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November 1, 2022

Animal and Plant Health Inspection Service
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road, Unit 118
Riverdale, MD 20737-1238

Submitted via Regulations.gov

Re: Notice of Request for Revision to and Extension of Approval of an Information Collection; Animal Welfare, Docket No. APHIS-2022-0050

Dear Administrator Shea,

On behalf of the Animal Legal Defense Fund (ALDF),¹ we write to provide comments in response to the U.S. Department of Agriculture Animal and Plant Health Inspection Service's (APHIS) notice of request for revision to and extension of approval for information collection under the Animal Welfare Act (AWA). We appreciate that APHIS is committed to the practical and effective use of recordkeeping for the proper enforcement of the AWA, and we applaud the agency for seeking public input on fulfillment of its regulatory duties.

The information collection activities contemplated by the agency's request are necessary for the agency's fulfillment of its statutory duties pursuant to the AWA. But the information only has practical utility if the agency acts on it, including by consistently pursuing enforcement in the face of inadequate inspections or poor recordkeeping by AWA facilities. Further, the categories listed in this information collection are insufficient for APHIS to meet its statutory duties. As explained in depth by ALDF in petitions for rulemaking and other legal advocacy, the agency must also collect additional records related to animal mortalities, veterinary care, and enrichment plans, conduct full inspections of facilities rather than partial ones, and make more information publicly available.

¹ The Animal Legal Defense Fund is a national non-profit organization founded in 1979, with a mission to protect the lives and advance the interests of animals through the legal system.

I. The information collection is necessary for the proper performance of APHIS's functions and will have practical utility only if the agency acts on the information it collects.

Information collection alone does not lead to proper performance of the AWA without clear, consistent enforcement action on the part of APHIS. As the agency responsible for enforcing the AWA, APHIS is tasked with “insur[ing] that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment[.]” 7 U.S.C. § 2131. As the agency recognizes, recordkeeping and information collection are essential for the effective and proper enforcement of the AWA, including “the use of information collection activities such as license applications and renewals; registration applications and updates; annual reports; acknowledgement of regulations and standards; inspections; requests; notifications; agreements; plans; written program of veterinary care and health records; itineraries; applications and permits; records of acquisition, disposition, or transport of animals; official identification; variances; protocols; health certificates; complaints; marking requirements; and recordkeeping.”² These records “provide APHIS with the data necessary for the review and evaluation of program compliance by regulated facilities.”³

Vitality, this information collection asks “whether the information will have *practical utility*[.]”⁴ The information collected only has practical utility if the agency acts upon, and consistent with, the information it receives; collecting this information is useless without follow-up agency action when the information demonstrates noncompliance with AWA standards. APHIS notoriously underenforces the AWA, protecting from public scrutiny the entities and individuals that it regulates rather than protecting animals who are at significant risk of exploitation and systemic cruelty in commercial industries.⁵ Indeed, APHIS has been chronically criticized by the public, former and current APHIS officials, and Congressmembers for its lax enforcement of the AWA.⁶ Though the agency often finds noncompliance at AWA-regulated facilities, it only acts on that noncompliance in exceedingly rare circumstances. The vast majority of AWA violations documented by the agency result in no agency action. The lack of agency action when it receives information showing AWA violations leads to ineffective administration of the AWA. In cases where animal welfare information has been collected, analyzed, and properly reported, the practical utility of that information is virtually zero if no enforcement measures are taken in response to violations.

² 70 Fed. Reg. 54,187 (Sept. 2, 2022).

³ *Id.*

⁴ *Id.* at 54,188. (emphasis added)

⁵ See, e.g., Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO ST. L.J. 451, 487–97 (2018) (explaining that AWA enforcement frequently fails to incentivize compliance and urging improvements to the enforcement policies); U.S. Dep’t of Agric., Off. of Inspector Gen., *Audit Report on Animal Care Program Oversight of Dog Breeders* (June 2021), at 6 (“We found that APHIS did not consistently address complaints it received or adequately document the results of its followup.”); 168 CONG. REC. 42,1712, (March 9, 2022) (explanatory statement) (“Committees are concerned about the ongoing mismanagement of APHIS’s Animal Care program. News reports have repeatedly documented long and inexplicable delays by APHIS in acting against blatant violations of the Animal Welfare Act that resulted in the illness and death of many animals under APHIS’s jurisdiction.”).

⁶ Attachment 1, Complaint, ¶¶ 65–68, *ALDF v. Vilsack*, Case No. 1:22-cv-03146 (D.D.C. Oct. 17, 2022).

Just one of many examples of this is Cricket Hollow Zoo, an Iowa roadside zoo that held an AWA license from 1994 to 2020 and publicly exhibited hundreds of animals in dismal conditions.⁷ Recurrent violations included: animals eating and defecating in the same area; dead animals left on display for long periods of time; animals suffering psychological damage from a lack of enrichment and improper housing; inadequate shelter from the elements, including extreme cold and heat; and insufficient staffing evidenced by no more than two employees caring for hundreds of animals. Over the years, Cricket Hollow garnered hundreds of AWA violations. But all the while, APHIS failed to act against the facility despite the ample information collected from the facility screaming for agency intervention. APHIS even renewed Cricket Hollow’s license in 2014 despite the facility’s chronic violations. Indeed, the very day APHIS renewed Cricket Hollow’s license, it also discovered 11 AWA violations at the facility.⁸ The agency did not take meaningful action against Cricket Hollow until 2015 when it issued an administrative complaint against the facility. But this was well after the agency had information demonstrating remarkable noncompliance and numerous ALDF lawsuits urging action against the facility. Ultimately, it was ALDF that secured the rescue of animals from Cricket Hollow, thanks to its public nuisance lawsuit against the facility.⁹

Another example of APHIS’s failure to act on information relates to an orca named Lolita, who has been held in captivity for over 50 years at the Miami Seaquarium.¹⁰ Lolita’s living conditions fall far short of AWA standards—her tank is far too small and lacks adequate shade and orca companionship. Among other things, APHIS inspection reports show that the Seaquarium is putting Lolita’s health at risk by acting directly contrary to veterinarian recommendations, and the Seaquarium fails to provide adequate shade resulting in injuries to many animals, including Lolita. Rather than act consistent with this information by initiating enforcement and confiscating Lolita to rehome her to a facility that meets her needs, APHIS allowed the Seaquarium to voluntarily remove Lolita from their license.¹¹ Thus, the agency has left Lolita to languish rather than give practical utility to the information it has collected. Most recently, in September 2022, a USDA inspector reported dozens of direct and critical AWA violations related to dolphins at the Seaquarium.¹² The violations included cutting the diet of nine dolphins so they would perform for guests and changing treatment without consulting the attending veterinarian, leading to regurgitation and abnormal behaviors for many dolphins. Yet again, APHIS is not properly functioning because—despite this information demonstrating egregious noncompliance—the agency is endlessly failing to take meaningful action against the Seaquarium.

⁷ *Id.* ¶ 80.

⁸ U.S. Dep’t of Agric., Administrative Record of 2015 Renewal of Animal Welfare Act License 42-C-0084 (July 27, 2015).

