

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 05-0032
)
Cheryl Morgan, an individual,)
d/b/a Exotic Pet Co.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 9, 2005. 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 Cheryl Morgan [hereinafter Respondent] willfully violated the Regulations and Standards (Compl. ¶¶ 6-11). The Hearing Clerk served Respondent

with the Complaint, the Rules of Practice, and a service letter on November 9, 2005.¹ Respondent failed to file an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On December 6, 2005, 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 Cheryl Morgan by Reason of Admission of Facts [hereinafter Proposed Default Decision]. On December 28, 2005, Respondent requested an extension of time within which “to solve this misunderstanding.”² On December 29, 2005, Acting Chief Administrative Law Judge Jill S. Clifton [hereinafter the Acting Chief ALJ] granted Respondent an extension of time within which to respond to Complainant’s Motion for Default Decision. On January 31, 2006, Respondent filed timely objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision. On February 23, 2006, Complainant filed Complainant’s Reply to Respondent’s Objections to Motion for Adoption of Proposed Decision and Order.

On March 29, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding

¹Memorandum to the File dated November 9, 2005, and signed by Tonya Fisher, Legal Technician.

²Letter from Respondent to the United States Department of Agriculture, Office of Administrative Law Judges, dated and filed December 28, 2005.

Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

On May 1, 2006, Respondent appealed to the Judicial Officer. On May 26, 2006, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I agree with the ALJ's Initial Decision; therefore, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

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

§ 2131. Congressional statement of policy

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

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

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

§ 2132. Definitions

When used in this chapter—

....

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

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

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

....

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

§ 2149. Violations by licensees

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

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

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

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

jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of \$1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

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

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

§ 2151. Rules and regulations

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

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

DECISION

Statement of the Case

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

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

Findings of Fact

1. Respondent is an individual doing business as Exotic Pet Co. and whose mailing address is 2006 Smith Lane, Beeville, Texas 78102.
2. At all times material to this proceeding, and between December 16, 2001, and December 16, 2004, Respondent was licensed and operating as an *exhibitor*, as that term is defined in the Animal Welfare Act and the Regulations and Standards, and held Animal Welfare Act license number 74-C-0406. On December 16, 2004, Animal Welfare Act license number 74-C-0406 expired because Respondent did not renew it.
3. On or about March 16, 2005, Respondent applied for a new Animal Welfare Act license and, since June 21, 2005, Respondent has operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations and Standards, and holds Animal Welfare Act license number 74-B-0530.
4. Animal and Plant Health Inspection Service personnel conducted inspections of Respondent's facilities, records, and animals for the purpose of determining Respondent's compliance with the Animal Welfare Act and the Regulations and Standards on May 23, 2002 (10 animals inspected), February 25, 2003 (28 animals inspected), February 26, 2003 (43 animals inspected), August 28, 2003 (40 animals

inspected), September 29, 2003 (20 animals inspected), May 26, 2004 (40 animals inspected), and August 12, 2004 (30 animals inspected).

5. Respondent has a medium-size business. At all times material to this proceeding, Respondent held, on average, 30 animals for exhibition or resale (including spider monkeys, capuchin monkeys, baboons, rhesus monkeys, vervet monkeys, kinkajous, cavies, kangaroos, porcupines, a blackbuck antelope, and a camel).

6. The gravity of Respondent's violations of the Regulations and Standards is great. Respondent's violations include numerous instances in which Respondent failed to provide minimally-adequate veterinary care, husbandry, and shelter to her animals.

