) of the Regulations (9 C.F.R. § 2.50(a)).

b. On October 19, 1999, Respondents failed to identify 54 puppies in willful violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)).

c. On January 10, 2000, Respondents failed to identify 20 adult dogs and five puppies in willful violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)).

3. Respondents willful violations of section 2.75 of the Regulations (9 C.F.R. § 2.75).

a. On October 19, 1999, Respondents, in willful violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), failed to maintain records that fully disclosed all required information, including: (i) required dates; (ii) the identification of each animal in Respondents possession; and (iii) the disposition of each animal.

b. On January 10, 2000, Respondents, in willful violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), failed to maintain records that fully disclosed all required information, including: (i) a correct description of each animal in

Respondents possession; (ii) the addresses of persons from whom Respondents acquired animals and to whom Respondents sold animals; (iii) the vehicle license numbers or drivers license numbers of the persons from whom Respondents acquired animals; and (iv) the dates when Respondents acquired and disposed of each animal.

4. On March 24, 1998, Respondents failed to allow Animal and Plant Health Inspection Service personnel access to their facility, animals, and records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

5. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) by failing to comply with the facilities and operating Standards (9 C.F.R. §§ 3.1-.6).

a. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1 of the Standards (9 C.F.R. § 3.1).

i. On January 10, 2000, Respondents housed five dogs in an outdoor enclosure that was not in good repair and did not protect the animals from injury, and specifically, the dogs in the enclosure were exposed to broken wire with sharp points, loose wire, and sharp pieces of metal in willful violation of section 3.1(a) and (c)(1)(ii) of the Standards (9 C.F.R. § 3.1(a), (c)(1)(ii)).

ii. On January 10, 2000, Respondents exercise area for 10 dogs was not in good repair and did not protect the animals from injury, and specifically, the

dogs in the exercise area were exposed to barbed wire in willful violation of section 3.1(a) and (c)(1)(ii) of the Standards (9 C.F.R. § 3.1(a), (c)(1)(ii)).

iii. On January 10, 2000, Respondents exercise area for 10 dogs was not structurally sound and in good repair, and did not contain the animals securely, and specifically, the wire used to enclose the area was loose, and there was an insufficient number of fence posts in willful violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)).

iv. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not designed and constructed so that the whelping area contained the animals securely, and specifically, animals have been able to leave the area in willful violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)).

v. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not free from accumulations of waste material and clutter, and specifically, the whelping area contained accumulations of compacted dried fecal matter in willful violation of section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)).

vi. On January 10, 2000, Respondents stored open supplies of food, which allowed for spoilage, contamination, and vermin infestation in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).

vii. On January 10, 2000, Respondents stored empty feed sacks no longer in use throughout the food storage area in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).

b. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2 of the Standards (9 C.F.R. § 3.2).

i. On February 9, 1999, Respondents south small dog building (housing 10 dogs) was not sufficiently ventilated to minimize ammonia levels in willful violation of section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)).

ii. On January 10, 2000, Respondents south small dog building (housing 15 dogs) was not sufficiently ventilated to minimize ammonia levels in willful violation of section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)).

iii. On January 10, 2000, Respondents whelping area (used by 58 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals in willful violation of section 3.2(c) of the Standards (9 C.F.R. § 3.2(c)).

iv. On January 10, 2000, Respondents puppy holding area (used by 18 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals in willful violation of section 3.2(c) of the Standards (9 C.F.R. § 3.2(c)).

v. On January 10, 2000, the material used on the ceiling of Respondents south small dog facility (used by 15 dogs) was not impervious to moisture, and specifically, the material was wet and soft in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

vi. On January 10, 2000, the food and water receptacles and whelp boxes (used by 60 dogs) were not impervious to moisture in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

vii. On January 10, 2000, the flooring of Respondents transport vehicle was not impervious to moisture in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

viii. On January 10, 2000, Respondents housed three Siberian Husky puppies in a whelp area without dry bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)).

c. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.4 of the Standards (9 C.F.R. § 3.4).