⁹ Clark Kauffman, “Legal battle over zoo concludes, but questions about the lack of enforcement linger,” *Des Moines Register* (Sept. 30, 2021), <https://www.desmoinesregister.com/story/news/crime-and-courts/2021/09/30/iowa-zoo-cricket-hollow-manchester-legal-fight-appears-over-supreme-court-animals/5927473001/>.

¹⁰ Attachment 1, ¶¶ 96–113.

¹¹ *Id.* ¶ 111.

¹² Louis Aguirre, “Miami-Dade mayor demands more oversight of Miami Seaquarium after fallout of USDA inspection report,” *Local10.com*, (Oct. 24, 2022 at 6:52pm) <https://www.local10.com/news/local/2022/10/24/miami-dade-mayor-demands-more-oversight-of-miami-seaquarium-after-fallout-of-usda-inspection-report/>; see also U.S. Dep’t of Agric., Animal and Plant Inspection Services, INS-0000814970, *Inspection Report* (September 2022).

In sum, the agency's collection of information is necessary for the effective administration of the AWA, but to collect the information alone and take no action based on that information is not sufficient to comply with the agency's statutory duties. Only through utilizing the information gathered can APHIS ensure that animals are being treated in compliance with the AWA standards.

II. For proper enforcement of the AWA and enhanced quality, utility, and clarity of the information collection, APHIS should collect additional categories of information and provide for enhanced public access to records.

Recordkeeping is essential for fulfilling the agency's mandate to enforce the AWA, but the current information collection falls short of what is needed to ensure that animals are receiving humane treatment at licensed facilities. Accordingly, ALDF suggests APHIS include additional categories in its information collection for better performance of the agency's functions, and to enhance the quality, utility, and clarity of the information to be collected. First, data about animal deaths and mortality could tremendously improve the quality of life for animals currently falling through the regulatory cracks. Second, veterinary qualifications and treatment plans should be a regular part of APHIS inspections, ensuring that animals are being properly and consistently treated by professionals as mandated by statute. Additionally, collection and evaluation of enrichment plans for captive animals will enhance the quality and clarity of the welfare requirements articulated at 7 U.S.C. §§ 2143(a)(2). The agency must also cease the "partial inspection" policy or collect more relevant data during the partial inspections. Finally, public access to all inspection reports will enhance accountability for AWA-licensed facilities without any extra work on the part of APHIS.

A. APHIS must collect information about animal mortality during all routine inspections.

The existing recordkeeping regime prevents APHIS from effectively monitoring AWA-licensed facilities and the animals who live and die at them. Currently, recordkeeping requirements have three primary avenues for APHIS to monitor and track animal deaths at AWA licensed facilities: (1) inventory numbers supplied by the licensees themselves which are often impossible for APHIS to double-check during short inspection visits, (2) acquisition and disposition records, which are often incomplete and (3) veterinary records.¹³ None of these three are comprehensive, and investigating suspicious animal deaths is virtually impossible due to the dearth of information disclosed about animals dying at licensed facilities.

AWA-licensed dealers and exhibitors are required to maintain records regarding all animals "in his or her possession," "transported, sold, euthanized, or otherwise disposed of," including the date of disposal. 9 CFR § 2.75(b)(1). Although the regulation requires that these licensees record instances of euthanasia, this category is not broad enough to encompass all animal deaths—in particular, deaths that could lend insight into conditions at the facility more generally. In practice, APHIS does not require licensees to record all animal deaths, and licensees typically do not retain that information of their own accord. This lack of information

¹³ See Attachment 2, ALDF, *Petition for Rulemaking to Amend Attending Veterinarian Rule to Clarify Requirement of Species-Specific Experience* (July 2016).

lends itself to animal abuse, animal trafficking, and discourages facilities from disclosing suspicious or concerning animal deaths.

For example, as detailed in a petition for rulemaking by ALDF, an AWA-licensed wolf-fur harvesting facility called Fur-Ever Wild was revealed to have a suspiciously high mortality rate, including infanticide likely caused by poor husbandry practices and the facility's unnecessary killing of wolves for the simple reason they were "aggressive."¹⁴ If APHIS had collected any sort of mortality records about the deaths of these animals, the unnecessary killings and cruelty might have been stopped years earlier. Another petition for rulemaking by ALDF also detailed how an AWA-licensed exhibitor had kept no records of the deaths or the causes of deaths of a badger, a llama, a black leopard, a bear, a lion, and a jaguar, all of which died at their facility within one calendar year.¹⁵ The bodies of the badger (that had died "sometime in December 2000") and a tiger were not discovered by APHIS employees until near the end of January 2001.

The discovery of inhumane treatment and death months or years after it occurs is a direct result of an information gap in current recordkeeping methods. By requiring facilities to track and report animal deaths, APHIS will ensure that inspectors do not overlook suspicious deaths or horrifying cases of severe AWA violations. Collection of this information is necessary for the proper performance of the agency's duties and will further APHIS's stated goal of increasing the utility and quality of the information collected by the agency.

B. APHIS must collect more accurate and detailed veterinary records from veterinarians who have demonstrated competency with the species of animal they oversee.

The veterinary records and plans currently collected by APHIS leave significant room for improvement, and enhancing the quality of veterinary records will improve administration and enforcement of the AWA. In particular, APHIS should require that veterinarians who oversee animals at AWA-licensed facilities have demonstrated competency in the particular species they oversee. Facilities subject to the recordkeeping requirements of the AWA often include animals that most veterinarians will never encounter in their practice. This leads to not only lack of *humane* treatment, but also a total failure to provide any treatment at all. For instance, Cricket Hollow Zoo used to house 300 animals, including endangered species such as lions, tigers, wolves, and lemurs. Their attending veterinarian had ample experience in treating dogs and cats, *but had no prior experience treating lemurs, lions, or tigers.*¹⁶ Eleven endangered species died at Cricket Hollow, many from preventable illnesses—due in no small measure to lack of preventative care and lack of diagnostic expertise.¹⁷

Accordingly, the agency should require facilities to certify that the attending veterinarian has the appropriate experience to inspect and treat the animals under their care, and that they have reviewed and signed a program of veterinary care for the facility within the past 12 months.

¹⁴ See Attachment 3, ALDF, *Petition for Rules to Require Recordkeeping and Reporting of Animal Mortality by Animal Welfare Act Licensees* (Sept. 8, 2022), at 9.

¹⁵ Attachment 2 at 10.

¹⁶ Attachment 2 at 3.

¹⁷ *Id.*

The agency should review both the veterinary experience and the program of veterinary care for adequacy before renewing an AWA license, and deny renewal and seek enforcement when the information collected demonstrates inadequacies. In sum, for proper performance of the agency's function and to enhance the quality, utility, and clarity of the information to be collected, the agency must collect more detailed, accurate, and consistent veterinary records from veterinarians who have demonstrated competency in the species they are overseeing.

