UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. 11-0072
	)	
Lee Marvin Greenly, an individual; Sandy Greenly, an individual; Crystal Greenly, an individual; and Minnesota Wildlife Connection, Inc., a Minnesota corporation,	)	**Decision and Order as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.**
Respondents	)	

PROCEDURAL HISTORY

On November 29, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

On April 14, 2011, the Administrator filed an Amended Complaint, which is the operative pleading in this proceeding. The Administrator alleges: (1) on March 14, 2006, and July 24, 2007, Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. [hereinafter Respondents],[1] failed to provide adequate veterinary care to animals, in willful violation of 9 C.F.R. § 2.40(a); (2) on March 14, 2006, and July 24, 2007, Respondents failed to establish a mechanism to communicate with Respondents' attending veterinarian, in willful violation of 9 C.F.R. § 2.40(b)(3); (3) on March 14, 2006, August 23, 2006, July 24, 2007, November 10, 2008, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to construct housing facilities so the housing facilities are structurally sound and by failing to maintain the housing facilities in good repair in accordance with 9 C.F.R. § 3.125(a); (4) on March 14, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to provide for removal and disposal of food waste in accordance with 9 C.F.R. § 3.125(d); (5) on March 14, 2006, and January 11, 2007, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to store food supplies in a manner that adequately protects the food supplies from contamination

[1]On April 9, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] entered a Consent Decision and Order as to Sandy Greenly, and, on May 2, 2012, the Chief ALJ entered a Consent Decision and Order as to Crystal Greenly; thereby, concluding this proceeding as it relates to Sandy Greenly and Crystal Greenly.

in accordance with 9 C.F.R. § 3.125(c); (6) on March 14, 2006, August 23, 2006, November 10, 2008, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to enclose outdoor housing facilities for animals with an adequate perimeter fence in accordance with 9 C.F.R. § 3.127(d); (7) on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents failed to make, keep, and maintain adequate and accurate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b)(1); (8) on August 23, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to enclose an outdoor housing facility for a lemur in accordance with 9 C.F.R. § 3.77(f); (9) on August 23, 2006, Respondents willfully violated 9 C.F.R. § 2.100(a) by failing to provide environmental enrichment for a lemur in accordance with 9 C.F.R. § 3.81(b); (10) on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow Animal and Plant Health Inspection Service [hereinafter APHIS] officials to inspect Respondents' facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); (11) on February 12, 2009, August 9, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents failed to handle animals as carefully as possible in a manner that did not cause trauma or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1); and (12) on February 12, 2009, August 6, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents failed to handle animals, during public exhibition, so there was minimal risk of harm to the animals and 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, in willful violation of 9 C.F.R. § 2.131(c)(1).[2]

On May 5, 2011, Respondents filed an Amended Answer in which they denied the material allegations of the Amended Complaint, except the allegation in paragraph 18 of the Amended Complaint that, on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents' facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).

[2]Amended Compl. at 3-8 ¶¶ 6-27.

On May 1-2, 2012, the Chief ALJ conducted a hearing in Minneapolis, Minnesota.[3] Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Larry D. Perry, Knoxville, Tennessee, represented Respondents. The Administrator called 12 witnesses and Respondents called seven witnesses.[4] The Administrator introduced 51 exhibits which were admitted into evidence,[5] and Respondents introduced 48 exhibits which were admitted into evidence.[6]

[3]On January 14, 2011, Respondents had filed a motion to consolidate this proceeding with *In re Lee Marvin Greenly*, AWA Docket No. 11-0073. On January 19, 2011, the Chief ALJ granted Respondents' motion and consolidated this proceeding with *In re Lee Marvin Greenly*, AWA Docket No. 11-0073, for the purposes of hearing (Chief ALJ's Summary of Teleconference and Order filed January 19, 2011).

[4]References to the transcript of the May 1-2, 2012, hearing are indicated as "Tr." and the page number.

[5]The Administrator's exhibits are identified as "CX" and the exhibit number.

[6]Respondents' exhibits are identified as "RX" and the exhibit number.

On August 22, 2012, after the parties submitted post hearing briefs, the Chief ALJ filed a Decision in which he: (1) concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm; (2) concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals, during public exhibition, so there was minimal risk of harm to the animals and the public, with sufficient distance or barriers between the animals and the public to assure the safety of the animals and the public; (3) concluded that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to construct housing facilities so the housing facilities are structurally sound and by failing to maintain the housing facilities in good repair; (4) concluded that, on March 14, 2006, and August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose outdoor housing facilities for animals with an adequate perimeter fence;[7] (5) concluded that, on August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.77(f) by failing to

[7]The Chief ALJ also concluded Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) on November 10, 2008, and June 29, 2009, as alleged in paragraph 24 of the Amended Complaint; however, the Chief ALJ's findings of fact do not support that conclusion. See Chief ALJ's Decision at 20, 22 (Findings of Fact ¶ 10, Conclusions of Law ¶ 8).

enclose an outdoor housing facility for a lemur with an adequate perimeter fence; (6) concluded that, on January 11, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store food in a manner that adequately protects the food from contamination; (7) concluded that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) by failing to make, keep, and maintain adequate records of the acquisition and disposition of animals; (8) concluded that, on June 12, 2007, February13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 9 C.F.R. § 2.126(a) by failing to allow APHIS officials to inspect their facilities, animals, and records; (9) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (10) revoked Mr. Greenly's Animal Welfare Act license (Animal Welfare Act license number 41-C-0122).[8]

On September 27, 2012, Respondents filed an Appeal Petition, and, on November 2, 2012, the Administrator filed Complainant's Response to Respondents' Petition for Appeal. On November 7, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

[8]Chief ALJ's Decision at 21-23.