7. Respondent has a previous history of violations. On July 4, 1999, Respondent paid a \$ 2,250 civil penalty for violations of the Animal Welfare Act and the Regulations documented in Animal Welfare Act investigation TX 99-086AC. At all times material to this proceeding, Respondent has continually failed to provide minimally-adequate veterinary care and husbandry to her animals despite having been repeatedly advised of deficiencies. An ongoing pattern of violations establishes a history of previous violations and a lack of good faith for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

8. Respondent violated the attending veterinarian and veterinary care regulations, as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to establish and maintain programs of adequate veterinary care that

included a written program of veterinary care and regularly scheduled visits to Respondent's premises. Specifically, Respondent failed to make her written program of veterinary care available to Animal and Plant Health Inspection Service officials during their inspection of her facility.

b. Respondent failed to establish and maintain an adequate program of veterinary care that included the availability of appropriate facilities, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, as follows:

(i) On May 23, 2002, Respondent failed to obtain veterinary treatment for a female capuchin monkey with a severely injured tail.

(ii) On May 23, 2002, Respondent housed nonhuman primates in enclosures that failed to protect them from injuries and disease.

(iii) On or about February 6, 2003, Respondent failed to have appropriate facilities, services, and methods available to provide minimally-adequate care to no fewer than eight animals, including: four hypothermic sugar gliders; one sugar glider that suffered from a prolapsed rectum; one neonatal capuchin monkey that suffered from diarrhea; one neonatal capuchin monkey that had nasal discharge and appeared dehydrated and lethargic; and one neonatal macaque that had nasal discharge and suffered from diarrhea.

(iv) On February 25, 2003, Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic.

(v) On February 26, 2003, Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic and a juvenile blackbuck antelope that appeared bloated, hypothermic, and had a rough hair coat.

(vi) On August 28, 2003, Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

(vii) On September 29, 2003, Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

c. On or about May 23, 2002, Respondent failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being with a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian. Specifically, Respondent failed to observe and convey timely and accurate information to her attending veterinarian concerning a female capuchin monkey that had a severely injured tail, which became infected and necrotic and was amputated.

9. Respondent violated the record-keeping regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession, as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to maintain, and make available for inspection, records concerning her acquisition and disposition of animals and animals in her possession or under her control.

b. On May 26, 2004, Respondent failed to maintain, and make available for inspection, complete and accurate records concerning animals in her possession or under her control, records concerning the disposition of animals (including a female spider monkey, two juvenile tigers, a vervet monkey, and a capuchin monkey), and records concerning the acquisition of four infant rhesus monkeys.

10. Respondent violated the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, as follows:

a. On February 25, 2003, Respondent failed to provide appropriate heat, shelter, and care to two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys that were exposed to cold, wet weather.

b. On February 26, 2003, Respondent failed to provide appropriate heat, shelter, and care to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys that were exposed to temperatures below 45 degrees Fahrenheit.

11. On or about February 6, 2003, Respondent violated the handling regulations by failing to handle three kinkajous, three nonhuman primates, and 28 sugar gliders as expeditiously and careful as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort.

12. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed in the facilities, are maintained in good repair, protect the animals from injury, and contain the animals, as follows:

(i) On May 23, 2002, the wire wall that separated the adjacently housed pig-tailed macaque and five capuchin monkeys lacked adequate structural integrity to contain the animals in their respective enclosures, thereby risking cross-contact injury.

(ii) On February 26, 2003, Respondent failed to repair or replace loose wire in an enclosure housing two capuchin monkeys and a collapsed resting shelf in the enclosure housing two rhesus monkeys and failed to remove an electrical cord in the enclosure housing a vervet monkey and broken glass in the enclosure housing two vervet monkeys.

(iii) On May 26, 2004, Respondent housed two capuchin monkeys in an enclosure that lacked adequate structural integrity and safety mechanisms to contain the animals, which failure allowed the animals to escape.

(iv) On August 12, 2004, Respondent failed to repair or replace chewed, holed, and splintered shelter structures in enclosures housing macaques, capuchin monkeys, and baboons.

b. Respondent failed to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials, as follows:

(i) On August 28, 2003, Respondent failed to remove boxes, tools, and trash from the room used to store animal food and bedding.