i. On February 9, 1999, Respondents housed no fewer than 20 dogs in outdoor enclosures with shelter structures that did not have a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

ii. On February 9, 1999, Respondents housed 41 dogs in outdoor enclosures with shelter structures that contained no bedding or insufficient bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

iii. On February 9, 1999, Respondents housed no fewer than 10 dogs in outdoor enclosures with three shelter structures that did not have a wind break or a rain break at the entrance in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

iv. On October 19, 1999, three of Respondents outdoor shelters (housing seven large-breed puppies) that contained three small pet taxis as shelters, did not provide sufficient shelter for all of the puppies in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

v. On October 19, 1999, one of Respondents outdoor shelters (housing two adult large-breed dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

vi. On October 19, 1999, one of Respondents outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

vii. On October 19, 1999, none of Respondents outdoor shelters (housing 65 dogs) provided the dogs with adequate protection from the cold, and specifically, none of the outdoor shelters contained sufficient bedding material in willful violation of section 3.4(b)(1) and (b)(4) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(4)).

viii. On October 19, 1999, three of Respondents outdoor shelters (housing eight dogs) did not have a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

ix. On October 19, 1999, three of Respondents outdoor shelters (housing seven large-breed puppies) that contained pet taxis as shelters, did not provide shelter structures that provided the puppies with adequate protection from the cold, in that each of the pet taxis had holes allowing the entry of cold air, snow, wind, and rain in willful violation of section 3.4(b)(1) and (b)(2) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(2)).

x. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure measuring 30 inches by 34 inches, which provided insufficient space for both of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xi. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure that did not provide the

dogs with adequate protection and shelter from the cold and heat in willful violation of section 3.4(b)(1) of the Standards (9 C.F.R. § 3.4(b)(1)).

xii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not have a wind break and rain break at the entrance of the shelter in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xiii. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with an outdoor shelter without a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xiv. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xv. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xvi. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a shelter structure that contained no bedding when the

ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xvii. On January 10, 2000, Respondents housed 35 dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xviii. On January 10, 2000, Respondents housed three Beagle dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xix. On January 10, 2000, Respondents housed three Beagle dogs (which breed is short-haired and does not tolerate cold climates) outdoors when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(a) of the Standards (9 C.F.R. § 3.4(a)).

xx. On January 10, 2000, Respondents housed 40 dogs in outdoor enclosures with shelter structures that did not have any wind break and rain break at the entrance of the shelters or did not have an adequate wind break and rain break in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xxi. On January 10, 2000, one of Respondents outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not

provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxii. On January 10, 2000, Respondents housed 12 dogs in outdoor enclosures with four shelter structures, none of which had a floor, in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxiii. On January 10, 2000, Respondents housed 20 dogs in outdoor enclosures with shelter structures that did not provide the animals with adequate protection and shelter from the cold and heat, in that the shelter roof had holes that allowed snow and rain inside in willful violation of section 3.4(b)(1) and (b)(2) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(2)).

xxiv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure measuring 30 inches by 34 inches which did not provide sufficient shelter for both animals in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that did not have any wind break and rain break at the entrance of the shelter in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xxvi. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xxvii. On January 10, 2000, Respondents used the cover for a truck bed as a shelter structure for five dogs in willful violation of section 3.4(c) of the Standards (9 C.F.R. § 3.4(c)).

xxviii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure measuring 22 inches by 27 inches, which provided insufficient space for both of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxix. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat in willful violation of section 3.4(b)(1) of the Standards (9 C.F.R. § 3.4(b)(1)).

d. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6 of the Standards (9 C.F.R. § 3.6).

i. On October 19, 1999, Respondents housed five adult dogs (each of which required at least 4 square feet of floor space - for a total of 20 square feet)

in a primary enclosure that measured 2 feet by 4 feet, providing a total of only 8 square feet of floor space for all five animals (which allotted each dog 1.6 square feet of floor space), which did not provide sufficient floor space for each animal, and specifically, did not allow each animal to turn about freely, and to stand, sit, and lie in a comfortable position in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

ii. On January 10, 2000, Respondents housed two adult Collie dogs (requiring 32 square feet of floor space) in a primary enclosure that only provided 25 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

iii. On January 10, 2000, Respondents housed seven 23-inch Lhasa Apso dogs (requiring over 40 square feet of floor space) in a primary enclosure that only provided 30 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

iv. On January 10, 2000, Respondents housed two 15-inch Pomeranian dogs (requiring over 6 square feet of floor space) in a primary enclosure that only provided 4 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

v. On January 10, 2000, Respondents housed four 22-inch Corgi dogs (requiring over 21 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

vi. On January 10, 2000, Respondents housed four 23-inch Bichon Frise dogs (requiring over 23 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

vii. On January 10, 2000, Respondents housed two French Poodle dogs and one Cocker Spaniel dog (requiring over 16 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

viii. On January 10, 2000, Respondents housed six puppies in a primary enclosure that only provided 3 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

6. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) by failing to comply with the animal health and husbandry Standards (9 C.F.R. §§ 3.7-.12).

a. Respondents willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.7 of the Standards (9 C.F.R. § 3.7).

i. On January 10, 2000, Respondents housed seven incompatible dogs together, and specifically, one of the dogs exhibited an overly-aggressive disposition and dominance with respect to food in willful violation of section 3.7(b) of the Standards (9 C.F.R. § 3.7(b)).

b. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.9 of the Standards (9 C.F.R. § 3.9).

i. On February 9, 1999, Respondents food receptacles for 20 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

ii. On February 9, 1999, Respondents food receptacles for 20 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

iii. On February 9, 1999, Respondents self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

iv. On February 9, 1999, Respondents self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

v. On January 10, 2000, Respondents self-feeder for two dogs was not protected from rain and snow, in that the top was missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

vi. On January 10, 2000, Respondents self-feeder for three dogs was not protected from rain and snow, in that the top was stuck open, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

vii. On January 10, 2000, Respondents food receptacles for 10 dogs in three outdoor enclosures were not protected from rain and snow in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

viii. On January 10, 2000, Respondents food receptacles for 60 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

ix. On January 10, 2000, Respondents food receptacles for 60 dogs were not disposable and were not kept clean and sanitized in accordance with

section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

c. Respondents willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.10 of the Standards (9 C.F.R. § 3.10).

i. On January 10, 2000, Respondents water receptacles for 60 dogs were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.10 of the Standards (9 C.F.R. § 3.10).

d. Respondents willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11 of the Standards (9 C.F.R. § 3.11).

i. On October 21, 1998, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 30 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

ii. On October 19, 1999, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 64 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

iii. On October 19, 1999, Respondents failed to remove excreta and waste from an enclosure housing two dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

iv. On February 9, 1999, Respondents inside facilities for dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents inside facilities had large accumulations of cobwebs, indicative of lack of cleaning, in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

v. On February 9, 1999, Respondents failed to remove excreta from primary enclosures housing 78 dogs in the south small dog building in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

vi. On January 10, 2000, Respondents inside facilities for 58 dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents inside facilities had large accumulations of cobwebs, indicative of lack of cleaning, in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

vii. On January 10, 2000, Respondents failed to keep premises free of trash, junk, and discarded matter around animal enclosures housing 40 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

viii. On January 10, 2000, Respondents failed to remove excreta in a primary enclosure housing one Malamute dog in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

ix. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 20 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

x. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures (whelp pens) housing 40 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

xi. On January 10, 2000, Respondents failed to remove accumulated excreta in a primary enclosure (transport vehicle) in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

xii. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 60 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

e. Respondents willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.12 of the Standards (9 C.F.R. § 3.12).

i. On January 10, 2000, Respondents did not have sufficient employees to carry out the required husbandry practices for 100 dogs in willful violation of section 3.12 of the Standards (9 C.F.R. § 3.12).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents Appeal Petition

Respondents raise four issues in their Motion to [S]et [A]side Default Judgement [hereinafter Appeal Petition]. First, Respondents contend their failure to file a timely answer is due to excusable neglect and under Rule 6(b) of the Federal Rules of Civil Procedure, the time for filing their answer should be enlarged (Appeal Pet. at 1).

Respondents reliance on the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice.⁷ Moreover, Respondents were required to file their answer no

⁷*In re Karl Mitchell*, 60 Agric. Dec. 91, 123 (2001), *aff d*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 147 (1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep t of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000). *See also Kelly v. EPA*, 203 F.3d 519, (continued...)

⁷(...continued)

523 (7th Cir. 2000) (stating the Federal Rules of Civil Procedure do not apply to administrative proceedings); *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 627, 636 (1999) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 683, 687 (1999) (Ruling on Certified Question) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 347-48 (1998) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs), *aff d*, Nos. 96-01252, 98-01082 (W.D. Tenn. Aug. 3, 1998), *rev d on other grounds*, 197 F.3d 221 (6th Cir. 1999), *aff d*, 533 U.S. 405 (2001); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended, and the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating while respondent s reference to the standard Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the United

(continued...)

later than November 4, 2001. Respondents request for an extension of time within which to file their answer, filed September 16, 2002, comes far too late to be considered.