C. APHIS must collect enrichment plans for captive nonhuman primates.

The AWA requires the agency to promulgate, among other things, minimum standards for the enrichment of nonhuman primates' environments to promote their psychological well-being. 7 U.S.C. §§ 2143(a)(2). Currently, APHIS guidance requires that enrichment plans be made available to the agency upon request.¹⁸ Instead, the agency should *require* submission of enrichment plans for primates in captivity and include a routine evaluation of the effectiveness of these plans during annual inspections. Additionally, the agency should permit public access to these enrichment plans to encourage facilities to cooperate and share best practices related to animal welfare, which will have the added benefit of lessening the investigative burden on APHIS by enhancing the consistency and efficiency of the enrichment plans. This is a necessary addition to this information collection for proper function of the agency and to enhance its quality, utility, and clarity.

D. APHIS must collect more data during “partial inspections” or cease the policy altogether.

Additionally, APHIS needs to collect relevant data during *every* inspection, including those conducted under the “partial inspection policy.” Currently, the agency's inspection reports do not contain information related to (a) what the inspector inspected, or (b) whether the facility is complying with all the standards of care required by the AWA and its implementing regulations. Moreover, under this partial inspection policy, as many as four years may lapse before APHIS inspects a single animal that is the subject of the facility's research.¹⁹ This gap in time and dearth of information makes it impossible to ascertain whether facilities are acting in compliance with applicable AWA standards, rendering the quality, utility, or clarity of any information collected virtually useless.

Conclusion

ALDF sincerely appreciates the opportunity to comment on this important subject and looks forward to continuing to participate in the development of animal welfare regulations as they continue to evolve. Information collection is necessary for the proper performance of the agency's functions, but the utility of the information is contingent on responsive agency action, for instance, by initiating enforcement when the agency receives information demonstrating noncompliance with the AWA. Moreover, there are several glaring gaps in the information currently collected as it relates to animal deaths, veterinary records, enrichment plans, and

¹⁸ See U.S. Dep't of Agric., *A Quick Reference of the Responsibilities & Functions of the Attending Veterinarians for Research Facilities under the Animal Welfare Act*, Sec. 3.81. <https://www.nal.usda.gov/legacy/awic/animal-welfare-act-quick-reference-guides> (last visited October 21, 2022).

¹⁹ Attachment 4, Complaint, ¶ 56, *ALDF v. Vilsack*, Case 8:22-cv-00810-TJS (D. MD. Oct. 17, 2022).

inspection reports. In addition to inspecting regulated facilities, APHIS should share the information gathered with the public to assist with effective AWA enforcement. Inspection records are the most efficient way for the public to know exactly which facilities are adhering to AWA humane treatment requirements. The public disclosure of information will ensure that the estimated burdens of recordkeeping do not outweigh the utility of those records. The quality, utility, and clarity of all the information collected would be dramatically enhanced by allowing public access to records on a regular basis.

Respectfully submitted,

A handwritten signature in black ink that reads "Bailey Frank". The signature is written in a cursive, flowing style.

Bailey Frank
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Attachment 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANIMAL LEGAL DEFENSE FUND,
525 East Cotati Avenue
Cotati, California 94931,

Plaintiff,

v.

THOMAS J. VILSACK, in his official
capacity, SECRETARY,
United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250,

UNITED STATES DEPARTMENT OF
AGRICULTURE,
1400 Independence Avenue, S.W.
Washington, D.C. 20250,

KEVIN SHEA, in his official capacity,
ADMINISTRATOR,
Animal and Plant Health Inspection Service
4700 River Road
Riverdale, MD 20737

ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
4700 River Road
Riverdale, MD 20737,

Defendants.

Civ. Action No. 22-cv-3146

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Animal Legal Defense Fund (“ALDF”) challenges the United States Department of Agriculture’s (“USDA”) denial of Plaintiff’s petition for rulemaking to revise the

agency's confiscation regulations to ensure the humane disposition of animals when an Animal Welfare Act ("AWA")¹ licensee is operating in blatant violation of AWA standards or goes out of business, either voluntarily or because its AWA license has been revoked or otherwise discontinued.²

2. There currently exists a fatal gap in the AWA regulations that allows USDA to abandon at-risk animals at facilities with AWA violations so severe that the agency pursues enforcement or revokes or suspends the facility's AWA license.

3. Though USDA is charged with "insur[ing] that animals . . . are provided humane care and treatment," 7 U.S.C. § 2131(1), and the agency has been granted the broad authority to promulgate any regulations needed to do so, *id.* § 2151, its current regulations only allow for confiscation of suffering animals under very narrow circumstances. USDA in fact refuses to relocate animals from facility conditions that are so abhorrent that the agency has sought revocation of the facility's license—a feat that itself is rare and to date has required years of chronic AWA violations before the agency takes such action.

4. USDA is aware of many AWA-licensed facilities that chronically flout AWA regulations and standards, yet the agency refuses to act within its broad statutory authority to remove barriers to immediate animal relocation. Such was the case at Cricket Hollow Zoo, a northeast Iowa roadside zoo where hundreds of animals were kept in conditions so inhumane that, after years of chronic AWA violations, USDA initiated an enforcement action to fine the facility and revoke its license. Throughout the proceedings the agency refused to seek animal

¹ 7 U.S.C. §§ 2131, *et seq.*

² Defendants USDA and its Secretary Thomas J. Vilsack, and the Animal and Plant Health Inspection Service ("APHIS") and its Administrator Kevin Shea are collectively referred to herein as "USDA" or "Defendants."

relocation as a remedy, essentially committing to leave the animals to suffer and die in illegal conditions without any continuing USDA oversight. A USDA administrative law judge ultimately revoked Cricket Hollow's AWA license but did not provide for animal confiscation and relocation.

5. To address the agency's ongoing failure to effectuate the purposes of the AWA and protect animals in need, on July 19, 2016, ALDF submitted to USDA a petition for rulemaking seeking to expand the agency's confiscation regulations.

6. On March 31, 2021, USDA denied Plaintiff's petition for rulemaking. The agency's denial is primarily premised on the erroneous assertion that it does not have statutory authority to expand its confiscation regulations. Directly contrary to the agency's stunted use of enforcement and confiscation, USDA also reasoned that its existing regulations are adequate to address the problem, the requested amendments would not help the animals most in need, and the requested amendments would unduly expand the enforcement process.

7. USDA's denial of Plaintiff's rulemaking petition is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A).

8. Congress granted USDA broad authority to promulgate the regulations necessary to effectuate the purposes of the AWA, including the authority to provide for confiscation pending license revocation and suspension. USDA's existing narrow confiscation regime does not adequately protect animal welfare, as shown by numerous documented cases of animals being left by the agency in squalid and unsafe conditions, as well as the frequency of confiscation plummeting over the last decade. Plaintiff's proposed amendments would protect animals that are in dire need—these at-risk animals have been forsaken by USDA, left in the

hands of chronic AWA violators. The agency also ignored that Plaintiff's proposed amendment would only add confiscation as an option when the agency already is pursuing or has completed enforcement, which only happens in the face of persistent AWA violations directly impacting animal health and welfare.

9. Thus, for the agency to meet its duty to ensure animals at AWA-regulated facilities are provided with humane care and treatment, the agency must reconsider Plaintiff's petition for rulemaking and expand its confiscation regulations to allow for relocation pending license revocation, suspension, and relinquishment.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question arising under the laws of the United States) and 28 U.S.C. § 1346 (actions against the United States).

11. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because this action is brought against an agency of the United States and officers of the United States acting in their official capacities.

12. This Court may award all necessary injunctive relief pursuant to the APA, 5 U.S.C. § 706(2), and may award declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02.

PARTIES

A. Plaintiff

13. Plaintiff Animal Legal Defense Fund is a national nonprofit membership organization founded in 1971 in Cotati, California. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. Advocating for effective oversight

and regulation of the captive animal industry is one of ALDF's main goals, which it achieves by filing lawsuits, administrative comments, and rulemaking petitions to uphold and increase protections for animals; by supporting strong animal protection legislation at the state and national levels; and by educating law students, members, and supporters about laws that help captive animals.

14. When ALDF learns about AWA violations, it advocates for remedies that will protect the animals at the violator facility, including, among other things, revocation of the violator's AWA license and relocation of the animals to a facility that can provide them with adequate care. USDA's denial of ALDF's petition for rulemaking frustrates ALDF's mission and requires a diversion of ALDF's resources to counteract the agency's failure to protect animals. Because USDA does not rehome animals during enforcement that may result license revocation or termination, or when a license is revoked, terminated, suspended, or relinquished—instead only confiscating animals in exceedingly rare circumstances—ALDF must expend additional resources conducting rescue activities itself, and engaging in both federal and state legal action to secure animal rescues. Additionally, ALDF must expend additional resources on federal and state agency advocacy, legislative lobbying, and public education and campaigning levers in attempts to ensure the animals at issue ultimately receive humane care and treatment. ALDF's limited resources could instead be directed toward its other advocacy efforts, such as its criminal justice or farmed animal campaigns.

15. For example, when USDA failed to confiscate and rehome animals in terrible conditions at Cricket Hollow Zoo in Iowa during and at the conclusion of AWA enforcement, ALDF had to expend its limited resources on a years-long public nuisance lawsuit against the zoo, at the conclusion of which ALDF undertook rescue and rehoming of animals. Further,

ALDF continues to expend its resources on tracking down animals hidden away before ALDF was able to conduct its rescue.

16. Another example relates to USDA's failure to rescue an orca named Lolita from captivity at the Miami Seaquarium. Lolita has been suffering at the Seaquarium for half a century in a tiny tank with no shade, and for 40 of those years with no interaction with other orcas. Accordingly, faced with USDA's unwillingness to help Lolita over the last decade, ALDF and others have filed numerous suits against USDA and the Seaquarium in attempts to rescue Lolita. Most recently, Lolita was removed from the facility's AWA license following a scathing inspection report that found Lolita suffering on numerous accounts. Regardless, USDA did not confiscate or otherwise arrange for the humane disposition of Lolita, who continues to languish at the Seaquarium. Because of USDA's failure to save Lolita, ALDF is forced to continue to expend its limited resources to advocate for her to be removed to a sanctuary or at minimum, a facility that is in compliance with the AWA.

17. In addition to its organizational interest in animal welfare, ALDF also has an interest in ensuring human health and welfare risks are prevented through enforcement of the AWA. For instance, humans risk disease spread from AWA-regulated commercial breeders selling unhealthy pets and AWA-regulated exhibitors that confine exotic and wild animals in dirty, small, dimly lit, and other inhumane conditions and allow public interaction. Dangerous wild animal escapes due to unkempt and improper animal enclosures and fences at AWA-regulated roadside zoos also risk human health harms.

18. ALDF has more than 300,000 members and supporters nationwide, many of whom enjoy observing and interacting with animals at AWA-regulated facilities, such as zoos and amusement parks, across the country. Their aesthetic, emotional, recreational, and

educational interests are harmed when they see exhibited animals treated inhumanely. Many ALDF members have developed strong emotional connections to animals they have visited. Seeing animals kept in physically and psychologically harmful conditions has led these ALDF members to suffer personal distress. In these ways, ALDF members are harmed by USDA's arbitrary and capricious denial of the petition, and the agency's failure to confiscate animals from chronic AWA violators despite seeking enforcement and license revocation.

19. Some of these individual ALDF members have seen animals in dirty, feces-laden enclosures without access to water. Others have seen animals injure themselves by pulling out their hair and ramming their heads against enclosure walls. Viewing animals in such conditions has caused personal anguish, including sleepless nights and stress, to these ALDF members.

20. ALDF members continue to experience this distress in two ways due to USDA's denial of the petition and failure to confiscate animals in need: some repeatedly visit the animals to whom they have connected and continue to suffer by observing the animals in harmful conditions, while others avoid returning to visit the animals because they cannot bear to view the conditions again. Such harms to ALDF members are prolonged by USDA's failure to confiscate animals from these conditions.

21. ALDF and its members have spent significant time attempting to improve the welfare and conditions of animals the members have seen in distress. They have written letters to local authorities, state agencies, and USDA, called federal and state legislators, and started petitions to help the animals at risk for suffering, whom USDA fails to protect under its current confiscation regulations.

22. For example, Tracey Kuehl (“Tracey”) is a member of ALDF. From her earliest memories of caring for cows and pigs on her family’s Iowa farm, she has felt a strong sense of respect, stewardship, and love for animals.

23. Tracey derives personal, recreational, educational, and aesthetic value from being in the presence of animals and observing animals in humane conditions. She has visited nearly every zoo within 300 miles of the Quad Cities because of her personal, recreational, educational, and aesthetic interest in observing animals that she knows she will never have the opportunity to see in the wild, and because she believes zoos are enjoyable places to go with her friends. Tracey suffers personal distress when she witnesses animals in conditions that physically or psychologically harm the animals or are otherwise inhumane.

24. Because of her interest in observing animals, Tracey visited Cricket Hollow Zoo in June 2012. Among other neglectful conditions, she observed bears kept in a small corncrib cage that was dirty and contained standing water and piled up feces. Based on what she saw, Tracey was severely distressed by what she had observed, and was haunted by the need to help the animals.

25. Tracey began spending significant time trying to improve the Cricket Hollow animals’ situation. She submitted several complaints about their welfare to USDA, state agriculture inspectors, and the local sheriff. And with co-plaintiffs ALDF and her sister, Lisa Kuehl, Tracey filed a number of lawsuits to protect Cricket Hollow animals. Despite Tracey’s efforts and documented conditions at Cricket Hollow, USDA did not confiscate any animals.

26. In fact, Cricket Hollow added more animals to its facility by exhibiting five bears borrowed from another AWA-licensed exhibitor, Robert Sawmiller. Tracey continued to visit and was saddened to see more animals suffering from the conditions at Cricket Hollow.

Moreover, she was saddened to see the animals' suffering prolonged due to USDA's arbitrary and capricious failure to intervene and confiscate the animals from the abhorrent conditions.

27. Because USDA had failed to rescue animals in distress at Cricket Hollow, in 2018, Tracey, her sister Lisa Kuehl, and others, including another ALDF member, sued Cricket Hollow under a public nuisance theory in Iowa court, seeking, *inter alia*, an order requiring Cricket Hollow to send all its animals to approved sanctuaries. Tracey and Lisa and their co-petitioners prevailed in their Iowa state court action.