(ii) On May 26, 2004, Respondent failed to remove caulk, insecticides, bags, a jug, fertilizer, and other discarded items from the room used to store animal food and failed to clean and sanitize the refrigerator used to store animal food.

c. On May 26, 2004, Respondent failed to construct and maintain all surfaces of nonhuman primate facilities in a manner, and of materials, that protect the animals from injury, and that allow the facilities to be readily cleaned and sanitized. Specifically, Respondent failed to repair or replace chewed shelter boxes with exposed, splintered wood and chipped linoleum from the resting platforms in primate enclosures.

d. Respondent failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, as follows:

(i) On February 25, 2003, Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls, and perches of enclosures that housed a baboon, seven capuchin monkeys, and three vervet monkeys.

(ii) On February 26, 2003, Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls, and perches of enclosures that housed a female baboon, seven capuchin monkeys, and two vervet monkeys.

(iii) On August 28, 2003, Respondent failed to remove old food, feces, and urine from the floors, shelters, walls, resting boards, and perches of enclosures that housed four capuchin monkeys, three vervet monkeys, and two white-faced capuchin monkeys.

(iv) On September 29, 2003, Respondent failed to remove dirt, body oils, and feces from the walls in the enclosures that housed five capuchin monkeys.

(v) On May 26, 2004, Respondent failed to remove accumulated body oils and old food from the resting shelves and shelter boxes in enclosures housing nonhuman primates.

e. Respondent failed to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation, as follows:

(i) On February 25, 2003, Respondent failed to store three open bags of feed in leakproof containers with tightly fitting lids.

(ii) On February 26, 2003, Respondent stored sacks of food on a wet floor and near insecticides, paints, old plastic bags, rags, and other discarded items.

(iii) On May 26, 2004, Respondent stored food supplies in a dirty refrigerator that contained spoiled food.

f. Respondent failed to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort, as follows:

(i) On February 25, 2003, two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

(ii) On February 26, 2003, four spider monkeys and seven capuchin monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

g. Respondent failed to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times, as follows:

(i) On February 25, 2003, Respondent failed to provide any heat to two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys when the ambient temperature was below 45 degrees Fahrenheit.

(ii) On February 26, 2003, Respondent failed to provide minimally-adequate shelter (including bedding and wind and rain breaks) and heat to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys when the ambient temperature was below 40 degrees Fahrenheit.

(iii) On August 12, 2004, Respondent failed to provide minimally-adequate shelter for four spider monkeys. A plastic barrel and a wood box were the animals' sole means of shelter and were too small to accommodate all four animals and lacked wind and rain breaks.

h. Respondent failed to house nonhuman primates in enclosures that provide the minimum space requirements, as follows:

(i) On or about February 6, 2003, Respondent housed three infant monkeys (two capuchin monkeys and one macaque) in an enclosure that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

(ii) On May 26, 2004, Respondent housed four infant macaques in enclosures that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

i. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to the Animal and Plant Health Inspection Service upon request, as follows:

(i) On May 23, 2002, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility and failed to provide five capuchin monkeys with species-typical enrichment activities, including elevated perches and cage complexities.

(ii) On or about February 6, 2003, Respondent failed to provide any environment enhancement to three infant monkeys (two capuchin monkeys and one macaque).

(iii) On August 28, 2003, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility.

(iv) On May 26, 2004, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility and failed to provide spider monkeys with species-typical enrichment activities, including ropes or a brachiating structure.

13. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals, as follows:

a. Respondent failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain the facilities in good repair to protect the animals from injury and to contain the animals, as follows:

(i) On February 26, 2003, Respondent risked injury to her animals by failing to provide any housing for a camel that roamed throughout the facility and was exposed to, among other things, numerous electrical cords and by housing a juvenile blackbuck antelope in an enclosure that contained sharp, protruding chain link fencing.