Based upon a careful review of the record, I affirm the Chief ALJ's Decision; except that, I conclude that, on December 19, 2006, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), and I assess Respondents a $11,725 civil penalty.

DECISION

Statutory and Regulatory Framework

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Exhibitors must also allow inspection by APHIS officials to assure the provisions of the Animal Welfare Act and the Regulations are being followed. 7 U.S.C. § 2146(a). Violations of the Animal Welfare Act or the Regulations by Animal Welfare Act licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149.

The Regulations include requirements for veterinary care, housing, disposal of food waste, storage of food supplies, perimeter fences, recordkeeping, humane handling of animals, and the inspection of facilities, animals, and records.

Discussion

The Respondents

Mr. Greenly is an individual who operates a photographic educational game farm near Sandstone, Minnesota (CX 23; Tr. 382). Mr. Greenly is a licensed exhibitor, holding Animal Welfare Act license number 41-C-0122. Mr. Greenly has trained animals for approximately 28 years and had experience at a zoo in Hinckley, Minnesota, prior to opening his own facility (Tr. 416). Mr. Greenly's Animal Welfare Act license renewal forms list as many as 190 animals that are maintained at Respondents' facility (CX 2).

Minnesota Wildlife Connection, Inc., is a corporation organized and existing under the laws of the State of Minnesota. Minnesota Wildlife Connection, Inc.'s address is the same as Mr. Greenly's address. Although Mr. Greenly suggests that Minnesota Wildlife Connection, Inc., is a marketing company, the record contains ample evidence that its activities and Mr. Greenly's activities are essentially identical and Minnesota Wildlife Connection, Inc.'s checks have been used to renew Mr. Greenly's Animal Welfare Act license. (CX 2, CX 5, CX 11, CX 23, CX 39-CX 40, CX 45-CX 46, CX 52, and RX 75.)

Handling Requirements

The Administrator alleges that, on February 12, 2009, August 9, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents failed to handle animals as carefully as possible in a manner that does not cause trauma or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1).[9] The Administrator also alleges that, on or about those same dates, Respondents 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 animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1).[10]

The evidence establishes that, on February 12, 2009, Respondents allowed two wolves to run free during a photographic shoot on property owned by Leo Gardner. Following the photographic shoot, the wolves went onto property owned by Linda and Carlyle Ziegler and attacked and killed the Ziegler's dachshund. (Tr. 52-58, 78-83, 439-40.) As Ms. Ziegler watched, one wolf scooped up the dog and the two wolves then ripped the dog in half (Tr. 55-56). Mr. Greenly accepted responsibility for the incident and compensated the Zieglers for their loss by purchasing a replacement animal (Tr. 84-85, 439-44).

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[9]Amended Compl. at 7 ¶ 26.

[10]Amended Compl. at 7-8 ¶ 27.

On April 22, 2010, during an outing at Respondents' facility for students from the Range Academy of Technology and Science, Respondents exhibited Blue, a 19 or 20 year old bear (Tr. 488-91). During the exhibition, the students and school employees were allowed to feed the bear "Gummi Worms," with the students putting candy in their mouths and letting the bear take the candy from their mouths (Tr. 490). During the feeding session, Blue bit Denise Jensen, Mr. Greenly's cousin and then a school employee, who had accompanied the students.

A couple of days after the bite, Ms. Jensen began to experience pain. After an emergency room visit, Ms. Jensen was admitted to the hospital and was discharged after a 5-day stay (Tr. 120-21). As she declined to have the bear euthanized and tested for rabies, Ms. Jensen later underwent the prophylactic series of inoculations for rabies (Tr. 122).

On August 14, 2010, at the request of APHIS veterinary medical officer Debra M. Sime, Kimberly Miller, an APHIS inspector, attended the Quarry Days celebration in Sandstone, Minnesota (Tr. 272-74). While at the event, Ms. Miller attended Respondents' show and observed the public having direct contact with and handling raccoons, a possum, and foxes without any distance or barriers between the animals and the public (Tr. 275-76; CX 41).

Although Respondents' show was performed from an elevated stage, only a short distance separated the stage from the public seating area and no barrier separated the stage and the public seating area (Tr. 276; CX 41). Ms. Miller also observed Mr. Greenly standing in the area between the stage and the public seating area with a mountain lion or cougar in his arms

(Tr. 276-79; CX 41). An adult wolf was exhibited on stage by two adolescent girls and two or three wolf cubs were brought through the audience and the audience was allowed to pet the wolves (Tr. 277-78). Ms. Miller prepared a report of her inspection on September 7, 2010 (CX 20).

The record establishes that, on October 19, 2010, Respondents were at or near Banning State Park for a photographic shoot, when Respondents' unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski (Tr. 10-16, 478, 522; CX 45-CX 46). The child's aunt, Maja Dockal, testified that the wolf attacked her niece and the record contains photographs of bloodied areas on Johnny's face, scalp, and arm and puncture wounds on the child's face and scalp (Tr. 12, 14, 19, 24-25, 478-80; CX 45). As a result of this incident, the wolf was euthanized and tested for rabies (Tr. 47).

Based upon this evidence, the Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1) on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010. Respondents contend the Chief ALJ's conclusions that they violated 9 C.F.R. § 2.131(b)(1) and (c)(1), are erroneous. Respondents advance numerous arguments regarding each of the violations found by the Chief ALJ. (Respondents' Appeal Pet. at 7-18.)

Based upon a careful consideration of the record, I find the Administrator proved by much more than a preponderance of the evidence that, on February 12, 2009, April 22, 2010,

August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1). None of the arguments advanced by Respondents has merit. Therefore, I reject Respondents' contention that the Chief ALJ erroneously concluded that, on February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) and (c)(1).

