

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) AWA Docket No. 04-0021  
)  
Marjorie Walker, d/b/a )  
Linn Creek Kennel, )  
)  
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 July 23, 2004. 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]. On February 6, 2006, Complainant filed an Amended Complaint.

Complainant alleges Marjorie Walker, d/b/a Linn Creek Kennel [hereinafter Respondent], willfully violated the Regulations and Standards on March 6, 2001,

November 5, 2001, November 15, 2001, November 27, 2001, January 16, 2002, March 18, 2002, April 1, 2002, July 18, 2002, January 21, 2004, July 29, 2004, August 19, 2004, February 4, 2005, March 10, 2005, August 31, 2005, October 13, 2005, November 18, 2005, and December 1, 2005 (Amended Compl. ¶¶ II-XVIII). The Hearing Clerk served Respondent with the Amended Complaint and a service letter on February 16, 2006.<sup>1</sup> Respondent failed to file an answer to the Amended 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 April 11, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Second Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and Proposed Decision and Order by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on April 19, 2006.<sup>2</sup> Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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<sup>1</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 2421.

<sup>2</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 2762.

On May 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Amended Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$15,000 civil penalty; and (4) revoking Respondent's Animal Welfare Act license (Initial Decision at 2-13).

On June 30, 2006, Respondent appealed the ALJ's Initial Decision to the Judicial Officer. On July 19, 2006, Complainant filed a response to Respondent's appeal petition. On July 24, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision, except for two of the ALJ's conclusions, which I discuss in this Decision and Order, *infra*.

**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—

....

(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[.]

## **§ 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. 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), 2146(a), 2149(a)-(c), 2151.

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.

....

*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 at the wholesale level 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 animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; 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; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

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

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(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;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

**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.

....

(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.

....

(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.

## 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 (or photographic identification card for nondrivers issued by a State) 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.

....

**§ 2.78 Health certification and identification.**

(a) No dealer, exhibitor, operator of an auction sale, broker, or department, agency, or instrumentality of the United States or of any State or local government shall deliver to any intermediate handler or carrier for transportation, in commerce, or shall transport in commerce any dog, cat, or nonhuman primate unless the dog, cat, or nonhuman primate is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) The licensed veterinarian inspected the dog, cat, or nonhuman primate on a specified date which shall not be more than 10 days prior to the delivery of the dog, cat, or nonhuman primate for transportation; and

(2) when so inspected, the dog, cat, or nonhuman primate appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

**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.

**SUBPART I—MISCELLANEOUS**

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**§ 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.

....

### **§ 2.130 Minimum age requirements.**

No dog or cat shall be delivered by any person to any carrier or intermediate handler for transportation, in commerce, or shall be transported in commerce by any person, except to a registered research facility, unless such dog or cat is at least eight (8) weeks of age and has been weaned.

## **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.

....

(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:

....

(ii) Be free of jagged edges or sharp points that might injure the animals.

....

(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.

....

(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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### **§ 3.3 Sheltered housing facilities.**

(a) *Heating, cooling, and temperature.* The sheltered part of sheltered 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. The ambient temperature in the sheltered part of 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 and discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs or 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.

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### § 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.

.....

(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:

.....

(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.

.....

### § 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.

(2) Primary enclosures must be constructed and maintained so that they:

.....

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner; and

(xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than 1/8 of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

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## ANIMAL AND HUSBANDRY STANDARDS

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### § 3.9 Feeding.

(a) Dogs and cats must be fed at least once each day, except as otherwise might be required to provide adequate veterinary care. The food must be uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the normal condition and weight of the animal. The diet must be appropriate for the individual animal's age and condition.

### § 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. . . .*

(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.

9 C.F.R. §§ 1.1; 2.40(a)-(b), .50(a)(1), (b)(1), (3), .75(a)(1), .78(a), .100(a), .126(a), .130; 3.1(a), (c)(1)(ii), (3), (e), .3(a), .4(a)(1), (b)(3)-(4), .6(a)(2)(xi), (xii), .9(a), .10, .11(a), (b)(2) (footnotes omitted).

