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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
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SIDNEY JAY YOST, an individual; and	)	AWA Docket No. 12-0294
AMAZING ANIMAL PRODUCTIONS, INC.,	)	AWA Docket No. 12-0295
a California corporation,	)	
	)	
Respondents.	)	

ORDER AFFIRMING INITIAL DECISION AND ORDER

Appearances:

Colleen A. Carroll, Esq., with the Office of the General Counsel, United States Department of Agriculture, for the Complainant, Animal and Plant Health Inspection Service ("APHIS"); and

James D. White, Esq., for the Respondents, Sidney Jay Yost, an individual, and Amazing Animal Productions, Inc., a California corporation.

On Appeal to the Judicial Officer, Bobbie J. McCartney

I. Summary of Relevant Procedural History[1]

The U.S. Department of Agriculture ("USDA") has authority over animal exhibitors and animals used or intended for use in exhibition. The USDA regulates the commercial transportation, purchase, sale, housing, care, handling, and treatment of such animals by exhibitors through the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act") and its regulations and standards (9 C.F.R. §§ 1.1 *et seq.*) ("Regulations and Standards").

On March 16, 2012, the Administrator of the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") filed a complaint alleging that Sidney Jay Yost and Amazing Animal Productions, Inc. ("Respondents") violated the Regulations on multiple occasions from

[1] Adopted from Complainant's Response to Order Affirming in Part and Denying in Part Exceptions on Appeal filed in the above-captioned dockets on February 22, 2019.

March 2008 through August 2010. In an answer filed May 16, 2012, Respondents generally denied each of the allegations in the Complaint.

This matter was assigned to Administrative Law Judge Jill S. Clifton ("Judge"). On June 20, 2013, Complainant moved for summary judgment. On October 21, 2013, Respondents filed an opposition thereto. On May 8, 2014, the Judge issued a ruling on summary judgment granting in part and denying in part Complainant's motion ("Ruling on MSJ"). Specifically, the Judge granted summary judgment with respect to the violation of 9 C.F.R. § 2.131(b)(1) by Respondent Yost as alleged in paragraph 12 of the corrected Complaint.[2]

On October 27, 2014 and November 19, 2014, APHIS filed notices of correction of the Complaint to correct five erroneous citations to subsections of the handling Regulations made in paragraphs 7, 9, 12, 16, and 20 of the Complaint. On December 16, 2014, the Judge filed a "Ruling Accepting Corrections."

On December 16, 2014, Complainant filed a second motion for summary judgment. On December 23, 2014, Respondents filed an opposition thereto. On December 24, 2014, the Judge filed a "Ruling on APHIS's Second Motion for Summary Judgment" ("Ruling on Second MSJ"). The Judge granted the motion in part and denied the motion in part. The Judge upheld her "previous ruling on summary judgment, that Sidney Jay Yost, an individual, committed one willful violation of 9 C.F.R. § 2.131(b)(1) on April 4, 2009, at Utica, Illinois."[3] The Judge also found that Complainant's proposed findings of fact in paragraphs 1, 2, 3, 5, 6, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 were proven.[4] The Judge found that there remained two proposed

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[2] Ruling on MSJ at 10 ("A violation of 9 C.F.R. § 2.131(b)(1) by the individual Respondent is proved through Summary Judgment based on material facts that are not disputed.").

[3] Ruling on Second MSJ at 5.

[4] *Id.* at 3-5.

Respondents violated the Regulations as alleged in the Complaint. The Judge ordered AWA license 93-C-0590 revoked, assessed Respondents civil penalties totaling $30,000 to be paid in monthly installments over a five-year period, and ordered Respondents to cease and desist from future violations.[7]

On January 16, 2018, Respondents filed a petition for appeal ("Appeal") and supporting brief ("Appeal Brief"), setting forth three general assignments of error, to wit: (1) the Judge erred in issuing a decision on the record; (2) the Judge erred in assessing $30,000 in civil penalties; and (3) the Judge erred in "failing to fully correct" the Initial Decision and Order.[8] On December 20, 2017, the Judge held a conference call with the parties at Respondents' request. Among other things, Respondents indicated that they wanted to propose "corrections" to the Initial Decision and Order.[9] On January 9, 2018, Respondents sent to the Judge, the Judge's assistant, and Complainant's counsel, by email, a handwritten markup of the Initial Decision and Order and a document entitled "Respondents Requests for Corrections to the Decision and Order on the Written Record."