The Chief ALJ dismissed the allegations that, on August 9, 2009, Respondents willfully violated 9 C.F.R. § 2.131(b)(1)[11] and that, on August 6, 2009, Respondents willfully violated 9 C.F.R. § 2.131(c)(1)[12] (Chief ALJ's Decision at 8, 22). The Administrator contends the Chief ALJ's failure to find that Respondents violated 9 C.F.R. § 2.131(b)(1), on August 9, 2009, and that Respondents violated 9 C.F.R. § 2.131(c)(1), on August 6, 2009, is error (Complainant's Response to Respondents' Pet. for Appeal at 38-39).

The Administrator offers as proof of these allegations a photocopy of a picture of Mr. Greenly with a bear which is in direct contact with an unidentified person. This picture appeared in the Thursday, August 6, 2009, edition of the Pine County Courier. Directly below this picture is the caption: "The Minnesota Wildlife's Connection involvement in Quarry Days is always popular. This year they will perform at noon to 1:30 p.m. on

[11]Amended Compl. at 7 ¶ 26.

[12]Amended Compl. at 8 ¶ 27b.

Saturday." (CX 39 at 1.) The Administrator did not offer any evidence that this picture was taken on August 6, 2009, did not offer any evidence that the unidentified person in the picture was a member of the public rather than one of Respondents' employees, and failed to explain the relevance of a picture printed in the Thursday, August 6, 2009, edition of the Pine County Courier to the allegation in paragraph 26 of the Amended Complaint that Respondents violated 9 C.F.R. § 2.131(b)(1) on August 9, 2009. Moreover, the testimony relied upon by the Administrator (Tr. 188-90, 195, 458-60, 463-464, 473-475, 492, 514-15) does not support a finding that, on August 9, 2009, Respondents violated 9 C.F.R. § 2.131(b)(1) or a finding that, on August 6, 2009, Respondents violated 9 C.F.R. § 2.131(c)(1). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on August 9, 2009, Respondents willfully violated 9 C.F.R. § 2.131(b)(1), is error, and I reject the Administrator's contention that the Chief ALJ's failure to find that, on August 6, 2009, Respondents willfully violated 9 C.F.R. § 2.131(c)(1), is error.

Veterinary Care Requirements

The Administrator alleges that, on March 14, 2006, and July 24, 2007, Respondents failed to provide adequate veterinary care to animals, in willful violation of 9 C.F.R. § 2.40(a) and failed to establish a mechanism to communicate with their attending veterinarian, in

willful violation of 9 C.F.R. § 2.40(b)(3).[13] The Chief ALJ found the Administrator's evidence of the March 14, 2006, violations equivocal; found the evidence of the July 24, 2007, violations in equipoise; and dismissed the allegations that Respondents violated 9 C.F.R. § 2.40(a) and(b)(3) (Chief ALJ's Decision at 10-11, 21). The Administrator contends the Chief ALJ erroneously dismissed the allegations that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. § 2.40(a) and (b)(3) (Complainant's Response to Respondents' Pet. for Appeal at 32-35).

I have carefully reviewed the Administrator's evidence of Respondents' violations of 9 C.F.R. § 2.40(a) and (b)(3) (CX 25, CX 30; Tr. 203-04, 217-18) and Respondents' evidence refuting the Administrator's allegations (Tr. 384-86, 426-27). I find the Administrator failed to prove by a preponderance of the evidence that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. § 2.40(a) and (b)(3). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. § 2.40(a) and (b)(3), is error.

Housing Facility Requirements

[13] Amended Compl. at 3, 6 ¶¶ 6-7, 21-22.

The Administrator alleges that, on March 14, 2006, August 23, 2006 (two violations), July 24, 2007, November 10, 2008, and June 29, 2009, Respondents failed to construct housing facilities so that the housing facilities are structurally sound and failed to maintain the housing facilities in good repair, in willful violation of 9 C.F.R. § 3.125(a).[14]

On March 14, 2006, Dr. Sime observed a piece of wood with exposed nails in the fisher enclosure (Tr. 205; CX 25 at 1-2). Mr. Greenly testified that the fisher enclosure had a board that had split exposing two or three screws. When this violation of 9 C.F.R. § 3.125(a) was brought to Mr. Greenly's attention, he corrected the violation while Dr. Sime was still at Respondents' facility. (Tr. 387-88.)

Dr. Sime's July 24, 2007, inspection of Respondents' facility revealed that a woodchuck enclosure had an area of wire fatigue of sufficient space that two juvenile woodchucks escaped (CX 30 at 2). Mr. Greenly acknowledged that the woodchucks had been able to escape, but stated they had not been able to breach the perimeter fence (Tr. 428-29). When the area of wire fatigue was brought to Mr. Greenly's attention, he corrected the violation of 9 C.F.R. § 3.125(a) at the time of the inspection (CX 30 at 2).

[14] Amended Compl. at 3-7 ¶¶ 8, 13-14, 23-24.

Based upon this evidence, the Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 3.125(a) on March 14, 2006, and July 24, 2007 (Chief ALJ's Decision at 11-12, 22).

The Chief ALJ found the Administrator failed to prove by a preponderance of the evidence the allegations that Respondents violated 9 C.F.R. § 3.125(a) on August 23, 2006 (two violations), November 10, 2008, and June 29, 2009 (Chief ALJ's Decision at 11-12, 22).