28. The Iowa court ordered that all the exotic animals at Cricket Hollow be removed to sanctuary immediately according to arrangements made by the petitioners and their agents. Expressly identified in the court's removal order were seven brown and black bears.

29. However, on the first evening of the removal, Tracey learned that the five brown bears were mysteriously no longer at Cricket Hollow and therefore could not be rescued.

30. Tracey was distraught and upset. She immediately worried over where the bears went and lamented that she could no longer ensure the bears live out their lives in safe and humane conditions. Nor could she visit and observe the bears at a sanctuary, as she had planned and expected.

31. Tracey later discovered that Sawmiller had swooped in before ALDF arrived to carry out the removal and whisked away the five bears with whom she had developed strong emotional and aesthetic connections.

32. Tracey then learned from a USDA inspection report that of the five adult bears transported from Cricket Hollow to Sawmiller, two died from "transportation stress." Tracey was distressed that those animals may have been saved had USDA confiscated them at an earlier time, including upon ordering revocation of Cricket Hollow's license.

33. The three remaining bears continued to suffer under Sawmiller's control at Sawmiller's facilities where USDA inspection reports detail the inhumane treatment of all animals, including the bears. USDA allowed these animals and others to continue to languish, and only intervened to confiscate certain animals on February 19, 2021, leaving other animals at the inadequate facility.

34. Tracey was furious about Sawmiller's interference with the relief she received from the Iowa court. Sawmiller's interference resulting in the death of two of the bears and the continued suffering of the other bears added to her aesthetic and emotional injuries.

35. Lisa Kuehl ("Lisa") is a member of ALDF. Like her sister Tracey, from her youngest memories of growing up on an Iowa farm in which she had both farmed animals and pets, she has felt a deep sense of respect, stewardship, and love for animals.

36. In June 2012, Lisa first visited Cricket Hollow and experienced distress and anguish from the conditions that she observed there. Because she cared about the animals at Cricket Hollow and was concerned about their health and welfare, she dedicated time to improving their situation.

37. In addition to her complaints to USDA, state agencies, and the local sheriff about the conditions of the Cricket Hollow animals, Lisa (and many others, including Tracey and ALDF) filed several lawsuits against Cricket Hollow. Through these lawsuits, Lisa learned that in 2016, Sawmiller lent Cricket Hollow five bears for exhibition and breeding purposes.

38. As explained above, after Lisa and her co-petitioners won a public nuisance lawsuit in Iowa state court, the judge ordered the removal of all the exotic animals at Cricket Hollow. But before the petitioners and their agents could carry out the rescue, Sawmiller removed at least five bears and transported them back to its facilities.

39. Lisa was irritated beyond belief and distraught. She was immediately concerned about the bears' new confinement and was disheartened to know she could no longer ensure the bears' safety and care as she thought she would. Adding to her distress, she learned from a USDA inspection report that of the five adult bears Sawmiller removed from Cricket Hollow, two died during transportation, and that the three other bears continued to suffer at Sawmiller's facilities. Lisa was distressed that those animals may have been saved had USDA confiscated them at an earlier time, including upon ordering revocation of Cricket Hollow's license. USDA did not confiscate animals from Sawmiller's facility until February 19, 2021. By that point, the animals were left by the agency to needlessly suffer for years.

40. The harms suffered by Tracey and Lisa were worsened and prolonged by USDA's failure to confiscate animals despite the agency initiating enforcement and revoking Cricket Hollow Zoo's license. Likewise, USDA's arbitrary and capricious denial of the petition harms ALDF members like Tracey and Lisa because it perpetuates the agency's inadequate protection of animals and regulatory oversight of AWA-licensed facilities.

41. These injuries to ALDF and its members are actual and concrete, are presently being suffered, and will be redressed if Plaintiffs prevail in this action. If Plaintiff prevails, USDA will have to reconsider its denial of the petition for rulemaking and issue a new decision expanding the availability of confiscation under its regulations, consistent with its authority pursuant to the AWA.

B. Defendants

42. Defendant Thomas J. Vilsack is the Secretary of the United States Department of Agriculture, which includes the Animal and Plant Health Inspection Service ("APHIS"). Congress assigned the Secretary of Agriculture the responsibility of enforcing the AWA. *See*

7 U.S.C. §§ 2132(b), 2151. As such, Secretary Vilsack is responsible for review of and decisions on petitions for rulemaking pursuant to the AWA. Secretary Vilsack is named a Defendant solely in his official capacity.

43. Defendant United States Department of Agriculture is the federal agency tasked with ensuring the humane treatment of animals under the AWA. USDA delegated its responsibilities under the AWA to APHIS.

44. Defendant Kevin Shea is the Administrator of the Animal and Plant Health Inspection Service. APHIS is the agency within USDA responsible for promulgating and enforcing federal regulations implementing the AWA. As such, Administrator Shea is responsible for review of and decisions on petitions for rulemaking pursuant to the AWA. Administrator Shea is named solely in his official capacity.

45. Defendant Animal and Plant Health Inspection Service is an agency of USDA and is responsible for administering the AWA. Animal Care is the APHIS program tasked with assuring the humane treatment of AWA-regulated animals. Animal Care does this primarily by licensing and inspecting regulated facilities. When Animal Care identifies AWA violations, it can alert APHIS's Investigative and Enforcement Services program, which may pursue enforcement actions against violators.

STATUTORY BACKGROUND

A. Animal Welfare Act

46. Congress passed the AWA to, among other things, “insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment” 7 U.S.C. § 2131(1).

47. The AWA provides that USDA “shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.” *Id.* § 2143(a)(1). This includes the establishment of “minimum requirements” for animal handling, care, treatment, and transportation. *Id.* § 2143(a)(2); *see* 9 C.F.R. pt. 3.

48. The AWA also empowers the Secretary of Agriculture “to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter,” 7 U.S.C. § 2151—again, to insure the humane treatment of animals used in research facilities and for exhibition purposes.

49. This broad grant of authority to USDA includes the authority to establish animal confiscation and relocation procedures upon initiation of an enforcement proceeding that could result in license revocation or suspension, or upon the relinquishment, suspension, or termination of a license.

50. The AWA provides for a license and registration scheme in which animal dealers, exhibitors, handlers, carriers, and researchers must be licensed or registered by USDA and agree to comply with the AWA and its regulations. *Id.* §§ 2133–34, 2136.

51. USDA is obligated to inspect and investigate regulated facilities for past and ongoing violations of the AWA. 7 U.S.C. § 2146(a).

52. The AWA also provides “[t]he Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder” *Id.*

53. However, the agency’s current implementing regulations for the AWA’s confiscation mandate only allow for animal confiscation and relocation in very narrow

circumstances. Specifically, a USDA inspector must find that the animal is suffering as a result of the failure of the licensee to comply with the AWA and its regulations and standards.