On February 13, 2018, Complainant filed Complainant's response to the Appeal. In addition to arguments related to Respondents' Appeal, Complainant requested:

> [t]hat the petition for appeal be denied, and either (A) the Judicial Officer issue a final decision and order of the Secretary consistent with the evidence, the Act and Regulations, and the case law, or (B) that the IDO be adopted as the final decision of the Secretary of Agriculture in this proceeding, with necessary modifications, including, specifically:

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[7] IDO at 18-19.

[8] Appeal at 1-3; Appeal Brief at 3-9.

[9] Contrary to Respondents' assertion, Complainant has not "concurred that the phrase 'suffices for these noncompliances' should be added at the last sentence" of paragraph 24 of the Initial Decision and Order. JO Order at 11.

(1) that respondents operate a moderately-sized business and there is no evidence of good faith (IDO ¶ 11);

(2) that the Judge's statement in IDO ¶ 11, that "the maximum civil penalty is $3,750 for each violation," be corrected;

(3) that the second and third-to-last sentences in IDO ¶ 13 be deleted;

(4) that the second-to-last sentences in IDO ¶¶ 15, 17, 18, 24 and 28 be deleted;

(5) that IDO ¶ 16 be corrected to reflect that the complainant did not amend paragraph 8 of the complaint, and any later citation to subsection (b)(1) - instead of (b)(2) – was a typographical error, as is apparent from the text; and

(6) that any order assessing a civil penalty provide that the civil penalty be made payable within 60 days after service on respondents of the final decision in this case.

Complainant's Response to Appeal at 11-12.

On February 14, 2018, Complainant filed Complainant's response to Respondents' requests for "corrections" to the Initial Decision and Order.

On December 13, 2018, in my capacity as the Judicial Officer ("JO"), I issued an "Order Affirming in Part and Denying in Part Exceptions on Appeal" ("JO Order" or "my Order"), which, *inter alia*, held that the Judge's findings of fact and conclusions of law in the Initial Decision and Order as to the "multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint" are "fully supported by the record" and "affirmed and adopted," except with respect to the assessment of civil penalties.[10] In my Order, I also found that the Judge's filing of a decision on the record was permissible and the Judge's definition of "willful" was not error.[11]

[10] *Id.* at 8-9.

[11] *Id.* at 7-8.

I also adopted three of Respondents' requested modifications of the Initial Decision and Order, to wit: (1) to add a statement about Respondent Yost's non-renewal of his exhibitor's license; (2) to add "and/or" to paragraph thirteen of the Initial Decision and Order[12] to comport "more accurately with the applicable provision in the Complaint and in the relevant Regulation"[13]; and (3) to find that during a December 20, 2017 telephone conference "all sides concurred that the phrase 'suffices for these noncompliances' should be added at the end of the last sentence" of paragraph 24 of the Initial Decision and Order.[14]

I also granted Complainant's request to correct paragraph 16 of the Initial Decision and Order "to reflect that Complainant did not amend paragraph 8 of the Complaint, and any later citation of subsection (b)(2) . . . was a typographical error, as is apparent from the text."[15] However, I denied without prejudice "Complainant's remaining requests for modification" of the Initial Decision and Order "in as much as the issue of the appropriateness of the civil money penalty remain[ed] in dispute."[16]

Finally, the Order instructed the parties to file cross-motions for summary judgment with respect to the assessment of civil penalties because "the record as currently developed is insufficient to support a civil money penalty assessment of $30,000."[17] As explained in my

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[12] *See* Complainant's Response to Appeal at 11.

[13] JO Order at 10-11.

[14] *Id.*

[15] *Id.* at 10.

[16] *Id.* Complainant's fourth proposal – "that the second-to-last sentences in IDO ¶¶ 15, 17, 18, 24 and 28 be deleted" – would have had no bearing on the issue in dispute. Complainant's Response to Appeal at 12.

[17] JO Order at 9.

Order, my primary concern pertained to the analysis of the factors required to be considered in 7 U.S.C. § 2149(b).

On January 31, 2019, Respondents filed a Response to my Order but failed to provide any new information helpful to me in my consideration of the sole issue remaining for adjudication, namely the appropriateness of the assessment of civil penalties.

On February 22, 2019, Complainant filed its Response to Order Affirming in Part and Denying in Part Exceptions on Appeal ("Complainant's Response"), which provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge.