The Administrator contends the Chief ALJ erroneously failed to conclude that, on November 10, 2008, Respondents failed to construct a structurally sound housing facility for eight wolves and failed to maintain the housing facility in good repair to protect and contain the wolves, in willful violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 24 of the Amended Complaint (Complainant's Response to Respondents' Pet. for Appeal at 37-38).

Based upon a careful consideration of the record, I find Respondents' photographs of the housing facility in question (RX 47) refute the Administrator allegation that, on November 10, 2008, Respondents willfully violated 9 C.F.R. § 3.125(a). Therefore, I reject the Administrator's contention that the Chief ALJ's failure to find that, on November 10, 2008, Respondents willfully violated 9 C.F.R. § 3.125(a), is error.

Perimeter Fence Requirements

The Administrator alleges that, on March 14, 2006, August 23, 2006, November 10, 2008, and June 29, 2009, Respondents failed to enclose outdoor housing facilities for animals

with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d),[15] and on August 23, 2006, Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.77(f).[16]

The record establishes that Respondents willfully violated 9 C.F.R. § 3.127(d) on March 14, 2006, and Dr. Sime gave Respondents until September 14, 2006, to correct this perimeter fence violation (Tr. 206-08; CX 25 at 2-3). Despite the September 14, 2006, time limit for correction of Respondents' perimeter fence violation, Respondents were cited for violating the perimeter fence requirement on August 23, 2006 (Tr. 208-09; CX 43 at 2). Mr. Greenly admits there was no perimeter fence when Dr. Sime inspected Respondents' premises, but testified that he had the perimeter fence violations corrected by September 14, 2006 (Tr. 393-94). The absence of a citation for violating the perimeter fence requirements during the next inspection, January 11, 2007, supports Mr. Greenly's testimony that he corrected the perimeter fence violations (CX 38). Nonetheless, I find the Administrator proved by a preponderance of the evidence that, on March 14, 2006, and August 23, 2006, Respondents failed to enclose outdoor housing facilities for animals with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d), and on August 23, 2006,

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[15]Amended Compl. at 4-7 ¶¶ 11, 15, 24.

[16]Amended Compl. at 5 ¶ 16.

Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.77(f).

The Chief ALJ found the allegations in paragraph 24 of the Amended Complaint that, on November 10, 2008, and June 29, 2009, Respondents failed to enclose outdoor housing facilities for eight wolves with an adequate perimeter fence, were refuted by Respondents' photographs (Chief ALJ's Decision at 20).[17] An examination of these photographs reveals a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom (RX 47). Therefore, I find the Administrator failed to prove by a preponderance of the evidence that Respondents violated 9 C.F.R. § 3.127(d) on November 10, 2008, and June 29, 2009.

Food Storage and Food Waste Requirements

The Administrator alleges that, on March 14, 2006, Respondents failed to store food supplies (unprocessed cow carcasses) in manner that adequately protects the food supplies from contamination and failed to provide for the removal and disposal of food waste, in willful violation of 9 C.F.R. § 3.125(c) and (d).[18] The Administrator also alleges that, on January 11, 2007, Respondents failed to store food supplies (three cans of uncovered feed and

[17]See note 7.

[18]Amended Compl. at 4 ¶ 9-10.

three bags of canine food stored on the floor) in manner that adequately protects the food supplies from contamination, in willful violation of 9 C.F.R. § 3.125(c).[19]

The Chief ALJ found the Administrator failed to prove by a preponderance of the evidence the March 14, 2006, violations of 9 C.F.R. § 3.125(c) and (d) (Chief ALJ's Decision at 13-14, 22). After reviewing the Administrator's evidence (Tr. 205-06; CX 25 at 2) and Mr. Greenly's explanation of the circumstances that gave rise to this allegation (Tr. 389-92), I find the Administrator failed to prove the March 14, 2006, violations of 9 C.F.R. § 3.125(c) and (d) by a preponderance of the evidence.

As for the January 11, 2007, violation of 9 C.F.R. § 3.125(c), Dr. Sime inspected Respondents' facility and prepared a report citing the violation and testified that the violation occurred (CX 38; Tr. 216-17). Moreover, Mr. Greenly admitted he had three cans of uncovered feed and three bags of canine food stored on the floor and testified that, since January 11, 2007, when Dr. Sime cited him for this violation of 9 C.F.R. § 3.125(c), he has stored food on pallets (Tr. 418-22). I find the Administrator proved by a preponderance of the evidence that, on January 11, 2007, Respondents stored food supplies in a manner did not adequately protect the food supplies from contamination, in willful violation of 9 C.F.R. § 3.125(c), as alleged in paragraph 19 of the Amended Complaint.

[19]Amended Compl. at 6 ¶ 19.

Recordkeeping Requirements

The Administrator alleges that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b)(1).[20] The Chief ALJ found that the Administrator proved by a preponderance of the evidence each of the alleged violations of 9 C.F.R. § 2.75(b)(1). Respondents contend the Chief ALJ's findings, are error (Respondents' Appeal Pet. at 2-5).

Dr. Sime's August 23, 2006, July 24, 2007, and June 29, 2009, inspection reports (CX 7 at 1, CX 30 at 1, CX 43 at 1), Dr. Sime's testimony (Tr. 210-11, 218, 221-24), and the photographs of Respondents' records taken by Dr. Sime on June 29, 2009 (CX 8), clearly establish that Respondents violated 9 C.F.R. § 2.75(b)(1) on the dates alleged. Therefore, I find the Administrator proved by a preponderance of the evidence that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1), and I reject Respondents' contention that the Chief ALJ's findings that, on August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1), are error.

Environmental Enrichment Requirements

[20]Amended Compl. at 4, 6-7 ¶¶ 12, 20, 25.