9 C.F.R. § 2.129(a). Then the inspector must “make a reasonable effort to notify the [licensee] of the condition of the animal(s) and request that the condition be corrected and that adequate care be given to alleviate the animal’s suffering or distress, or that the animal(s) be destroyed by euthanasia.” *Id.* If the licensee refuses, then the inspector “*may* confiscate the animal(s) . . . if, in the opinion of the Administrator, the circumstances indicate the animal's health is in danger.” *Id.* (emphasis added). If the licensee cannot be located, the inspector must contact law enforcement to accompany him to provide temporary care for the animal “when necessary to alleviate the animal’s suffering.” *Id.* § 2.129(b). The inspector will only then confiscate the animal “[i]f in the opinion of the Administrator, the condition of the animal(s) cannot be corrected by this temporary care” *Id.*

54. The regulations provide for confiscation of animals used in AWA-licensed research facilities under similarly limited circumstances. 9 C.F.R. § 2.38(e).

55. The regulations are silent on what should happen to animals during or at the conclusion of enforcement resulting in license revocation or termination. The regulations also do not allow parties to intervene during license revocation proceedings to advocate for animal confiscation and relocation.

56. While the AWA imposes a mandatory duty on USDA to promulgate regulations for confiscation when an animal is found to be suffering, 7 U.S.C. § 2146(a), the statutory scheme’s broad grant of authority to USDA to promulgate any regulations necessary to effectuate the purposes of the AWA provides the requisite authority to confiscate animals in

other circumstances., including upon enforcement and license revocation and termination. *See* 7 U.S.C. §§ 2143, 2151.

57. Thus, the agency is required to promulgate regulations for confiscation of animals who are suffering and may promulgate additional regulations for confiscation of animals for any other reason needed to effectuate the purposes of the AWA, which includes “insur[ing] that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment” 7 U.S.C. § 2131(1).

58. Nothing in the AWA prohibits the agency from promulgating regulations that, consistent with the purposes of the AWA, allow for confiscation of animals upon initiation of an enforcement action that may result in license revocation or suspension, or upon relinquishment, suspension or termination of an AWA license.

B. Administrative Procedure Act

59. The APA provides, “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).

60. The APA grants the right of judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” *Id.* § 702.

61. The APA defines “agency action” to “include[] includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,” *id.* § 551(13), and in turn defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ,” *id.* § 551(4). *See id.* § 701(b)(2).

62. Under the APA, a court must “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” *Id.* § 706(2)(A).

63. An agency action is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

64. In addition, an agency cannot contract the authority that Congress has conferred upon it. *See Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs*, 558 U.S. 67, 86 (2009).

FACTUAL BACKGROUND

A. USDA’s Apathetic History of Animal Relocation Under the AWA

65. When it comes to enforcing the AWA, USDA’s modus operandi entails protecting from public scrutiny the entities and individuals it regulates—or in the agency’s own words, its “customers”—rather than protecting animals who are at significant risk of exploitation and systemic cruelty in commercial industries.

66. USDA has been chronically criticized for its lenient interpretation and lax enforcement of the AWA. The agency’s enforcement rates have drastically declined in recent years, as have the rates of its animal confiscation and relocation actions. The agency’s failure to properly implement the AWA to protect animals has resulted in consternation from the taxpaying public, former and current APHIS officials, and Congressmembers.

67. USDA's Office of Inspector General ("OIG") agrees with these criticisms. When the OIG audited APHIS's Animal Care Unit in 2010, it found that APHIS was "not aggressively pursuing enforcement actions against violators of the AWA," concluding that "the enforcement process was ineffective against problematic dealers."

68. But, to this day, the agency still rarely pursues meaningful enforcement against AWA violators. When an inspector finds an AWA violation, the agency "will typically give the facility a date by which to correct those items"³ by issuing a notice or warning letter.⁴ Then, if corrective measures are not taken or "the noncompliance presents (or presented) a direct risk to the health and well-being of the animals involved," USDA may proceed by enter a pre-enforcement stipulation with the violator or may institute an administrative proceeding before an Administrative Law Judge.⁵ USDA records show that the agency only pursues enforcement in circumstances involving repeat noncompliance and animal welfare violations over the course of years. The vast majority of AWA violations, including those involving harms to animal safety and welfare, are merely documented in an inspection report with no action by the agency. To the extent USDA actually does something more than simply document the noncompliance, the agency mostly proceeds by issuing a warning or monetary fine. Only on the rarest occasions does the agency pursue suspension or revocation of the violator's license.

³ APHIS, *Animal Welfare Act Enforcement* (June 2, 2020), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/ct_awa_enforcements, also available at <https://perma.cc/4SU4-6BJ8> (permanent record created June 7, 2022).

⁴ APHIS, *Animal Welfare Act* (Jan, 12, 2022), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa, also available at <https://perma.cc/NYQ2-SDD9> (permanent record created June 7, 2022).

⁵ *Id.*

69. Even in those rare circumstances where USDA finds violations so repeat and egregious that it pursues license revocation—or even sometimes a lifetime ban on acquiring an AWA license—the agency’s practice is to leave at-risk animals with the violator.

70. The 2010 OIG audit report specifically recommended that APHIS “modify regulations to allow immediate confiscation where animals are dying or seriously suffering.” In response, APHIS stated that this recommendation was unnecessary because inspectors could “consider” relocating suffering animals if “there is no evidence relief will be provided [to the animals] in the immediate future.”

71. Instead of strengthening USDA’s AWA animal relocation procedures, USDA has wound down their use, confiscating and rehoming fewer and fewer animals over the years. According to USDA, it “either confiscated or facilitated the voluntary surrender of over 11,000 animals” between 2010 and 2015. On information and belief, USDA did not confiscate any animals from 2017 through 2019. Based on the APHIS’s public database of Animal Welfare and Horse Protection Actions, USDA has only confiscated animals in two instances in since the beginning of 2020.⁶

72. These two confiscations themselves illustrate the shortcomings in USDA’s current confiscation methods. On February 19, 2021, seven bears and one cougar were confiscated from Robert Sawmiller dba Wildlife on Wheels. This was after over a decade of chronic AWA violations, which included failure to provide clean drinking water for animals,

⁶ See APHIS, *Animal Welfare and Horse Protection Actions*, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/actions/awa-actions> (last visited September 14, 2022), also available at <https://perma.cc/G2QT-U8S2> (permanent record created June 7, 2022). In one other instance that the agency does not consider a “confiscation,” an AWA-licensed dog breeder turns over his dogs to the Animal Rescue League of Iowa as part of a consent decree with the agency. This illustrates that the agency knows confiscation of animals should be an appropriate, statutorily permitted remedy for serious AWA violations.

unclean and unsafe enclosures, and transferring animals to and from unlicensed, unapproved, and unknown facilities.

73. Many animals died in Sawmiller's care over the years. This includes one incident in which a cougar was observed by an inspector to be motionless and in apparent distress. Rather than confiscate the animal, the inspector directed Sawmiller to have the animal seek by a veterinarian within 24 hours; but according to a USDA inspection report Sawmiller failed to do so and the cougar was left to succumb from its illness without pain relief or supportive care.