## **DECISION**

### **Statement of the Case**

Respondent failed to file an answer to the Amended 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 Amended 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 Linn Creek Kennel whose address is P.O. Box 107, Gentry, Missouri 64453.
2. Respondent, at all times material to this proceeding, had an Animal Welfare Act license and operated as a “dealer,” as defined in the Animal Welfare Act and the Regulations and Standards. As of the date of the issuance of the Amended Complaint,

January 12, 2006, Respondent's Animal Welfare Act license was listed as being held in the name of Harold and Marjorie Walker.

3. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to provide adequate veterinary care to several dogs, including, but not limited to:

a. A 6-week old puppy that was observed bumping into walls and that had not had its eyes examined by a veterinarian;

b. Nine dogs that were observed to be visibly thin with visible ribs, prominent pelvic bones, and obvious waist and abdominal tuck (seven of these dogs also had coats that were thin and patchy and none of the nine dogs had been examined by a veterinarian);

c. Two dogs that had matted coats caked with mud and fecal matter; and

d. Twenty-seven dogs that had excessively long toenails that were affecting the dogs' normal stance. (9 C.F.R. § 2.40(b).)

4. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify all dogs on the premises with an official tag or legible tattoo marking acceptable to, and approved by, the Administrator,

Animal and Plant Health Inspection Service, United States Department of Agriculture (9 C.F.R. § 2.50(a)(1)).

5. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the following:

a. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii));

b. Hard surfaces with which the dogs come in contact were not spot-cleaned daily to prevent accumulation of excreta and debris and to reduce disease hazards (9 C.F.R. §§ 2.100(a); 3.1(c)(3));

c. Toxic substances, including, but not limited to, bleach and cleaning supplies, were improperly stored in the food preparation area (9 C.F.R. §§ 2.100(a); 3.1(e));

d. The sheltered parts of sheltered housing facilities for dogs were not sufficiently heated to protect the dogs from temperature extremes and to provide for their health and well-being since the heating unit was not working and the temperature inside the building at the time of inspection was 23 °F (9 C.F.R. §§ 2.100(a); 3.3(a));

e. Breeds of dogs that cannot tolerate the prevalent temperatures of the area without stress or discomfort were kept in outdoor facilities without specific approval by the attending veterinarian (9 C.F.R. §§ 2.100(a); 3.4(a)(1));

f. Dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind breaks were not provided for at least 30 outdoor enclosures containing approximately 70 dogs (9 C.F.R. §§ 2.100(a); 3.4(b)(3));

g. Dogs in outdoor housing facilities were not provided with adequate protection from the elements and were not provided with clean, dry bedding material when the ambient temperature was below 50 °F and additional bedding when the temperature is below 35 °F (9 C.F.R. §§ 2.100(a); 3.4(b)(4));

h. Dogs in outdoor housing facilities were not provided with adequate protection from the elements since the structures available were either too small to hold all of the dogs or not sufficient in number to allow all dogs to move inside in a normal manner (9 C.F.R. §§ 2.100(a); 3.4(b));

i. Dogs were not provided with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals since the amount of food available would only last for another day and no arrangements were made to bring more food to the facility (9 C.F.R. §§ 2.100(a); 3.9(a));

j. Dogs were not provided with potable water since the water in their dishes in all outdoor enclosures and one of the sheltered facilities was frozen and the dogs

were not offered water as often as necessary to ensure their health and well-being (9 C.F.R. §§ 2.100(a); 3.10); and

k. Primary enclosures for dogs were not kept clean since the majority of outdoor and sheltered facilities had an accumulation of fecal matter that was estimated to be more than the amount of fecal matter that accumulates in 24 hours (9 C.F.R. §§ 2.100(a); 3.11(a)).

6. On November 18, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

7. On October 13, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

8. On August 31, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to

conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

9. On March 10, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent could not locate the program of veterinary care or establish the last date that a veterinarian had visited Respondent's facility (9 C.F.R. § 2.40(a)).

10. On March 10, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found primary enclosures for dogs were not constructed so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xi)).

11. On February 4, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

12. On August 19, 2004, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind and rain breaks were not provided for outdoor enclosures (9 C.F.R. §§ 2.100(a); 3.4(b)(3)).