The Administrator alleges that, on August 23, 2006, Respondents failed to provide environmental enrichment for a lemur housed in an outdoor hutch, in willful violation of 9 C.F.R. § 3.81(b).[21] During the hearing, the Administrator withdrew this allegation (Tr. 408-09).

Access Requirements

[21] Amended Compl. at 5 ¶ 17.

The Administrator alleges that, on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents' facilities, animals, and records, during normal business hours, in willful violation 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a).[22]

The record establishes that Dr. Sime attempted to gain access to Respondents' place of business on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, but was unable to gain access (Tr. 200-02; CX 3, CX 10, CX 14, CX 28, CX 37). Mr. Greenly testified that, on December 19, 2006, he was ill, had a doctor's appointment, and could not stay for an inspection, and on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, he did not deny Dr. Sime access to Respondents' place of business, but rather Dr. Sime's inability to gain access resulted from Mr. Greenly's absence from the place of business. Mr. Greenly explained he is a sole proprietor and has neither the staff nor the funds to have someone in the office from 9:00 a.m. to 5:00 p.m. Mr. Greenly also testified he was frequently out of town, he had given APHIS officials his cell phone number, and, in the past, some APHIS officials had called prior to inspection to ensure that someone would be present at Respondents' place of business. (Tr. 413-16.)

[22]Amended Compl. at 5 ¶ 18.

The Chief ALJ dismissed the allegation that, on December 19, 2006, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), but found Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009 (Chief ALJ's Decision at 15-16, 22).

The Administrator contends the Chief ALJ's failure to find that, on December 19, 2006, Respondents did not allow APHIS officials to inspect their facilities, animals, and records, is error (Complainant's Response to Respondents' Pet. for Appeal at 30-32). Respondents contend the Chief ALJ erroneously concluded that, on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Respondents contend the evidence establishes that no one was present at Respondents' place of business when APHIS officials arrived to conduct inspections on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009. (Respondents' Appeal Pet. at 5-7.)

As an initial matter, Respondents admit they violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, as alleged in paragraph 18 of the Amended Complaint (Amended Answer at 7 ¶ 18). Moreover, the requirement that exhibitors allow APHIS officials access to and inspection of facilities, property, records, and animals, during business hours, as provided in 9 C.F.R. § 2.126(a), is unqualified and contains no exemption. The fact that no one was at

Respondents' place of business to allow APHIS officials access to the facilities, property, records, and animals is not a defense. Therefore, I reject Respondents' contention that the Chief ALJ's conclusion that, on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), is error.

Moreover, the record establishes that, on December 19, 2006, when Dr. Sime attempted to conduct an inspection at Respondents' place of business, Mr. Greenly informed Dr. Sime that he was ill and had to leave for a doctor's appointment (Tr. 413). According to an interview log prepared by APHIS investigator Leslie Vissage, Dr. Sime told Mr. Greenly that "she would return another day to do the inspection" (CX 37). The Chief ALJ declined to find Respondents violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) on December 19, 2006, based upon Dr. Sime's agreement to return another day (Chief ALJ's Decision at 15).

Nothing in the Animal Welfare Act or the Regulations excuses an exhibitor from compliance with 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), even if the APHIS official offers to return to conduct the inspection at another time. Therefore, I find Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on December 19, 2006, as well as on June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, and I find the Chief ALJ's failure to conclude that Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on December 19, 2006, is error.

Respondents' Appeal Petition

Respondents raise four issues in their Appeal Petition, which are not discussed in this Decision and Order, *supra*. First, Respondents suggest that 9 C.F.R. § 2.131(b)(1) and (c)(1) are unconstitutionally vague (Respondents' Appeal Pet. at 17).

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.[23] I have reviewed 9 C.F.R. § 2.131(b)(1) and (c)(1) and find they are not unconstitutionally vague.[24] Nonetheless, difficulty may arise when defining certain regulatory terms, such as "unnecessary discomfort" found in 9 C.F.R. § 2.131(b)(1) and "minimal risk of harm" found in 9 C.F.R. § 2.131(c)(1), and applying those terms to the

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[23] *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

[24] I have previously rejected vagueness doctrine challenges to the handling regulations. *See In re Tri-State Zoological Park of Western Maryland, Inc.* (Order Denying Respondents' Pet. for Recons.), __ Agric. Dec. ___, slip op. at 5-7 (July 12, 2013) (finding 9 C.F.R. § 2.131(c)(1) is not unconstitutionally vague); *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78-79 (2002) (concluding 9 C.F.R. § 2.131(b)(1) (2000) provides the respondents with adequate notice of the manner in which the respondents' animals are to be handled during public exhibition); *In re John D. Davenport*, 57 Agric. Dec. 189, 214 (1998) (concluding 9 C.F.R. § 2.131(a)(1) (1998) is not unconstitutionally vague), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[25] Therefore, I reject Respondents' suggestion that 9 C.F.R. § 2.131(b)(1) and (c)(1) are void for vagueness.

Second, Respondents contend they have been singled out for enforcement (Respondents' Appeal Pet. at 18-20).

[25] *Great American Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

I find nothing in the record to support Respondents' contention that the Administrator has singled out Respondents for enforcement of the Animal Welfare Act and the Regulations. Respondents bear the burden of proving they are the target of selective enforcement. Persons claiming selective enforcement must demonstrate the enforcement policy had a discriminatory effect and the enforcement policy was motivated by a discriminatory purpose.[26] In order to prove their selective enforcement claim, Respondents must show one of two sets of circumstances. Respondents must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[27] Respondents have not shown that they are members of a protected group; that, in a similar situation, no disciplinary proceeding would be instituted against others that are not members of the protected group; or that this proceeding was initiated with discriminatory intent. In the alternative, Respondents must show: (1) they exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the

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[26] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985).