74. Then, in 2020, despite Sawmiller's chronic failure to comply with the AWA and an inspection from that year documenting 19 non-compliances, USDA absurdly approved Sawmiller's application for renewal of his AWA license. ALDF brought an APA lawsuit challenging that decision. *Animal Legal Defense Fund v. Vilsack*, Case No. 1:21-cv-00623 (D.D.C. Mar. 9, 2021). USDA soon thereafter changed course by initiating an administrative complaint against Sawmiller on July 8, 2021, which resulted in the revocation of his license on April 6, 2022. Despite all of this, the agency left all but a few animals in Sawmiller's care.

75. In the other confiscation, just one brown bear was confiscated from a defunct zoo owned by James Svoboda dba Sunrise Side Nature Trail and Exotic Park after an inspector found a wound above the bear's left eye that had been left untreated and worsening for nine months. At the same time, the inspector observed a lion who was "very thin with prominent vertebral bodies" and whose enclosure had not been cleaned for nearly a year, an obese bobcat with matted hair who appeared to be in pain while he walked and whose enclosure had accumulated feces, and bear enclosures in significant disrepair. The facility's attending veterinarian had retired years earlier and there was no program of veterinary care from a new attending veterinarian. The facility has a history of AWA violations dating back to 2012, including one

instance where a lion bit off a patron's fingertip. Regardless, the agency did not seek enforcement and left all animals other than the brown bear with Svoboda. Ultimately, PETA entered an agreement with Svoboda to never again own exotic or wild animals and to relocate the remaining animals to a sanctuary.⁷

76. In both circumstances, the facilities' conditions and animal treatment caused such significant suffering that USDA felt compelled to rescue some animals and the facilities' licenses were cancelled. Yet the agency allowed numerous animals to remain in the very same conditions.

77. Sawmiller and Svoboda are just two of the many AWA license holders with serious repeat AWA violations in recent years that are continually permitted to house animals that are at great risk for harm. Yet USDA only half-heartedly pursued confiscation of select animals in these two rare cases.

78. In one other instance, USDA initially pursued confiscation but then bent to the will of industry. In 2017, when a facility breeding and raising raccoons for use as pets and in research hit 100 degrees Fahrenheit and the raccoons suffered "severe heat distress," USDA "took a rare step" of confiscating some raccoons and promising to come back for the rest. But industry lobbying led the Secretary of Agriculture and USDA officials to "block" confiscation of the remaining raccoons and order the return of those the agency seized.⁸

⁷ PETA, *Sunrise Side Nature Trail and Exotic Park Factsheet*, <https://www.peta.org/wp-content/uploads/2021/08/sunrise-side-nature-animal-educational-park.pdf> (last visited July 21, 2022), also available at <https://perma.cc/4L88-NY48> (permanent record created June 8, 2022).

⁸ See Karin Brulliard & William Wan, *Caged Raccoons Drooled in 100-Degree Heat. But Federal Enforcement Has Faded.*, Washington Post (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html, also available at <https://perma.cc/VJ59-9C2V> (permanent record created June 8, 2022).

79. Even USDA’s internal guidance has been modified in recent years to remove animal relocation procedures. USDA’s “Animal Welfare Inspection Guide” is an internal aid for APHIS Animal Care inspectors, providing guidance on how to implement the AWA and its regulations. In 2013, the Guide had an entire chapter on animal relocation. Over the years, critical pieces of the chapter disappeared. The 2020 Guide has no chapter dedicated to animal relocation.

B. USDA’s Repeat Failures to Remove and Relocate Animals Have Led to Unnecessary Suffering and Death

80. The situation at an AWA-regulated roadside zoo in northeastern Iowa underscores the issues inherent in USDA’s limited animal removal and relocation regulations and policies. Cricket Hollow Zoo held an AWA license from 1994 to 2020 and exhibited to the public hundreds of animals—including lions, tigers, bears, baboons, lemurs, macaws, and pigs—in dismal conditions.

81. Over the years, Cricket Hollow garnered hundreds of documented AWA violations. The animals at Cricket Hollow suffered from substandard sanitation, housing, pest control, and veterinary care. Recurrent violations included: animals eating and defecating in the same area; dead animals left on display for long periods of time; animals suffering psychological damage from a lack of enrichment and improper housing; inadequate shelter from the elements, including extreme cold and heat; and insufficient staffing evidenced by no more than two employees caring for hundreds of animals.

82. USDA internally acknowledged and documented Cricket Hollow’s persistent violations for years. In 2006, Former APHIS Western Regional Director Robert Gibbens wrote, “it is clear that there is a chronic management problem at the facility, and for whatever reason, the [zoo owners] either do not understand the regulations, are not willing to comply, or are not

able to comply.” Six years later, in 2012, Gibbens wrote that Cricket Hollow “has been in chronic non-compliance since July 2010.” And in 2014, APHIS Administrator Shea wrote that since 2013, the agency found “numerous noncompliances” during its inspections of Cricket Hollow.

83. ALDF and its members raised concerns to USDA about the animals at Cricket Hollow through letters, phone calls, and emails, but the agency repeatedly rebuffed them and did not confiscate a single animal. USDA’s failure to act caused ALDF to pursue other avenues of ensuring the animals at Cricket Hollow received the benefit of AWA protections.

84. In light of USDA’s inaction, ALDF sued Cricket Hollow directly, arguing that its substandard care did not meet the minimum requirements mandated under the AWA and constituted a take under the Endangered Species Act. ALDF prevailed and ultimately removed the endangered animals and relocated them to other facilities. *Kuehl v. Sellner*, 161 F.Supp.3d 678 (N.D. Iowa 2016), *aff’d*, 887 F.3d 845 (8th Cir. 2018).

85. Concurrently, ALDF sued USDA in 2014 for renewing Cricket Hollow’s AWA license while the agency was aware of the facility’s chronic AWA violations. In fact, on the same day the agency renewed Cricket Hollow’s license, the agency also discovered 11 AWA violations. The D.C. Circuit Court of Appeals held that the USDA’s reliance on Cricket Hollow’s self-certification of compliance with the AWA was arbitrary and capricious in violation of the APA. *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602 (D.C. Cir. 2017).

86. Only after ALDF sued USDA for rubber-stamping Cricket Hollow’s AWA license renewal did the agency act against Cricket Hollow. In 2015, APHIS initiated an enforcement action by issuing an administrative complaint against Cricket Hollow, seeking civil

penalties and license revocation. Still, the agency did not seek to relocate the animals housed at the woefully deficient facility.

87. The administrative enforcement proceeding resulted in a November 2017 USDA administrative law judge decision ordering Cricket Hollow cease and desist violating the AWA, pay a \$10,000 penalty, and have its AWA license revoked. The administrative law judge found that Cricket Hollow's "violations are in such frequency and numbers that . . . [r]evocation of the license is necessary."⁹

88. The proceeding confirmed that Cricket Hollow's AWA violations caused widespread animal suffering. For instance, a capuchin monkey plucked her hair off and chewed her tail due to stress. A pig left to give birth in the extreme cold lost three of her piglets. An emaciated tiger covered in open wounds, cuts, and sores received no medical treatment. Many animals' food was spoiled, covered in bugs, or contaminated with feces.