13. On July 29, 2004, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

14. On January 21, 2004, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind and rain breaks were not provided for outdoor enclosures (9 C.F.R. §§ 2.100(a); 3.4(b)(3)).

15. On March 6, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce without valid health certificates (9 C.F.R. § 2.78(a)).

16. On November 5, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

17. On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

18. On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to make and maintain records which correctly disclosed the required information for dogs held at Respondent's facility (9 C.F.R. § 2.75(a)(1)).

19. On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found Respondent failed to provide housing facilities for dogs which were in good repair and which protected the dogs from injury (9 C.F.R. §§ 2.100(a); 3.1(a)).

20. On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and

found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

21. On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were under 16 weeks of age (9 C.F.R. § 2.50(b)(3)).

22. On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the following:

a. Respondent failed to provide clean, dry bedding for dogs (9 C.F.R. §§ 2.100(a); 3.4(b)(4)); and

b. Respondent failed to remove excreta from primary enclosures on a daily basis (9 C.F.R. §§ 2.100(a); 3.11(a)).

23. On March 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

24. On April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found

Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

25. On April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce without valid health certificates (9 C.F.R. § 2.78(a)).

26. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to provide adequate veterinary care (9 C.F.R. § 2.40(b)).

27. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

28. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were under 16 weeks of age (9 C.F.R. § 2.50(b)(3)).

29. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found

Respondent had failed to make and maintain records which correctly disclosed the required information for dogs held at Respondent's facility (9 C.F.R. § 2.75(a)(1)).

30. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected the Respondent's facility and found the following:

a. Respondent failed to provide housing facilities that were structurally sound and maintained to secure the dogs and to protect them from injury (9 C.F.R. §§ 2.100(a); 3.1(a));

b. Respondent failed to provide outdoor housing that provided shelter from the elements (9 C.F.R. §§ 2.100(a); 3.4(b));

c. Respondent failed to provide dog enclosures that had suspended floors constructed of metal strands with strands that either were greater than one-eighth of an inch in diameter or were coated with a material such as plastic or fiberglass (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xii));

d. Respondent failed to remove excreta and food waste from primary enclosures on a daily basis (9 C.F.R. §§ 2.100(a); 3.11(a)); and

e. Respondent failed to properly clean and sanitize water and food receptacles and primary enclosures (9 C.F.R. §§ 2.100(a); 3.11(b)(2)).

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On December 1, 2005, Respondent failed to provide adequate veterinary care to several dogs, in willful violation of section 2.40(b) of the Regulations and Standards (9 C.F.R. § 2.40(b)).
3. On December 1, 2005, Respondent failed to identify all dogs on the premises with an official tag or legible tattoo marking acceptable to, and approved by, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, in willful violation of section 2.50(a)(1) of the Regulations and Standards (9 C.F.R. § 2.50(a)(1)).
4. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep interior surfaces of housing facilities and surfaces that come in contact with dogs free of jagged edges and sharp points that might injure the animals, as required by section 3.1(c)(1)(ii) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(ii)).
5. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to spot-clean hard surfaces with which the dogs come in contact to prevent accumulation of excreta and debris and to reduce disease hazards, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)).

6. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by storing toxic substances, including, but not limited to, bleach and cleaning supplies, in the food preparation area, as prohibited by section 3.1(e) of the Regulations and Standards (9 C.F.R. § 3.1(e)).

7. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to sufficiently heat the sheltered parts of sheltered housing facilities for dogs to protect the dogs from temperature extremes and to provide for their health and well-being, as required by section 3.3(a) of the Regulations and Standards (9 C.F.R. § 3.3(a)).

8. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by keeping breeds of dogs that cannot tolerate the prevalent temperatures of the area without stress or discomfort in outdoor facilities without specific approval by the attending veterinarian, as required by section 3.4(a)(1) of the Regulations and Standards (9 C.F.R. § 3.4(a)(1)).

9. On January 21, 2004, August 19, 2004, and December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements, as required by section 3.4(b)(3) of the Regulations and Standards (9 C.F.R. § 3.4(b)(3)).

10. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements and with clean, dry bedding material when the ambient temperature was below 50 °F and additional bedding when the temperature is below 35 °F, as required by section 3.4(b)(4) of the Regulations and Standards (9 C.F.R. § 3.4(b)(4)).

11. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements, since the structures available were either too small to hold all of the dogs or not sufficient in number to allow all dogs to move inside in a normal manner, as required by section 3.4(b) of the Regulations and Standards (9 C.F.R. § 3.4(b)).

12. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals, since the amount of food available would only last for another day and no arrangements were made to bring more food to the facility, as required by section 3.9(a) of the Regulations and Standards (9 C.F.R. § 3.9(a)).

13. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs with potable water, as required by section 3.10 of the Regulations and Standards (9 C.F.R. § 3.10).

14. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep primary enclosures for dogs clean, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

15. On July 29, 2004, February 4, 2005, August 31, 2005, October 13, 2005, and November 18, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)), since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility.

16. On March 10, 2005, Respondent could not locate the program of veterinary care or establish the last date that a veterinarian had visited Respondent's facility, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

17. On March 10, 2005, Respondent willfully violated of section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to construct primary

enclosures for dogs so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)).

18. On March 6, 2001, and April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) of the Regulations and Standards (9 C.F.R. § 2.78(a)).

19. On November 5, 2001, March 18, 2002, and April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age, in willful violation of section 2.130 of the Regulations and Standards (9 C.F.R. § 2.130).

20. On November 15, 2001, January 16, 2002, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to identify dogs that were over 16 weeks of age, in willful violation of section 2.50(b)(1) of the Regulations and Standards (9 C.F.R. § 2.50(b)(1)).

21. On November 15, 2001, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to make and maintain records which correctly disclosed the required information for dogs

held at Respondent's facility, in willful violation of section 2.75(a)(1) of the Regulations and Standards (9 C.F.R. § 2.75(a)(1)).

22. On November 15, 2001, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide housing facilities for dogs which were in good repair and which protected the dogs from injury, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

23. On January 16, 2002, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to identify dogs that were under 16 weeks of age, in willful violation of section 2.50(b)(3) of the Regulations and Standards (9 C.F.R. § 2.50(b)(3)).

24. On January 16, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide clean, dry bedding for dogs, as required by section 3.4(b)(4) of the Regulations and Standards (9 C.F.R. § 3.4(b)(4)).

25. On January 16, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to remove excreta from primary enclosures on a daily basis, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

26. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to provide adequate

veterinary care, in willful violation of section 2.40(b) of the Regulations and Standards (9 C.F.R. § 2.40(b)).

27. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide housing facilities that were structurally sound and maintained to secure the dogs and to protect them from injury, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

28. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide outdoor housing that provided shelter from the elements, as required by section 3.4(b) of the Regulations and Standards (9 C.F.R. § 3.4(b)).

29. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dog enclosures that had suspended floors constructed of metal strands with strands that either were greater than one-eighth of an inch in diameter or were coated with a material such as plastic or fiberglass, as required by section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)).

30. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to remove excreta and food waste from primary enclosures on a daily basis, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

31. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to properly clean and sanitize water and food receptacles and primary enclosures, as required by section 3.11(b)(2) of the Regulations and Standards (9 C.F.R. § 3.11(b)(2)).

### **Respondent's Appeal Petition**

Respondent raises three issues in her June 30, 2006, filing [hereinafter Appeal Petition]. First, Respondent denies some of the material allegations of the Amended Complaint.

Respondent's denial of the allegations in the Amended Complaint comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because she failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served her with the Amended Complaint. 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.

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

[T]his complaint shall be served upon the respondents [sic]. The respondents [sic] 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.

Amended Compl. at 13.

Similarly, the Hearing Clerk informed Respondent in a service letter transmitting the Amended Complaint 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 Amended Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

February 7, 2006

Ms. Marjorie Walker d/b/a  
Linn Creek Kennel  
P. O. Box 107  
Gentry, Missouri 64453

Dear Ms. Walker:

Subject: In re: Marjorie Walker d/b/a Linn Creek Kennel - Respondent  
AWA Docket No. 04-0021

Enclosed is a copy of Complainant's Amended Complaint and Notice of Filing of Amended Complaint which have been filed with this office in the above-captioned proceeding.