[27] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondents for exercise of the protected right.[28] Respondents have not shown any of these circumstances. Therefore, I reject Respondents' unsupported assertion that the Administrator singled out Respondents for enforcement of the Animal Welfare Act and the Regulations.

Third, Respondents contend, in light of the less severe sanctions imposed in other Animal Welfare Act proceedings which were resolved with stipulations or consent decisions, the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error (Respondents' Appeal Pet. at 18-19).

Respondents' reliance on stipulations and consent decisions is misplaced. A consent decision is a signed agreement by the parties in the form of a decision that must be entered by the administrative law judge, unless an error is apparent on the face of the agreement (7 C.F.R. § 1.138). Generally, stipulations and consent decisions do not come before the Judicial Officer and none of the proceedings referenced by Respondents came before the Judicial Officer.

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[28] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453-54 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

I have long held that sanctions in consent decisions, which involve respondents other than the respondents before me, are given no weight in determining the sanction in a litigated case.[29] The former Judicial Officer, Donald A. Campbell, briefly articulated the reasons for this position, as follows:

> Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In re Braxton McLinden Worsley, 33 Agric. Dec. 1547, 1569 (1974).

Unlike the stipulations and consent decisions referenced by Respondents, this proceeding was fully litigated and Respondents were found to have committed serious violations of the Animal Welfare Act and the Regulations. Therefore, I do not find that the

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[29] *In re Todd Syverson* (Decision on Remand), 69 Agric. Dec. 1500, 1506 (2010), *aff'd*, 666 F.3d 1137 (8th Cir. 2012); *In re Steven Thompson* (Decision as to Darrell Moore), 50 Agric. Dec. 392, 407 (1991); *In re Paul Rodman*, 47 Agric. Dec. 1400, 1416 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974).

stipulations and consent decisions referenced by Respondents support Respondents' contention that the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error.

Fourth, Respondents contend the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error because revocation deprives Mr. Greenly of his ability to earn a livelihood for himself and his family; deprives the public and educational organizations of access to one of the finest photographic and educational game farms in the country; destroys one of the few businesses in Sandstone, Minnesota; and forces Respondents to destroy all of their animals (Respondents' Appeal Pet. at 19-20).

Even if I were to find that revocation of Mr. Greenly's Animal Welfare Act license would have the unfortunate collateral effects identified by Respondents, those collateral effects would not constitute mitigating circumstances to be considered when determining the sanction to be imposed for Respondents' violations of the Animal Welfare Act and the Regulations.[30]

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[30] *See In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 108 (2009) (stating the collateral effect of termination of Animals of Montana, Inc.'s Animal Welfare Act license on Mr. Hyde's career is not relevant to the determination of whether Animals of Montana, Inc., is unfit to be licensed); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1069 (2008) (stating the collateral effect of termination of Ms. Vigne's Animal Welfare Act license on her ability to retain possession of and breed ocelots is not relevant to the determination of whether Ms. Vigne is unfit to be licensed); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 477 (2001) (stating the respondent's need for income to support himself is not a defense to his violations of the Animal Welfare Act and the Regulations or a mitigating circumstance to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations); *In re Michael A. Huchital, Ph.D.*, 58 Agric. Dec. 763, 815-16 (1999) (stating collateral effects of a civil penalty on a respondent's business and

Therefore, I reject Respondents' contention that the Chief ALJ's revocation of Mr. Greenly's Animal Welfare Act license, is error because of the collateral effects identified by Respondents.

The Administrator's Response to Respondents' Petition for Appeal

In addition to the Administrator's response to Respondents' Appeal Petition, the Administrator raises three issues in Complainant's Response to Respondents' Petition for Appeal, which are not discussed in this Decision and Order, *supra*. First, the Administrator contends the Chief ALJ found a number of the violations alleged in the Amended Complaint, but erroneously treated those violations as "non-violations" because Respondents corrected the violations (Complainant's Response to Respondents' Pet. for Appeal at 35-37).

The Chief ALJ concluded Respondents willfully violated 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint;[31] however, the Chief ALJ found Respondents had corrected each of these violations and stated "no further action is required." (Chief ALJ's Decision at 22 (Conclusions of Law ¶¶ 6, 8).)

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family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations).

[31]See note 7.

I disagree with the Administrator's contention that the Chief ALJ treated the violations in question as "non-violations." The Chief ALJ explicitly concluded Respondents willfully violated 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint. While not without doubt, I infer the Chief ALJ's statement that "no further action is required" means that the Chief ALJ imposed no sanction for the violations in question.

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.[32] Nonetheless, Respondents' corrections of their Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed. While I disagree with the Chief ALJ's determination that no sanction should be imposed on Respondents for the violations in question, I take Respondents' corrections into account and impose only a cease and desist

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[32] *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. ___, slip op. at 63 (Mar. 22, 2013); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

order for Respondents' violations of 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint.

Second, the Administrator contends the Chief ALJ's comments regarding the Administrator's litigation decisions are unwarranted (Complainant's Response to Respondents' Pet. for Appeal at 39-41).

The Chief ALJ's comments regarding the Administrator's litigation decisions have no bearing on the disposition of this proceeding; therefore, I decline to make a determination regarding the justification for the Chief ALJ's comments on the Administrator's litigation decisions.

Third, the Administrator contends the Chief ALJ's failure to assess Respondents a civil penalty, is error (Complainant's Response to Respondents' Pet. for Appeal at 41-47).