Further still, on January 24, 2002, Respondents filed a late-filed answer in which they failed to deny or otherwise respond to the allegations of the Complaint. Respondents cite no basis for my allowing Respondents to file a second answer. Therefore, I deny Respondents request that I enlarge the time for filing an answer.

Second, Respondents, relying on *Houston v. Lack*, 487 U.S. 266 (1988), contend the Chief ALJ's Initial Decision and Order should be set aside because Terry Wharff McGloghlon is a prisoner and a pro se respondent in this proceeding. Respondents argue, based on Terry Wharff McGloghlon's status as a prisoner, any documents Mr. McGloghlon filed in this proceeding must be deemed to have been filed on the day the documents were delivered to prison authorities for forwarding to the Hearing Clerk. (Appeal Pet. at 1.)

⁷(...continued)

States Department of Agriculture's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff d*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988) (stating procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings and it is the United States Department of Agriculture's policy to make no effort to follow them), *aff d*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989).

As an initial matter, Terry Wharff McGlohlon is not a respondent in this proceeding. The record before me indicates that there are only two Respondents, Heartland Kennels, Inc., and Halvor Skaarhaug. However, even if Terry Wharff McGlohlon were a pro se respondent in this proceeding, I would not deem documents filed by him to be filed on the date that he delivered them to prison authorities for forwarding to the Hearing Clerk.

Houston v. Lack holds that under Federal Rule of Appellate Procedure 4(a)(1), a pro se prisoner's notice of appeal is filed at the moment of delivery to prison authorities for forwarding to the appropriate United States district court. Rule 1(a)(1) of the Federal Rules of Appellate Procedure provides that the Federal Rules of Appellate Procedure govern procedure in the United States courts of appeals, as follows:

Rule 1. Scope of Rules; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

Fed. R. App. P. 1(a)(1).

The Federal Rules of Appellate Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act. Therefore, I find *Houston v. Lack*, which construes the Federal Rules of Appellate Procedure, inapposite.

Section 1.147(g) of the Rules of Practice, which is applicable to this proceeding, clearly provides that a document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

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

7 C.F.R. § 1.147(g).

An incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk under the Rules of Practice.⁸ Therefore, I reject Respondent's contention that any

⁸*See generally In re Jack Stepp*, 59 Agric. Dec. 265, 268 (2000) (Ruling Denying Respondent's Pet. for Recons. of the Order Lifting Stay) (stating neither respondent's mailing the reply to motion to lift stay nor the United States Postal Service's delivering the reply to motion to lift stay to the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, constitutes filing with the Hearing Clerk); *In re Harold P. Kafka*, 58 Agric. Dec. 357, 365 (1999) (Order Denying Late Appeal) (stating the respondent's unsuccessful efforts to file his appeal petition with the Hearing Clerk do not constitute filing the appeal petition with the Hearing Clerk), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table), *printed in* 60 Agric. Dec. 23 (2001); *In re Sweck s, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; indicating the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 82 (1999) (Order Denying Pet. for Recons.) (stating

(continued...)

documents Terry Wharff McGloghlon filed in this proceeding must be deemed to have been filed on the day the documents were delivered to prison authorities for forwarding to the Hearing Clerk.

Third, Respondents contend that setting aside the Chief ALJ's Initial Decision and Order and remanding the proceeding to the Chief ALJ for a hearing will not prejudice Complainant's ability to present his case (Appeal Pet. at 2).

Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint. Under these circumstances, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Therefore, even if I found

⁸(...continued)

the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 140 n.2 (1999) (stating the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Severin Peterson*, 57 Agric. Dec. 1304, 1310 n.3 (1998) (Order Denying Late Appeal) (stating neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

that Complainant would not be prejudiced by my remanding the proceeding to the Chief ALJ for a hearing, that finding would not constitute a basis for setting aside the Chief ALJ's Initial Decision and Order and remanding the proceeding to the Chief ALJ for a hearing.⁹

Fourth, Respondents deny the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint and found by the Chief ALJ in the Initial Decision and Order (Appeal Pet. at 2).

Respondents' denials come too late to be considered. Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint.

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's October 4, 2001, service letter on October 15, 2001.¹⁰ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time

⁹See *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating even if complainant would not be prejudiced by allowing respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting respondent's contention that complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced complainant's ability to present its case).

¹⁰See note 1.

within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

§ 1.141 Procedure for hearing.

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

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

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

Compl. at 19.