You will have 20 days from service of this letter in which to file an answer to the amended complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motion or requests that you may wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1031, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and 3 copies are required for each document submitted.

Sincerely,

/s/

Joyce A. Dawson  
Hearing Clerk

The Hearing Clerk served Respondent with the Amended Complaint and the Hearing Clerk's service letter on February 16, 2006;<sup>3</sup> therefore, Respondent's answer to the Amended Complaint was due no later than March 8, 2006. Respondent failed to file a timely response to the Amended Complaint. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Amended Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On April 11, 2006, 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. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on April 19, 2006.<sup>4</sup> Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 25, 2006, the ALJ issued an Initial Decision: (1) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Amended Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a

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<sup>3</sup>See note 1.

<sup>4</sup>See note 2.

\$15,000 civil penalty; and (4) revoking Respondent's Animal Welfare Act license (Initial Decision at 2-13).

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,<sup>5</sup> generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.<sup>6</sup>

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<sup>5</sup>See *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).

<sup>6</sup>See generally *In re Cheryl Morgan*, \_\_\_ Agric. Dec. \_\_\_ (July 6, 2006) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 29 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 and Standards alleged in the complaint); *In re Mary Jean Williams* (Decision (continued...))

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<sup>6</sup>(...continued)

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 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

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<sup>6</sup>(...continued)

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 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

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<sup>6</sup>(...continued)

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 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);

(continued...)

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.<sup>7</sup>

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<sup>6</sup>(...continued)

*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 & 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).

<sup>7</sup>*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (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

(continued...)

Second, Respondent contends she “filed a response to the earlier violation allegations in triplicate plus an original.” (Respondent’s Appeal Pet. at first unnumbered page.) I infer Respondent contends her response to the Complaint operates as a response to the Amended Complaint.

I disagree with Respondent’s contention that her response to the Complaint operates as a response to the Amended Complaint. Complainant instituted this proceeding by filing a Complaint on July 23, 2004. The Hearing Clerk served Respondent with the Complaint on August 3, 2004.<sup>8</sup> 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 May 26, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant’s Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order. The Hearing Clerk served Respondent with Complainant’s Motion for Adoption of Proposed Decision and Order, Complainant’s Proposed Decision and Order, and a service letter on

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<sup>7</sup>(...continued)

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).

<sup>8</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0885.

June 6, 2005.<sup>9</sup> On June 27, 2005, Respondent filed objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order. On November 30, 2005, the ALJ denied Complainant's Motion for Adoption of Proposed Decision, stating Respondent's "objections, while untimely filed, deny the allegations of the complaint and the circumstances of the death of one of the Respondents<sup>[10]</sup> and the resulting period of turmoil following his death will be found to be good cause for the failure to file an Answer in a timely manner." (Order filed Nov. 30, 2005, at 1.)

On January 12, 2006, Complainant filed a Motion to Amend Complaint. On January 17, 2006, the ALJ issued an Order granting Complainant's Motion to Amend Complaint, requiring Respondent to answer the Amended Complaint, and stating "[i]n the event no such Answer is filed, the Complainant may file an appropriate Motion for Decision Without Hearing By Reason of Default." (Order filed Jan. 17, 2006, at 2.) On February 6, 2006, Complainant filed the Amended Complaint. The Hearing Clerk served Respondent with the Amended Complaint on February 16, 2006.<sup>11</sup> Respondent failed to

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<sup>9</sup>United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8902 6046.

<sup>10</sup>The Complaint was filed against "Marjorie & Harold Walker, d/b/a Linn Creek Kennel."

<sup>11</sup>See note 1.

file an answer to the Amended 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)).

Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint.

Third, Respondent contends she is not able to pay the \$15,000 civil penalty assessed by the ALJ (Respondent's Appeal Pet. at third unnumbered page).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent's inability to pay the \$15,000 civil penalty is not a basis for reducing the \$15,000 civil penalty.<sup>12</sup>

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<sup>12</sup>The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re Jewel Bond* (Order Denying Pet. to Reconsider), \_\_ Agric. Dec. \_\_\_, slip op. at 7-8 (July 6, 2006) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Mary Jean Williams* (Decision as to Mary Jean Williams), \_\_ Agric. Dec. \_\_\_, slip op. at 28-29

(continued...)