The Chief ALJ based his decision not to assess Respondents a civil penalty on the significant financial impact that revocation of Mr. Greenly's Animal Welfare Act license would have on Respondents (Chief ALJ's Decision at 17). Nothing in the Animal Welfare Act provides that revocation of an Animal Welfare Act license precludes assessment of a civil

penalty. The Secretary of Agriculture has assessed civil penalties, in addition to ordering revocation of Animal Welfare Act licenses, in numerous cases.[33]

[33] *See, e.g., In re Sam Mazzola*, 68 Agric. Dec. 822, 852 (2009) (revoking Animal Welfare Act license number 31-C-0065 and assessing a $21,000 civil penalty), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 736 (2009) (revoking Animal Welfare Act license number 31-C-0034 and assessing a $93,975 civil penalty); *In re Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093, 1106 (2007) (revoking Animal Welfare Act license number 58-C-0816 and assessing a $13,750 civil penalty), *aff'd sub nom. Ramos v. U.S. Dep't of Agric.*, 322 F. App'x 814 (11th Cir. 2009).

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[34] The financial impact of revocation of an Animal Welfare Act license is not one of the factors considered by the Secretary of Agriculture when determining the amount of the civil penalty. Therefore, the Chief ALJ's consideration of the financial impact of revocation of Mr. Greenly's Animal Welfare Act license when determining the amount of the civil penalty to be assessed against Respondents, is error.

[34] 7 U.S.C. § 2149(b).

Based upon the number of animals which Respondents held during the period 2005 through 2008, I find Respondents operate a large business.[35] The gravity of Respondents' violations is great. Respondents' violations of 9 C.F.R. § 2.131(b)(1) and (c)(1) resulted in the death of two animals and injuries to the public. Moreover, an exhibitor's failure to allow APHIS officials to enter the exhibitor's place of business to conduct inspections, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations.

Respondents have not shown good faith. Despite the death of animals and injuries to the public, Respondents continued to handle their animals in a manner which risked harm to their animals and the public. Finally, Respondents 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 United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50

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[35]Respondents reported holding 49 animals in 2008, 178 animals in 2007, 190 animals in 2006, and 121 animals in 2005 (CX 2).

Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[36]

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[36] *In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Amarillo Wildlife Refuge, Inc.,* 68 Agric. Dec. 77, 89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I assess Respondents at least a $25,000 civil penalty for their violations of the Animal Welfare Act and the Regulations (Complainant's Response to Respondents' Pet. for Appeal at 46).

I conclude Respondents committed 22 violations of the Animal Welfare Act and the Regulations during the period March 14, 2006, through October 19, 2010. However, for the reasons explained in this Decision and Order, *supra*, I assess no civil penalty for Respondents' violations of 9 C.F.R. § 3.77(f), as alleged in paragraph 16 of the Amended Complaint; 9 C.F.R. § 3.125(a), as alleged in paragraphs 8 and 23 of the Amended Complaint; and 9 C.F.R. § 3.127(d), as alleged in paragraphs 11 and 15 of the Amended Complaint; therefore, I assess Respondents a civil penalty for only 17 of their violations of the Animal Welfare Act and the Regulations. Respondents could be assessed a maximum civil penalty of $132,500 for the 17 violations of the Animal Welfare Act and the Regulations.[37] After

[37]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)). 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 Federal 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 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)

examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and 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, I conclude a $11,725 civil penalty for 17 of Respondents' violations of the Animal Welfare Act and the Regulations is appropriate and necessary 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.[38]

(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)). Thus, the Secretary of Agriculture may assess Respondents a civil penalty of not more than $3,750 for each of Respondents' six violations of the Animal Welfare Act and the Regulations that occurred before June 18, 2008, and a civil penalty of not more that $10,000 for each of Respondents' 11 violations of the Animal Welfare Act and the Regulations that occurred after June 18, 2008.

[38]I assess Respondents a $1,000 civil penalty for each of their four violations of 9 C.F.R. § 2.131(b)(1); a $1,000 civil penalty for each of their four violations of 9 C.F.R. § 2.131(c)(1); a $1,000 civil penalty for each of their two post-June 18, 2008, violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); a $375 civil penalty for each of their three pre-June 18, 2008, violations of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a); a $100 civil penalty for their violation of 9 C.F.R. § 3.125(c); a $100 civil penalty for each of their two pre-June 18, 2008, violations of 9 C.F.R. § 2.75(b)(1); and a $300 civil penalty for their post-June 18, 2008, violation of 9 C.F.R. § 2.75(b)(1).

Based upon the record before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Greenly is an individual residing in the State of Minnesota.

2. At all times material to this proceeding, Mr. Greenly was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Greenly held an Animal Welfare Act license (Animal Welfare Act license number 41-C-0122).

4. Mr. Greenly exhibits wild and exotic animals to the public at his photographic educational game farm near Sandstone, Minnesota, and at other locations (Tr. 439-40).

5. Minnesota Wildlife Connection, Inc., is a corporation organized and existing under the laws of the State of Minnesota.

6. Minnesota Wildlife Connection, Inc., has the same address for its registered office as Mr. Greenly's address. The affairs of Minnesota Wildlife Connection, Inc., and Mr. Greenly are sufficiently intertwined that they cannot be separated. (CX 2, CX 5, CX 11, CX 23, CX 39-CX 40, CX 45-CX 46, CX 52, and RX 75.)

7. On February 12, 2009, Respondents allowed two wolves to run free during a photographic shoot on property owned by Leo Gardner following which the wolves went onto

property belonging to Linda and Carlyle Ziegler and attacked and killed the Ziegler's dachshund (Tr. 52-58, 78-83, 439-40).