(ii) On August 12, 2004, Respondent failed to house animals in enclosures that protect them from injury by housing a juvenile cougar and juvenile tiger

in an enclosure that contained holes and gaps in the floor and Patagonian cavies and crested porcupines in enclosures that had floors with exposed, sharp, protruding wires.

b. On or about February 6, 2003, Respondent failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris and to provide and operate disposal facilities so as to minimize vermin infestation, odors, and disease hazards. Specifically, Respondent failed to remove animal and food waste, old bedding, and a dead animal from enclosures housing three kinkajous and 28 sugar gliders.

c. Respondent failed to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility, as follows:

(i) On February 25, 2003, Respondent failed to construct and maintain a perimeter fence around three kangaroos, a juvenile blackbuck antelope, and a camel.

(ii) On February 26, 2003, Respondent failed to construct and maintain a perimeter fence around three kangaroos and three porcupines.

d. Respondent failed to provide animals with food that is wholesome, palatable, free from contamination, and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species,

condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, as follows:

(i) On or about February 6, 2003, Respondent failed to provide 28 sugar gliders with food of sufficient quantity and nutritive value to maintain good animal health; all of the animals ate voraciously when offered food and many appeared malnourished and underweight.

(ii) On May 26, 2004, Respondent fed cavies, African porcupines, and capybaras decaying cabbage.

e. On or about February 6, 2003, Respondent failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and failed to keep water receptacles clean and sanitary. Specifically, Respondent provided a small amount (if any) of dirty water to 28 sugar gliders; when offered water, the animals drank thirstily.

f. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, as follows:

(i) On or about February 6, 2003, Respondent housed three kinkajous in an enclosure that contained excessive feces.

(ii) On February 25, 2003, Respondent housed two kinkajous in an enclosure that contained excessive feces.

(iii) On February 26, 2003, Respondent housed two kinkajous in an enclosure that contained excessive feces.

g. Respondent failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, as follows:

(i) On or about February 6, 2003, Respondent's one unsupervised employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the condition of the animals and their enclosures.

(ii) On February 25, 2003, Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.

(iii) On February 26, 2003, Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.

Conclusions of Law

1. The Secretary has jurisdiction over this matter.
2. Respondent willfully violated sections 2.40 and 2.126 of the Regulations and Standards (9 C.F.R. §§ 2.40, .126), as follows:

- a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to comply with sections 2.40(a)(1) and 2.126(a)(2) of the Regulations and Standards (9 C.F.R. §§ 2.40(a)(1), .126(a)(2)).
 - b. On May 23, 2002, February 25, 2003, February 26, 2003, August 28, 2003, and September 29, 2003, and on or about February 6, 2003, Respondent failed to comply with section 2.40(a) and (b)(1)-(2) of the Regulations and Standards (9 C.F.R. § 2.40(a), (b)(1)-(2)).
 - c. On or about May 23, 2002, Respondent failed to comply with section 2.40(a) and (b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(a), (b)(3)).
3. On May 23, 2002, August 28, 2003, September 29, 2003, and May 26, 2004, Respondent willfully violated sections 2.75(b)(1) and 2.126(a)(2) of the Regulations and Standards (9 C.F.R. §§ 2.75(b)(1), .126(a)(2)) by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession.
 4. On February 25, 2003, and February 26, 2003, Respondent willfully violated section 2.131(d) of the Regulations and Standards (9 C.F.R. § 2.131(d) (2004)) [(9 C.F.R. § 2.131(e) (2006))] by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being.
 5. On or about February 6, 2003, Respondent willfully violated section 2.131(a) of the Regulations and Standards (9 C.F.R. § 2.131(a) (2004)) [(9 C.F.R. § 2.131(b) (2006))] by failing to handle animals as expeditiously and carefully as possible

in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort.

6. Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed in the facilities, are maintained in good repair, protect the animals from injury, and contain the animals, as follows:

(i) On May 23, 2002, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(ii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(ii)).

(ii) On February 26, 2003, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(i)-(ii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(i)-(ii)).

(iii) On May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(iii)).