II. Request to Reconsider Instruction to File Cross-Motions for Summary Judgment

Complainant requests that I reconsider the instruction to file cross-motions for summary judgment (along with supporting evidence) as to the assessment of the civil penalties, for the JO's consideration in advance of issuing a decision and order pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) or that I remand this case to the Judge for further proceedings with respect to the assessment of the civil penalties.[18]

Complainant's request that I reconsider the instruction to file cross-motions for summary judgment (along with supporting evidence) as to the assessment of civil penalties is supported by good cause and is ***granted***. As noted by Complainant, in my Order I ruled on all issues except the civil penalties requested by Complainant and as assessed by the Judge. Upon my initial review, I found that the record was insufficiently developed to permit a decision as to the appropriateness of the civil penalty assessment and instructed the parties to file summary judgment motions accompanied by supporting evidence on the civil penalty issue. However,

[18] Complainant's Response to JO Order at 5.

Complainant's February 22, 2019 Response to my Order provided additional guidance, supported by specific references back to the existing record developed by the Judge below, which sufficiently addressed my concerns regarding the appropriateness of the civil penalties assessed by the Judge to enable me to move forward with a ruling affirming the Judge's Initial Decision and Order[19] without the need to take additional evidence.

In this case, in my December 13, 2018 Order I affirmed and adopted the Judge's Initial Decision and Order as to the allegations in the Complaint that Respondents violated the Regulations and Standards, as well as to two of the three sanctions ordered by the Judge: the revocation of AWA license 93-C-0590 and the cease-and-desist order. The sole remaining issue to be decided was the third sanction requested by Complainant and ordered by the Judge: the assessment of the civil penalties.

Complainant's February 22, 2019 Response to my Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the photographic, documentary, and testimonial evidence, even construed in the light most favorable to Respondents, measured against: (1) the applicable statutory provisions; (2) departmental case law; and (3) the remedial

[19] *See* 7 C.F.R. § 1.132 ("*Judge* means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.") ("*Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture . . . to perform the function involved (§ 2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.") ("*Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.").

purposes of the Act, supports a finding that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate and should be affirmed.

III. Undisputed Facts Related to Civil Penalties

1. The maximum civil penalty for a single violation of the Act or its Regulations occurring between June 23, 2005 and June 17, 2008 is $3,750.[20] The maximum civil penalty for a single violation of the Act or its Regulations occurring between June 18, 2008 and December 4, 2017 is $10,000.[21] The maximum civil penalty for a single violation of the Act or its Regulations occurring between December 5, 2017 and March 13, 2018 is $11,162.[22] Under the Act, each violation and each day during which a violation continues constitutes a separate offense.[23]

2. In my December 13, 2018 Order, I affirmed and adopted the findings of fact and conclusions of law made by the Judge in the Initial Decision and Order, affirming that Respondents willfully violated the Regulations alleged in the Complaint as summarized in paragraphs 3 through 7 below.

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[20] Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum penalty from $2,500 to $3,750. 7 C.F.R. § (b)(2)(ii) (2006). "This maximum civil penalty was in effect until June 18, 2008, when the Animal Welfare Act was amended to authorize the Secretary of Agriculture to assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations." *White*, 73 Agric. Dec. 114, 152-53 n.6 (U.S.D.A. 2014).

[21] 7 C.F.R. § 3.91(b)(2)(ii) (2008); *see White*, 73 Agric. Dec. at 152-53 n.6.

[22] 7 C.F.R. § 3.91(b)(2)(ii) (2017). Effective March 14, 2018, the maximum civil penalty for a violation of the Animal Welfare Act (7 U.S.C. § 2149(b)) occurring after March 14, 2018 is $11,390. 7 C.F.R. § 3.91(b)(2)(ii) (2018).

[23] 7 U.S.C. § 2149(b).

3. Willful violations of the Regulations governing the handling of animals:

a. 9 C.F.R. § 2.131(c)(1). On or about February 29, 2008, at Burbank, California, Respondents failed to handle a lion during public exhibition, so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the lion and the general viewing public so as to assure the safety of the lion and the public.[24]

b. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131(c)(2). On or about September 2008, November 3, 2008, and December 18, 2008, at Devore Heights, California, and January 10, 2009, at Los Angeles, California, Respondents: (1) failed to handle animals as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle animals during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.[25]

c. 9 C.F.R. § 2.131(b)(1). On multiple occasions between approximately January 11, 2009 and March 2009, Respondents failed to handle animals as carefully as possible in a manner that did not cause trauma, stress, physical harm, or unnecessary discomfort, and, specifically, used a wooden cane and the potential application of physical force to handle animals.[26]

d. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). In approximately February 2009, at Wrightwood, California, Respondents: (1) failed to handle a mountain lion as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle a mountain lion during public exhibition, so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animal and the public.[27]

e. 9 C.F.R. § 2.131(b)(1). On or about March 13, 2009, in Colorado, Respondents failed to handle four animals (a mountain lion, a tiger, and two wolves) as carefully as possible in a manner that would not cause trauma, stress, physical harm, or unnecessary discomfort.[28]

f. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On April 4, 2009, at Utica, Illinois, Respondents: (1) failed to handle a wolf as carefully as possible in a manner that would not cause physical pain, stress, or discomfort; and (2) failed to handle a wolf

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[24] IDO ¶ 13 (one violation per Respondent).

[25] IDO ¶ 15 (eight violations per Respondent).

[26] IDO ¶ 16 (at least two violations per Respondent).

[27] IDO ¶ 17 (two violations per Respondent).

[28] IDO ¶ 18 (eight violations per Respondent).

during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the wolves and the general viewing public so as to assure the safety of the animals and the public.[29]

g. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On or about June 10, 2009, at Site 003 and at off-site locations, Respondents failed to handle animals (large felids) as carefully as possible in a manner that would not cause physical pain, stress, or discomfort and failed to handle large felids during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animal and the public.[30]

h. 9 C.F.R. § 2.131(b)(1) and 9 C.F.R. § 2.131 (c)(2). On or about October 21, 2009, at Site 002, and at off-site locations, Respondents: (1) failed to handle animals (large felids) as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort; and (2) failed to handle large felids during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animal and the public.[31]

4. Willful violations of the Regulations governing recordkeeping:

a. 9 C.F.R. § 2.75(b). On or about April 9, 2009, at Utica, Illinois, Respondents failed to maintain accurate and complete records of the acquisition and disposition of six animals, as required.[32]

b. 9 C.F.R. § 2.75(a) and 9 C.F.R. § 2.75(b). On or about October 21, 2009, at Site 002, Respondents failed to maintain accurate and complete records of the acquisition and disposition of dogs (wolf hybrids), ferrets, a non-human primate, and a fox, as required.[33]

5. Willful violations of the Regulations governing health certificates:

a. 9 C.F.R. § 2.78(a)(1). On or about April 9, 2009, at Utica, Illinois, Respondents transported two domestic dogs, two hybrid wolves, and one nonhuman primate without any accompanying health certificates.[34]

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[29] IDO ¶ 20 (two violations per Respondent).

[30] IDO ¶ 24 (two violations per Respondent).

[31] IDO ¶ 28 (two violations per Respondent).

[32] IDO ¶ 21 (six violations per Respondent).

[33] IDO ¶ 27 (twelve violations per Respondent).

[34] IDO ¶ 22 (five violations per Respondent).

6. Willful violations of the Regulations governing veterinary care:

a. 9 C.F.R. § 2.40(b)(2). On or about October 21, 2009, at Site 002, Respondents failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent diseases.[35]

7. Willful violations of the Regulation requiring compliance with the Standards:

a. 9 C.F.R. § 2.100(a). On or about March 18, 2008, at Site 003, Respondents: (i) failed to provide animals with uncontaminated food (9 C.F.R. § 3.54(a)); (ii) housed incompatible animals in single enclosure (9 C.F.R. § 3.58); (iii) housed an animal in an enclosure containing a buildup of food debris (9 C.F.R. § 3.75(c)(1)); (iv) failed to provide animals with adequate nutritious food (9 C.F.R. § 3.82(a)); (v) failed to provide an animal with adequate shelter from inclement weather (9 C.F.R. § 3.127(b)); (vi) failed to construct an adequate perimeter fence around enclosures housing dangerous animals (9 C.F.R. § 3.127(d)); (vii) failed to maintain and repair perimeter fence (9 C.F.R. § 3.127(d)); (viii) failed to provide an animal with adequate space (9 C.F.R. § 3.128); and (ix) failed to maintain an animal enclosure in good repair (9 C.F.R. § 3.131(a)).[36]

b. 9 C.F.R. § 2.100(a). On or about June 10, 2009, at Site 003, Respondents: (i) failed to provide dogs with sufficient space (9 C.F.R. § 3.6(a)(2)); (ii) failed to ensure that food for animals was wholesome, palatable, and free from contamination (9 C.F.R. § 3.129(a)); (iii) failed to keep food preparation and storage areas clean (9 C.F.R. § 3.131(c)); and (iv) failed to establish and maintain an effective pest control program (9 C.F.R. § 3.131(d)).[37]