Similarly, the Hearing Clerk informed Respondents in the October 4, 2001, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 4, 2001

Halvor Skaarhaug
Heartland Kennels, Inc.
Rural Route 1, Box 27
Greenville, South Dakota 57239

Dear Sir:

Subject: In re: Heartland Kennels, Inc., a South Dakota corporation;
and Halvor Skaarhaug, an individual - Respondents
AWA Docket No. 02-0004

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

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

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing. In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number [sic].

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears [sic] on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

On December 4, 2001, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Complaint had not been received within the time required in

the Rules of Practice.¹¹ On January 24, 2002, Respondents filed a letter in response to the Complaint. Respondents' late-filed response to the Complaint does not deny or otherwise respond to the allegations of the Complaint.¹²

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting

¹¹See note 2.

¹²See note 6.

aside the default decision,¹³ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹⁴

¹³See *Dale Goodale*, 60 Agric. Dec. ____ (Dec. 11, 2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. ____ (Nov. 9, 2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

¹⁴See generally *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. ____ (Jan. 4, 2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are

(continued...)

¹⁴(...continued)

deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to

(continued...)

¹⁴(...continued)

have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the

(continued...)

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondents failed to file a timely answer. Moreover, when Respondents did file an answer, 3 months 9 days after being served with the Complaint, Respondents failed to deny or otherwise respond to the allegations of the Complaint. Respondents' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Respondents' failure to deny or otherwise respond to the allegations of the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive

¹⁴(...continued)

violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Respondents of their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁵

Paragraph 4.I. of the Complaint

Respondents are deemed to have admitted that on January 10, 2000, Respondents maintained expired or ineffective drugs for animal use, as alleged in paragraph 4.I. of the Complaint. Complainant alleges that Respondents maintenance of these expired or ineffective drugs is a failure to provide a program of adequate veterinary care in accordance with section 2.40(b)(1) and (b)(2) of the Regulations (9 C.F.R. § 2.40(b)(1), (b)(2)) (Compl. ¶ 4.I.).

Section 2.40 of the Regulations (9 C.F.R. § 2.40) does not specifically prohibit the maintenance of expired or ineffective drugs. Based on the limited record before me, I do not conclude that Respondents maintenance of expired and ineffective drugs by itself is a

¹⁵*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party s failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party s failure to file a timely answer).

failure to provide adequate veterinary care in violation of section 2.40(b)(1) and (b)(2) of the Regulations (9 C.F.R. § 2.40(b)(1), (b)(2)).¹⁶

Paragraph 4.m. of the Complaint

Respondents are deemed to have admitted that on January 10, 2000, Respondents housed 60 dogs outside in wet and cold conditions without providing the animals without adequate means to stay warm and dry, as alleged in paragraph 4.m. of the Complaint. Complainant alleges that Respondents housing the dogs outside in wet and cold conditions without providing the animals without adequate means to stay warm and dry constitutes a failure to establish and maintain programs of adequate veterinary care in violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)) (Compl. ¶ 4.m.).

The meaning of without providing the animals without adequate means to stay warm and dry in paragraph 4.m. of the Complaint is not clear. Therefore, even though Respondents are deemed to have admitted the allegations in paragraph 4.m. of the Complaint, I do not conclude that Respondents violated section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)) based on their admission of the allegations in paragraph 4.m. of the Complaint.

¹⁶See generally *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1321-22 (1997), remanded, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000) (citation limited under 6th Circuit Rule 28(g)), printed in 59 Agric. Dec. 534 (2000), final decision on remand, 60 Agric. Dec. 73 (2001), *aff d*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished).

Section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b))

The Chief ALJ concluded that Respondents willfully violated section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b)), a provision which relates to carriers (Initial Decision and Order at 21, 26). However, the facts alleged in the Complaint, which Respondents are deemed to have admitted, do not support the conclusion that Respondents were carriers. Instead, I conclude, based on the allegations in the Complaint, which Respondents are deemed to have admitted, that Respondents were dealers who willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), a provision which relates to dealers.

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

ORDER

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

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

2. Respondents are jointly and severally assessed a \$54,642.50 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents payment of the \$54,642.50 civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondents.

Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 02-0004.

3. Respondent Halvor Skaarhaug s Animal Welfare Act license (Animal Welfare Act license number 46-B-0062) is revoked. The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent Halvor Skaarhaug.

4. Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in

whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is October 8, 2002.

Done at Washington, DC

October 8, 2002

William G. Jenson
Judicial Officer