8. On April 22, 2010, during an outing at Respondents' facility for students from East Range Academy of Technology and Science, Respondents exhibited a bear (Tr. 488-91). During the exhibition, the students and school employees were allowed to feed the bear "Gummi Worms," with the students putting candy in their mouths and letting the bear then take the candy from their mouths (Tr. 490). During the feeding session, the bear bit Denise Jensen, Mr. Greenly's cousin and a school employee, who had accompanied the students (Tr. 120-22).

9. On August 14, 2010, during the Quarry Days celebration in Sandstone, Minnesota, Respondents allowed the public to have direct contact with and handle raccoons, a possum, and foxes without any distance or barriers between the animals and the public (Tr. 272-76; CX 41). Respondents performed a show from an elevated stage with chairs for the public in front of the stage a short distance away, but without any barrier between the stage and the public seating area (Tr. 276). Mr. Greenly stood in the area between the stage and the public seating area with a mountain lion or cougar in his arms (Tr. 276-79; CX 41). Two adolescent girls exhibited an adult wolf on the stage and two or three wolf cubs were brought through the audience, which was allowed to pet the wolves (Tr. 277-78).

10. On October 19, 2010, Respondents were at or near Banning State Park for a photographic shoot when Respondents' unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski (Tr. 10-16, 478, 522; CX 45-CX 46). The contact between the wolf and Johnny resulted in bloodied areas on Johnny's face, scalp, and arm and puncture wounds on Johnny's face and scalp (Tr. 12, 14, 19, 24-25, 478-80; CX 45). As a result of this incident, the wolf was euthanized and tested for rabies (Tr. 47).

11. On March 14, 2006, Respondents failed to construct a housing facility so that the housing facility was structurally sound and failed to maintain the housing facility in good repair. Specifically, the enclosure housing a fisher had a perch with separated wood exposing two or three screws, which could injure the fisher. (CX 25 at 1-2; Tr. 205, 387-88.)

12. On July 24, 2007, Respondents failed to construct a housing facility so that the housing facility was structurally sound and failed to maintain the housing facility in good repair. Specifically, the enclosure housing two juvenile woodchucks had an area of wire fatigue large enough to allow the woodchucks to escape from their enclosure. (CX 30 at 2; Tr. 428-29.)

13. On March 14, 2006, Respondents failed to enclose outdoor housing facilities for adult wolves with an adequate perimeter fence (CX 25 at 2-3; Tr. 206-08).

14. On August 23, 2006, Respondents failed to enclose outdoor housing facilities for 13 wolves, 2 coatimundi, 5 beaver, and 4 bear with an adequate perimeter fence (CX 43 at 2; Tr. 208-09).

15. On August 23, 2006, Respondents failed to enclose an outdoor housing facility for a lemur with an adequate perimeter fence (CX 43 at 2; Tr. 208-09).

16. On January 11, 2007, Respondents failed to store three cans of feed and three bags of canine food in a manner that adequately protected the food from contamination (CX 38; Tr. 216-17, 418-22).

17. On August 23, 2006, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least 15 animals at Respondents' facility (CX 43 at 1; Tr. 210-11).

18. On July 24, 2007, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least 17 animals at Respondents' facility (CX 30 at 1; Tr. 218).

19. On June 29, 2009, Respondents failed to make, keep, and maintain adequate records of the acquisition and disposition of at least three bears and a bobcat at Respondents' facility (CX 7 at 1, CX 8; Tr. 221-24).

20. On December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents failed to allow APHIS officials to inspect Respondents'

facilities, property, animals, and records, during normal business hours (CX 3, CX 10, CX 14, CX 28, CX 37; Tr. 200-02).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(b)(1) by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm.

3. On February 12, 2009, April 22, 2010, August 14, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. § 2.131(c)(1) by failing 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 animals and the public.

4. On March 14, 2006, and July 24, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to construct housing facilities so that the housing facilities were structurally sound and by failing to maintain housing facilities in good repair.

5. On March 14, 2006, and August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose outdoor housing facilities for animals with adequate perimeter fences.

6. On August 23, 2006, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.77(f) by failing to enclose an outdoor housing facility for a lemur with an adequate perimeter fence.

7. On January 11, 2007, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store three cans of feed and three bags of canine food in a manner that adequately protected the food from contamination.

8. On August 23, 2006, July 24, 2007, and June 29, 2009, Respondents willfully violated 9 C.F.R. § 2.75(b)(1) by failing to make, keep, and maintain adequate records of the acquisition and disposition of animals at Respondents' facility.

9. On December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009, and May 13, 2009, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) by failing to allow APHIS officials to inspect Respondents' facilities, property, animals, and records, during normal business hours.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

a. failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm;

b. failing to handle animals, during public exhibition, so there is 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 animals and the public;

c. failing to construct housing facilities so that the housing facilities are structurally sound;

d. failing to maintain housing facilities in good repair;

e. failing to enclose outdoor housing facilities for animals with adequate perimeter fences;

f. failing to store food in a manner that adequately protects the food from contamination;

g. failing to make, keep, and maintain adequate records of the acquisition and disposition of animals; and

h. failing to allow APHIS officials to inspect their facilities, property, animals, and records, during normal business hours.

Paragraph 1 of this Order shall become effective upon service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.

2. Mr. Greenly's Animal Welfare Act license (Animal Welfare Act license number 41-C-0122) is revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Lee Marvin Greenly.

3. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., are assessed, jointly and severally, a $11,725 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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, Ms. Carroll within 60 days after service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 11-0072.

RIGHT TO JUDICIAL REVIEW

Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order.[39] The date of entry of the Order in this Decision and Order is August 5, 2013.

Done at Washington, DC

August 5, 2013

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William G. Jenson
Judicial Officer

[39]7 U.S.C. § 2149(c).