c. 9 C.F.R. § 2.100(a). On or about October 21, 2009, at Site 002, Respondents: (i) failed to provide dogs housed outdoors with sufficient space (9 C.F.R. § 3.4(b)); (ii) failed to maintain a primary enclosure for dogs in good repair (9 C.F.R. § 3.6(a)); (iii) failed to construct and maintain an enclosure for an animals so that it securely contained the animal (9 C.F.R. § 3.125(a)); (iv) failed to construct an adequate perimeter fence around an enclosure housing a dangerous animal (9 C.F.R. § 3.127(d)); and (v) failed to provide adequate space for animals (9 C.F.R. § 3.128).[38]

d. 9 C.F.R. § 2.100(a). On or about August 24, 2010, Respondents: (i) failed to store food supplies in a manner that would protect them from deterioration and contamination (9 C.F.R. § 3.125(c)); and (ii) failed to clean facilities used for food storage (9 C.F.R. § 3.131(c)).[39]

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[35] IDO ¶ 26 (one violation per Respondent).

[36] IDO ¶ 14 (nine violations per Respondent).

[37] IDO ¶ 25 (four violations per Respondent).

[38] IDO ¶ 29 (five violations per Respondent).

[39] IDO ¶ 30 (two violations per Respondent).

IV. The Assessment of Civil Penalties Is Appropriate in This Case Based on the Statute, the Case Law, and the Evidence

Complainant's February 22, 2019 Response to the JO Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the civil penalties assessed by the Judge against Respondents in the case are consistent with the evidence, with the case law, and with the remedial purposes of the Act.

The Judge concluded that Respondents committed multiple willful violations of the Regulations. I affirmed and adopted the Judge's findings of fact and conclusions of law. Based on the Initial Decision and Order and my Order, Complainant calculates that the total minimum number of established willful violations by each Respondent is seventy-one (71) (twenty-seven violations of the handling Regulations, eighteen violations of the record-keeping Regulations, one violation of the veterinary care Regulations, five violations of the health certificate Regulations, and twenty violations of the Regulations requiring compliance with the Standards). Ten of the established willful violations occurred before June 18, 2008. The maximum civil penalty for each of those violations is $3,750, for a total of $37,500 per Respondent.[40] The remaining sixty-one violations occurred between June 18, 2008 and December 4, 2017. The maximum civil penalty for each of those violations is $10,000, for a total of $610,000.[41]

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[40] 7 C.F.R. § (b)(2)(ii) (2006); *see supra* note 20.

[41] 7 C.F.R. § 3.91(b)(2)(ii) (2008); *see supra* notes 20 and 21. "Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b) (2006)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the

Effective June 18, 2008, Congress amended section 2149(b) of the Act to increase the maximum civil penalty for a single violation of the Act or the Regulations (per day) to $10,000.[42]

Complainant's February 22, 2019 Response to my Order provided specific references to the existing record developed by the Judge below regarding the appropriateness of the civil penalties assessed by the Judge and demonstrated that the assessment was warranted based on an application of the factors required to be considered in assessing a civil penalty, which was the basis for my concern in considering the appropriateness of the assessment on appellate review.

First, Complainant demonstrates that under departmental precedent, Respondents should be considered to operate a moderate-size business. In *Mitchell*, the JO found that, like Respondents here, Mr. Mitchell and his corporation "jointly operate[d] a moderate-size business that owns lions, tigers, and other animals," generating revenue through public appearances and work in the entertainment industry:

> The record establishes that Mr. Mitchell and Big Cat Encounters' animals have appeared in movies; television shows; commercials; photographs in magazines, such as Vogue and Elle; Las Vegas, Nevada, conventions and trade shows; and rock videos (Tr. 509; CX 6, CX 16) indicating that Mr. Mitchell and Big Cat Encounters' jointly-operated business generates revenues.

Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008))." *Knapp*, 72 Agric. Dec. 766, 782 (U.S.D.A. 2013) (Order Den. Pet. for Recons.).