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<sup>12</sup>(...continued)

(Sept. 14, 2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), \_\_\_ Agric. Dec. \_\_\_, slip op. at 9 (Sept. 9, 2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of

(continued...)

**The ALJ's Conclusions That Respondent Violated  
9 C.F.R. §§ 3.1(b)(2) and 3.11(f)**

Complainant alleges that Respondent violated section 3.1(b)(2) of the Regulations and Standards (9 C.F.R. § 3.1(b)(2)) on November 15, 2001, and section 3.11(f) of the Regulations and Standards (9 C.F.R. § 3.11(f)) on November 27, 2001 (Amended Compl. ¶¶ XIII(C)(2), XIV(A)(1)). Respondent, by her failure to answer the Amended Complaint is deemed, for the purpose of this proceeding, to have admitted these violations, and the ALJ concluded Respondent committed these violations (Initial Decision at 9). However, I am not able to locate section 3.1(b)(2) or section 3.11(f) of the Regulations and Standards (9 C.F.R. §§ 3.1(b)(2), .11(f)) in the Code of Federal Regulations. Therefore, while Respondent is deemed to have admitted violating these apparently non-existent provisions of the Code of Federal Regulations, I decline to conclude that she violated section 3.1(b)(2) of the Regulations and Standards (9 C.F.R. § 3.1(b)(2)) on November 15, 2001, or section 3.11(f) of the Regulations and Standards (9 C.F.R. § 3.11(f)) on November 27, 2001, as alleged in the Amended Complaint. Further, I reduce

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<sup>12</sup>(...continued)

respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

the civil penalty assessed against Respondent from \$15,000 to \$14,300 to reflect my conclusion that Respondent did not violate section 3.1(b)(2) or section 3.11(f) of the Regulations and Standards (9 C.F.R. §§ 3.1(b)(2), .11(f)).

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, and, in particular, shall cease and desist from:

- (a) Failing to provide adequate veterinary care to dogs;
- (b) Failing to identify all dogs, as required;
- (c) Failing to keep interior surfaces of housing facilities and surfaces that come in contact with dogs free of jagged edges and sharp points that might injure the animals;
- (d) Failing to spot-clean hard surfaces with which the dogs come in contact to prevent accumulation of excreta and debris and to reduce disease hazards;
- (e) Failing to store toxic substances separate from food preparation areas;
- (f) Failing to provide dogs in outdoor housing facilities with adequate protection from the elements;

- (g) Failing to provide dogs in outdoor housing facilities with clean, dry bedding material, as required;
- (h) Failing to provide dogs with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals;
- (i) Failing to provide dogs with potable water;
- (j) Failing to keep primary enclosures for dogs clean;
- (k) Failing to permit United States Department of Agriculture, Animal and Plant Health Inspection Service, employees to conduct inspections;
- (l) Failing to have a program of veterinary care and regularly scheduled visits by a veterinarian;
- (m) Failing to construct primary enclosures for dogs so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;
- (n) Failing to transport puppies in interstate commerce with valid health certificates;
- (o) Transporting puppies in interstate commerce that are not at least 8 weeks of age;
- (p) Failing to make and maintain records which correctly disclose the required information for dogs held at the facility;

- (q) Failing to provide housing facilities for dogs which are in good repair and structurally sound and which protect the dogs from injury;
- (r) Failing to remove excreta from primary enclosures on a daily basis;
- (s) Failing to ensure, if a suspended floor of a primary enclosure for dogs is constructed of metal strands, the strands either are greater than one-eighth of an inch in diameter or are coated with a material such as plastic or fiberglass; and
- (t) Failing to properly clean and sanitize water and food receptacles and primary enclosures.

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

2. Respondent is assessed a \$14,300 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:

Sharlene Deskins  
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, Sharlene Deskins 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. 04-0021.

3. Respondent's Animal Welfare Act license is 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.<sup>13</sup> The date of entry of the Order in this Decision and Order is August 10, 2006.

Done at Washington, DC

August 10, 2006

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William G. Jenson  
Judicial Officer

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<sup>13</sup>7 U.S.C. § 2149(c).