(iv) On August 12, 2004, Respondent failed to comply with sections 2.100(a), 3.75(a), (c), and 3.80(a)(2)(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), (c), .80(a)(2)(iii)).

b. On August 28, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a) and 3.75(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(b)) by failing to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials.

c. On May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(c), and 3.80(a)(2)(i)-(ii), and (ix) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(c), .80(a)(2)(i)-(ii), (ix)) by failing to construct and maintain all surfaces of nonhuman primate facilities in a manner, and of materials, that protect the animals from injury and that allow the surfaces to be readily cleaned and sanitized.

d. On February 25, 2003, February 26, 2003, August 28, 2003, September 29, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(c)(3), 3.80(a)(2)(v), and 3.84(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(c)(3), .80(a)(2)(v), .84(a)) by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards.

e. On February 25, 2003, February 26, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a) and 3.75(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(e)) by failing to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation.

f. On February 25, 2003, and February 26, 2003, Respondent failed to comply with sections 2.100(a) and 3.78(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.78(a)) by failing to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort.

g. On February 25, 2003, February 26, 2003, and August 12, 2004, Respondent failed to comply with sections 2.100(a), 3.78(b), and 3.80(a)(2)(vi) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.78(b), .80(a)(2)(vi)) by failing to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times.

h. On May 26, 2004, and on or about February 6, 2003, Respondent failed comply with sections 2.100(a), 3.80(a)(xi), (b)(2)(i), and 3.87(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(xi), (b)(2)(i), .87(e)) by failing to house nonhuman primates in enclosures that provide the minimum space requirements.

i. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to the Animal and Plant Health Inspection Service upon request, as follows:

(i) On May 23, 2002, and May 26, 2004, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), 3.81, and 3.81(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81, .81(b)).

(ii) On or about February 6, 2003, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), 3.81, and 3.81(c)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81, .81(c)(1)).

(iii) On August 28, 2003, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), and 3.81 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81).

7. Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), as follows:

a. On February 26, 2003, and August 12, 2004, Respondent failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(a)) by failing to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain indoor and outdoor housing facilities in good repair to protect the animals from injury and to contain the animals.

b. On or about February 6, 2003, Respondent failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(d)) by failing to make provisions for the removal and disposal of animal and food

wastes, bedding, dead animals, trash, and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards.

c. On February 25, 2003, and February 26, 2003, Respondent failed to comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(d)) by failing to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility.

d. On May 26, 2004, and on or about February 6, 2003, Respondent failed to comply with sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.129(a)) by failing to provide animals with food that is wholesome, palatable, free from contamination, and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination.

e. On or about February 6, 2003, Respondent failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.130) by failing to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary.

f. On February 25, 2003, and February 26, 2003, and on or about February 6, 2003, Respondent failed to comply with sections 2.100(a) and 3.131(a) of the

Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(a)) by failing to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors.

g. On February 25, 2003, and February 26, 2003, and on or about February 6, 2003, Respondent failed to comply with sections 2.100(a), 3.85, and 3.132 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.85, .132) by failing to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care.

Respondent's Appeal Petition

Respondent raises three issues in her "Appeal of Decision of Administrative Law Judge" [hereinafter Respondent's Appeal Petition]. First, Respondent asserts she filed a timely response to the Complaint in which she denied the material allegations of the Complaint (Respondent's Appeal Pet. at 1-4).

The record does not support Respondent's assertion that she filed a timely response to the Complaint. The Hearing Clerk, by certified mail, sent Respondent the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated September 9, 2005. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter "unclaimed" and returned it to the Hearing Clerk. On November 9, 2005, the Hearing Clerk, by ordinary mail, sent the Complaint, the Rules of Practice, and the

Hearing Clerk's September 9, 2005, service letter to Respondent at the same address as the Hearing Clerk used for the September 9, 2005, certified mailing.³ Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides, if the Hearing Clerk sends a document by certified mail and it is returned by the United States Postal Service marked "unclaimed," the document shall be deemed to be received by the party on the date of remailing by ordinary mail to the same address. Thus, the Hearing Clerk is deemed to have served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter on November 9, 2005.

Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

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

. . . .

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

³See note 1.

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

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

§ 1.141 Procedure for hearing.

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

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

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

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

Compl. at 15.

Respondent's answer was due no later than November 29, 2005. Respondent's first filing in this proceeding is dated and was filed December 28, 2005, 29 days after Respondent's answer was due.

On December 6, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 28, 2005, in her first filing in this proceeding, Respondent requested an extension of time within which "to solve this misunderstanding." The Acting Chief ALJ issued an order granting Respondent an extension to January 31, 2006, within which to file a response to Complainant's Motion for Default Decision, as follows:

By letter dated December 28, 2005, Respondent Cheryl Morgan requested an extension "to solve this misunderstanding." I hereby grant Respondent Cheryl Morgan an extension through **Tuesday, January 31, 2006**, to file her response to Complainant's Motion for Adoption of Proposed Decision and Order. I grant the extension in my capacity as acting chief administrative law judge; the case has not yet been assigned to an administrative law judge.

Respondent Cheryl Morgan failed to file a request for additional time by November 29, 2005, the deadline for filing an answer. It is not clear to me whether Respondent Cheryl Morgan recognizes how far this case has progressed. Respondent Cheryl Morgan is in default, having failed to file an answer by November 29, 2005. I wholeheartedly encourage Respondent Cheryl Morgan to contact the Attorney for APHIS, Bernadette R. Juarez, telephone number 202.720.2633 and FAX 202.690.4299, to try to settle the case.

Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order at 1. On January 31, 2006, 2 months 2 days after

Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint.

On March 29, 2006, the ALJ issued an Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

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

the default decision,⁴ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁵

⁴See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

⁵See generally *In re Mary Jean Williams* (Decision as to Mary Jean Williams) ___ Agric. Dec. ___ (Sept. 14, 2005) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed almost 8 months after her 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*
(continued...)

⁵(...continued)

Mary Jean Williams (Decision as to Deborah Ann Milette) __ Agric. Dec. __ (June 29, 2005) (holding the default decision was properly issued where the respondent filed her answer 1 month 4 days after her 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 Bodie S. Knapp*, __ Agric. Dec. __ (May 31, 2005) (holding the default decision was properly issued where the respondent filed his answer 1 month 15 days after his answer was due and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent

(continued...)

⁵(...continued)

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 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

(continued...)

⁵(...continued)

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), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy &*
(continued...)

Respondent's first filing in this proceeding was filed with the Hearing Clerk 29 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly deemed Respondent to have admitted the allegations of the Complaint.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.⁶

⁵(...continued)

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).

⁶*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980)

(continued...)

Second, Respondent contends, under the circumstances in this proceeding, revocation of her Animal Welfare Act licenses and assessment of a \$16,280 civil penalty are too harsh. Respondent identifies the following circumstances as bases for Respondent's contention that her Animal Welfare Act licenses should not be revoked and a \$16,280 civil penalty should not be assessed: (1) the alleged violations occurred over the course of 2 years; (2) Respondent has corrected the alleged violations; (3) many of the alleged violations did not occur; (4) many of the alleged violations did not occur when Respondent was in possession or control of the facility; (5) other Animal Welfare Act licensees have violated the Animal Welfare Act and the Regulations and Standards on more numerous occasions than Respondent and have not had their Animal Welfare Act licenses revoked; (6) Respondent has had a good record with the United States Department of Agriculture; and (7) Respondent cares about her animals and the safety of the public. (Respondent's Appeal Pet. at 4.)