[42] 7 U.S.C. § 2149(b). The civil penalties for violations of the AWA and the Regulations and noncompliance with cease-and-desist orders were recently increased, effective March 14, 2018. *See* 7 C.F.R. § 3.91(a)(1)-(2) (2018) ("The Secretary will adjust the civil monetary penalties, listed in paragraph (b) of this section, to take account of inflation as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, as amended. . . . Any increase in the dollar amount of a civil monetary penalty listed in paragraph (b) of this section applies only to violations occurring after March 14, 2018."); 7 C.F.R. § (b)(2)(ii) (2018) ("Civil penalty for a violation of the Animal Welfare Act, codified at 7 U.S.C. § 2149(b), has a maximum of $11,162, and knowing failure to obey a cease and desist order has a civil penalty of $1,674.").

Mitchell, AWA Docket No. 09-0084, 2010 WL 5295429, at **3, 9 (U.S.D.A. Dec. 21, 2010).

In another similar case, the JO again found that the respondent operated a moderately-sized business based on the number and type of public exhibitions.

> Respondent has at least a moderate-sized operation, and certainly one where the maximum civil penalty would be appropriate. In 1994, Respondent was involved in the exhibition of animals at least a half dozen times, including the training of animals for use in movies, commercials, and photography sessions. (Tr. 353-59.) In 1993, Respondent was involved in the exhibition of animals on at least three occasions, including the training of animals for three motion pictures. (Tr. 359-60.) The period that Respondent was occupied for just one of these 1993 motion pictures, Iron Will, was from November 1992, to the beginning of April 1993, during which period Respondent was paid $1,850 per week. (Tr. 360-62.).

Vergis, 55 Agric. Dec. 148, 164 (U.S.D.A. 1996).

Like the respondents in Mitchell and Vergis, Respondents here operated a moderate-size business based upon the number of their exhibitions and use of animals in the entertainment industry (movies and television) and for personal appearances. *See, e.g.*, CX 2 (Respondents identified their business as "animal acts" on forms submitted to the Secretary); CX 11 (Respondents describe their work in movies and television); CX 59 (Respondents describe their "Walk on the Wild Side" business as providing the public with an opportunity to learn from "[o]ur team of movie and television industry animal trainers" how to handle wild and exotic animals); CX 106 (Respondents' brochure offering training courses at their "Amazing Animals Teaching Zoo and Affection Training Center" states that their "instructors are expert consultants for the media, providing animals and trainers for on-set studio work, still photo shoots, commercials, feature films, live events and animal educational programs"). Respondent Yost appears to continue to operate an extensive animal business.[43]

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[43] *See, e.g.*, Attachment A to Complainant's Submission in Response to 2016 Further Instructions and Attachment A hereto. *See also McCall*, 52 Agric. Dec. 986, 1009 (U.S.D.A.

The Secretary has also based a finding that a respondent's business was moderately-sized on the number and kinds of animals exhibited:

> Respondent operates a 25-acre park in which an "animal area" is located. (Respondent's Appeal Petition, p. 1.) Respondent exhibits approximately 24 deer, (Respondent's Appeal Petition, attachment 7), approximately 20 chickens, (Respondent's Appeal Petition, attachment 1), and an unspecified number of rabbits, (Respondent's Appeal Petition, p. 2), at its facility. The annual licensing fee regulations, (9 C.F.R. § 2.6), classify exhibitors by the number of animals exhibited. Under this scheme, Respondent's facility is considered moderate-sized.

In re City of Orange, Cal., Cmty. Servs. Dep't, 55 Agric. Dec. 1081, 1087 (U.S.D.A. 1996).

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

Morgan, 65 Agric. Dec. 849, 855 (U.S.D.A. 2006).

> When the size of Respondent's business is examined, it is revealed that 84 animals were on hand during the May 13, 1989, inspection: 11 dogs, 21 cats, 4 primates, 2 guinea pigs, 5 rabbits, 7 prairie dogs, 12 rodent species, 4 ferrets, 3 foxes, 1 bear, 2 lions, 1 cougar, 6 pygmy goats, 2 raccoons, 1 woodchuck, 1 opossum, and 1 Vietnamese pot-bellied pig (CX 3). Additionally, the record shows totals of 114 animals on hand on June 1, 1989 (CX 4), and 78 on July 18, 1989 (CX 5). Even though Respondent argues that gross sales for 1989 were only $11,468, I do not find this persuasive on the issue of size. The regulations require licensing of dealers who gross in excess of $500 annually, placing Respondent beyond small dealers who nonetheless are covered by the Act, and must comply with the regulations. Moreover, the complexity of a facility to house these many, varied and somewhat- exotic animals must be taken into consideration, making it difficult to see how such an operation could be considered small. Thus, I conclude that Respondent operated a moderate-sized facility, and certainly one where the civil penalty in question would not be inappropriate.

1993) ("The second case, *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986), involved an exhibitor that was one of the nation's largest suppliers of wild animals for exhibition in motion picture and television productions. In that case, the Judicial Officer affirmed the Administrative Law Judge's assessment of a $15,300 civil penalty and the permanent revocation of the respondent's license. The Administrative Law Judge's conclusion was based upon the number and gravity of the respondent's violations and the consideration that the respondent conducted a large and once extremely profitable business as an animal exhibitor.") (internal citations omitted)).

Pet Paradise, Inc., 51 Agric. Dec. 1047, 1071-72 (U.S.D.A. 1992).

Second, Complainant demonstrates that under departmental precedent, the gravity of Respondents' twenty-seven violations of the handling Regulations is considered to be great for purposes of 7 U.S.C. § 2149(b).[44] The Secretary has found that violations based on an exhibitor's failure to handle dangerous animals with sufficient distance and/or barriers are serious, can result in harm to animals and people, and merit assessment of "the maximum, applicable civil penalty for each handling violation."

> On the same days as Mr. Mitchell and Big Cat Encounters exhibited animals without an Animal Welfare Act license (April 17, 2004, February 1, 2008, February 2, 2008, a day in June 2009, and August 22, 2009), they also failed to handle animals, during public exhibition, so there was minimal risk of harm to the animals and to the public, with sufficient distance or barriers or distance and barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in violation of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005). Mr. Mitchell and Big Cat Encounters' violations of the handling provisions were serious and could have resulted in harm to Mr. Mitchell and Big Cat Encounters' animals or to the people viewing those animals. Therefore, I assess Mr. Mitchell and Big Cat Encounters the maximum, applicable civil penalty for each handling violation that occurred on April 17, 2004, February 1, 2008, February 2, 2008, a day in June 2009, and August 22, 2009, for a total of $30,250.

Mitchell, 2010 WL 5295429 at *8.

> The ALJ states she kept in mind the gravity of Mr. Perry and PWR's violations. I agree with the ALJ that Mr. Perry and PWR's violations of the Animal Welfare Act and the Regulations are grave. I find particularly grave Mr. Perry and PWR's violations of the handling regulations (9 C.F.R. § 2.131) and the veterinary care regulations (9 C.F.R. § 2.40) because those violations thwarted the Secretary of Agriculture's efforts to protect the health and well-being of exhibited animals. Mr. Perry and PW's violations of the handling regulations and the veterinary care regulations resulted in the very harm these regulations are designed to prevent; namely, the death of animals and injuries to members of the public.

Perry, 72 Agric. Dec. 635, 649 (U.S.D.A. 2013).

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[44] Respondents' other violations are also not insignificant.

> Respondent willfully violated 9 C.F.R § 2.131(b)(1). Respondent's violation was extremely serious and resulted in the very harm that compliance with the regulation is designed to prevent. The record clearly demonstrates that Respondent failed to handle Sarang, a 450-pound male Bengal tiger, so that there was minimal risk of harm to Sarang and to members of the public, in willful violation of 9 C.F.R § 2.131(b)(1).

Vergis, 55 Agric. Dec. at 164.

In this case, "the maximum, applicable civil penalty for each handling violation" totals $270,000. That neither animals nor persons were harmed in certain of the instances that were found to be violations of the handling Regulations does not minimize the gravity of the violations:

> The purpose of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005) is to reduce the risk of harm to animals and to the public. The fact that no harm actually resulted from Mr. Mitchell and Big Cat Encounters' violations does not affect my view of the gravity of the violations; therefore, I disagree with the ALJ's reliance on the fact that no harm resulted from Mr. Mitchell and Big Cat Encounters' violations when determining the amount of the civil penalty to be assessed, and I assess Mr. Mitchell and Big Cat Encounters the maximum civil penalty that may be assessed for their violations of 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005).

Mitchell, 2010 WL 5295429 at *12.

Third, Complainant demonstrates that under departmental precedent, Respondents have not shown good faith for purposes of 7 U.S.C. § 2149(b). In 2004, Respondent Yost was advised by APHIS not to handle or exhibit animals without sufficient distance and/or barriers, yet he persisted in doing so, to the detriment of the public and the animals in Respondents' custody. CX 109 at 1-4. The JO has rejected findings of a respondent's good faith in the face of repeated noncompliance:

> The record does not support the ALJ's assessment of Mr. Perry's good faith. I do not find the length of time that Mr. Perry held an Animal Welfare Act license or Mr. Perry's courage, expertise, and success establish his good faith. Efforts to comply with the Animal Welfare Act and the Regulations and instructions to employees to comply with the Animal Welfare Act and the Regulations are

> relevant to good faith. However, the record establishes that Mr. Perry repeatedly violated the Animal Welfare Act and the Regulations during the period September 10, 2000, through June 15, 2005.