⁶(...continued)

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

I reject Respondent's contention that the lengthy period during which Respondent violated the Regulations and Standards is a basis for reducing the sanction imposed by the ALJ. To the contrary, generally, a respondent who violates the Regulations and Standards over a long period of time warrants a more stringent sanction than a respondent who commits the same violations over a short period of time. Violations over a long period of time often demonstrate continued disregard of the Animal Welfare Act and the Regulations and Standards.

There is no evidence before me to support Respondent's assertions that she corrected many of the alleged violations, that many of the alleged violations did not occur when Respondent was in possession or control of the facility, and that Respondent cares about her animals and the safety of the public. Moreover, I reject Respondent's assertions that many of the alleged violations did not occur and that Respondent has had a good record with the United States Department of Agriculture. Respondent is deemed by her failure to file a timely answer to have admitted, for the purposes of this proceeding, the violations alleged in the Complaint and the history of previous violations alleged in the Complaint.

Finally, I reject Respondent's contention that the ALJ's revocation of her Animal Welfare Act licenses is error because other Animal Welfare Act licensees have violated the Animal Welfare Act and the Regulations and Standards on more numerous occasions than Respondent and have not had their Animal Welfare Act licenses revoked. Even if the sanction imposed against Respondent were more severe than the sanctions imposed

against offenders in similar cases, the sanction in this proceeding would not be rendered invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Animal Welfare Act, and the Animal Welfare Act has no requirement that there be uniformity in sanctions among violators.

A sanction by an administrative agency must be warranted in law and justified in fact.⁷ The Secretary of Agriculture has authority to revoke the Animal Welfare Act

⁷*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re M. Trombetta & Sons, Inc.*, __ Agric. Dec. __, slip op. at 38 (Sept. 27, 2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), __ Agric. Dec. __, slip op. at 26 (June 29, 2005); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951

(continued...)

license of any person who has violated the Animal Welfare Act or the Regulations and Standards⁸ and to assess a civil penalty of \$2,750 for each violation of the Animal Welfare Act or the Regulations and Standards.⁹ Respondent committed hundreds of willful violations of the Regulations and Standards. Therefore, the ALJ's revocation of Respondent's Animal Welfare Act licenses and assessment of a \$16,280 civil penalty are warranted in law. Moreover, I find revocation of Respondent's Animal Welfare Act licenses and assessment of a \$16,280 civil penalty are justified in fact.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.¹⁰

⁷(...continued)
(1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

⁸7 U.S.C. § 2149(a).

⁹7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(b)(2)(v).

¹⁰7 U.S.C. § 2149(b).

Respondent is deemed to have admitted she has a medium-size business, the gravity of Respondent's violations of the Regulations and Standards is great, and Respondent has a history of violations of the Regulations and Standards.¹¹

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Complainant recommends revocation of Respondent's Animal Welfare Act licenses, assessment of a \$16,280 civil penalty, and the issuance of an order requiring Respondent to cease and desist violations of the Animal Welfare Act and the Regulations and Standards.

¹¹Compl. ¶¶ 3-5.

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order, assessment of a \$16,280 civil penalty against Respondent, and revocation of Respondent's Animal Welfare Act licenses are appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent appeals the Acting Chief ALJ's December 29, 2005, Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order; however, Respondent states her appeal of the Acting Chief ALJ's December 29, 2005, Order is contingent upon the Order being a decision (Respondent's Appeal Pet. at 5).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the

Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132. The Acting Chief ALJ's December 29, 2005, Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order is not an initial decision made in accordance with the provisions of 5 U.S.C. §§ 556 and 557. Therefore, as Respondent's appeal of the Acting Chief ALJ's December 29, 2005, Order is contingent upon the Order being a decision, I do not address the merits of Respondent's appeal of the Acting Chief ALJ's December 29, 2005, Order.

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

ORDER

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

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a \$16,280 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:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW

Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0032.

3. Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) are revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 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 the Order in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹² The date of entry of the Order in this Decision and Order is July 6, 2006.

Done at Washington, DC

July 6, 2006

¹²7 U.S.C. § 2149(c).

William G. Jenson
Judicial Officer