Perry, 72 Agric. Dec. at 650. Respondents also instructed participants in their training school not to answer any questions by USDA inspectors, stating: "If USDA shows up on the property, you must call Sid immediately. Do not allow them into the ranch and do not answer any questions or show them around!. . . . Remember, do not answer ANY questions for USDA."[45]

Fourth, Complainant demonstrates that although there have not been previous administrative proceedings against Respondents, under departmental precedent the JO has held that a respondent's ongoing pattern on noncompliance is sufficient to establish a history of violations, for purposes of 7 U.S.C. § 2149(b).

> Mr. Staples is deemed to have admitted the allegations in the Complaint that he operated a moderately large zoo and animal act, that his violations are serious, and that he resolved two previous Animal Welfare Act cases in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.18. Moreover, Mr. Staples is deemed to have admitted that he committed the 19 violations of the Animal Welfare Act and the Regulations alleged in the Complaint. This ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith.

Staples, 73 Agric. Dec. 173, 189 (U.S.D.A. 2014).[46]

CONCLUSION AND ORDER

Complainant, the Administrator of the Animal and Plant Health Inspection Service, filed the Complaint in this case on March 16, 2012 alleging that Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. violated the Regulations on multiple occasions from March 2008 through August 2010. The Complaint allegations have been fully adjudicated and based on

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[45] CX 109 at 5.

[46] *See also Perry*, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013) ("Finally, Mr. Perry and PWR have a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).").

the photographic, documentary, and testimonial evidence contained in the record developed by the Judge below, Respondents have been found to have committed multiple willful violations of the Regulations. More specifically, based on the Judge's Initial Decision and Order and the JO Order, Complainant calculates that the total minimum number of established willful violations by each of the Respondents is seventy-one (71) (twenty-seven violations of the handling Regulations, eighteen violations of the record-keeping Regulations, one violation of the veterinary care Regulations, five violations of the health certificate Regulations, and twenty violations of the Regulations requiring compliance with the Standards).

For the foregoing reasons, the photographic, documentary, and testimonial evidence contained in the existing record developed by the Judge below supports a finding that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate under applicable statutory provisions, departmental case law, and the remedial purposes of the Act. Accordingly, the Judge's assessment of a joint and several civil penalty of not less than $30,000 is affirmed. Specifically, I find that the Judge's assessment of a joint and several civil penalty of not less than $30,000 is reasonable and appropriate under the facts and circumstances of this case taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act . . ." to ensure Respondents' "compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act." *Perry*, 72 Agric. Dec. 635, 652-53 (U.S.D.A. 2013).

Accordingly, the Judge's initial "Decision and Order on the Written Record" filed in the above captioned dockets on December 14, 2017 is hereby affirmed and adopted with the modifications discussed herein above and in my December 13, 2018 Order. Respondents' AWA

license number 93-C-0590 is revoked, Respondents are ordered to cease and desist from violating the Act and the Regulations, and Respondents are assessed a joint and several civil penalty of not less than $30,000 to be paid within sixty (60) days of final decision in this matter.[47]

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above.

Done at Washington, D.C.
this 11 day of March 2019

Bobbie J. McCartney
Judicial Officer

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[47] The Judge ordered AWA license 93-C-0590 revoked, ordered Respondents to cease and desist from future violations, and assessed Respondents civil penalties totaling $30,000 to be paid in monthly installments over a five-year period. IDO at 18-19. A five-year payment period is unwarranted and contrary to established departmental precedent. To the extent that the payment plan in the Initial Decision and Order was based on an assumption of Respondents' ability to pay a civil penalty, it is well-settled that an alleged inability to pay a civil penalty is not considered in determining civil penalties under the AWA. *See, e.g.*, *Mielke*, 64 Agric. Dec. 1295, 1315-16 (U.S.D.A. 2005) ("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, Respondents' inability to pay the civil penalties assessed is not a basis for reducing the civil penalties."); *Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1076 (U.S.D.A. 1992) ("Under some of the USDA-administered statutes which impose civil penalties, Congress has made penury a consideration; however, the Animal Welfare Act is not one of them[.]").