89. Even though USDA proved that Cricket Hollow's AWA violations resulted in pervasive animal suffering, the agency did not remove and relocate the animals. Revoking Cricket Hollow's AWA license merely prevented Cricket Hollow from exhibiting animals to the public. This in no way "insured" humane treatment and care of the animals, as the AWA demands. It resulted in an absurd outcome where USDA recognized Cricket Hollow egregiously failed to meet minimum standards of care, but the agency nonetheless left the animals in the hands of the violators.

⁹ *In re Cricket Hollow Zoo, Inc.*, Nos. 15-0152–0155 (AWA), 2017 WL 6506038 (U.S.D.A. Nov. 30, 2017). Cricket Hollow appealed the decision, which an appellate agency adjudicator vacated because the presiding administrative law judge had not been appointed consistent with a subsequently decided Supreme Court decision. Immediately after the case was remanded to a new administrative law judge, USDA and Cricket Hollow reached a settlement agreement, which included a consent order again revoking Cricket Hollow's AWA license.

90. Because of USDA's failure to confiscate and relocate the hundreds of animals held without adequate food, water, or veterinary care, the animals continued suffering at Cricket Hollow. ALDF was thus compelled to file a public nuisance lawsuit on behalf of its members against Cricket Hollow for violations of Iowa animal cruelty laws in Iowa state court, seeking relocation of all the animals. ALDF filed its public nuisance action in September 2018.

91. In November 2019, relying on the dozens of AWA violations documented in USDA inspection reports and witness testimony, the Iowa trial court ruled in favor of ALDF and its members, finding Cricket Hollow constituted a public nuisance due to its numerous violations of state animal neglect laws. The court enjoined the zoo's owners from owning exotic animals and wildlife, and ordered the animals be transferred to reputable sanctuaries. On appeal, the decision was affirmed. *Kuehl v. Sellner*, 965 N.W.2d 926 (Iowa Ct. App. 2021).

92. Starting in December 2019, pursuant to the Iowa state court's order, ALDF removed hundreds of animals from Cricket Hollow and transferred them to sanctuaries across the United States. But, before ALDF could rescue all the animals from Cricket Hollow, the zoo owners and other wildlife traffickers killed, hid, removed, or sold almost 100 animals.

93. Many of these animals are still missing and others are known but unreachable. For instance, a kinkajou and cockatiel were sold online. Some animals, including two brown bears, a coyote, and a fox, died during transport because of a wildlife trafficker's negligence. Other animals survived being trafficked, and ALDF is still searching for them today.

94. To find the missing animals, ALDF filed a contempt motion against the owners of Cricket Hollow. Due to the Cricket Hollow owners' deliberate violations of the nuisance abatement order, they were held in contempt of court and ordered to pay \$70,000 or serve a six-month sentence in county jail.

95. Had USDA properly read the AWA to conclude it had the authority to relocate the animals from “chronic” violator Cricket Hollow and exercised that authority when an administrative law judge revoked the zoo’s AWA license in 2017, or even before, hundreds of animals would not have continued to suffer—and scores of animals would not have died, been unlawfully trafficked, or otherwise disappeared—before ALDF’s rescue began in late 2019. ALDF similarly would not have had to expend tens to hundreds of thousands of dollars on advocating for, and carrying out, the rescue and rehoming of the Cricket Hollow animals.

96. Lolita the orca is another prime example of the agency’s ongoing failure to confiscate an animal in serious need despite the facility no longer having a license to exhibit her. Lolita has been held captive in a small tank at the Miami Seaquarium in Florida since she was brutally taken from her family off the coast of Washington in 1970. In Lolita’s time at the Seaquarium, USDA has concluded that she is kept in conditions that do not meet AWA standards—the agency has nonetheless abandoned her to languish and suffer.

97. At the Seaquarium, Lolita—who is approximately 20 feet long and weighs 7,500 pounds—is confined to a small, shallow, and barren concrete tank, without adequate protection from the sun, without a single orca companion, and with animals of other species that are not biologically or socially compatible with her. For more than 50 years, Lolita has been unable to swim any meaningful distance, dive, forage, or carry out virtually any natural behaviors, and she is forced to spend the majority of her life at, or just below, the surface of the water. The conditions in which she has been and continues to be kept inflict significant physical and mental injuries on her.

98. In the wild, orcas may swim nearly 100 miles per day, and regularly dive hundreds of feet beneath the ocean’s surface. At the Seaquarium, Lolita is kept in an oblong

tank that measures just 80 feet by 60 feet. Lolita does not even have free range of this tiny area because the tank has a large concrete obstruction measuring approximately 45 feet long by 5 feet wide in the center that was used as a stage by Lolita's trainers during public performances. The tank therefore has an unobstructed space of only 80 feet by 35 feet. Lolita's tank is only 20 feet deep at its deepest point. Accordingly, the dimensions of the tank and concrete platform prevent Lolita from turning about or swimming freely.

99. Lolita's tank does not meet the "minimum" size required for orcas under AWA regulations, 9 C.F.R. § 3.104. This was indeed confirmed by a 2017 USDA OIG audit report related to APHIS's implementation of regulations specific to cetaceans. The audit concluded that Lolita's tank "would only have an [minimum horizontal dimension] of 35 feet," which "falls short of the minimum requirements for an orca."¹⁰

100. Orcas have extremely delicate skin that is susceptible to sunburn and other damage. But, Lolita's tank offers no natural or artificial shade structures. Instead, her tank leaves her completely exposed to direct sunlight, including during the most intense heat of the day when no shadows are cast over the tank. Lolita cannot dive down in her tank to protect herself from the sun because her tank is only 20 feet deep. Accordingly, it has been reported by a former caretaker that Lolita often suffers sunburns causing her skin to crack and bleed. She also is at risk for development of cataracts and retinal damage.

101. USDA indeed found in a 2021 inspection report that the Seaquarium's failure to provide adequate protection from the sun violates the minimum standards required for shelter under AWA regulations, 9 C.F.R. § 3.103(b).

¹⁰ USDA Office of Inspector General, *APHIS: Animal Welfare Act – Marine Mammals (Cetaceans)* (May 2017), <https://www.usda.gov/sites/default/files/33601-0001-31.pdf>, also available at <https://perma.cc/THJ9-VBLB> (permanent link created July 26, 2022).

102. The Seaquarium also isolates Lolita from any other member of her species. For ten years, Lolita lived with another orca named Hugo, who died in 1980 after a brain aneurysm occurred from him repeatedly ramming his head into the side of the tank. Though orcas are highly social animals with complex family structures and life-long relationships, Lolita has not lived with another orca since Hugo's death. Rather, she currently shares her tank with Pacific white-sided dolphins, a species with which Lolita is not compatible and would not interact with in the wild. The dolphins have been known to "rake" her, meaning they scrape her with their teeth.

103. These conditions violate the minimum standards for social housing required by AWA regulations, 9 C.F.R. § 3.109.

104. Because USDA has refused to confiscate Lolita despite its own conclusion that her tank—which she has been trapped in for over 50 years—does not meet AWA standards, ALDF and other groups have made numerous attempts to help Lolita through the legal system.

105. In 2012, when the Seaquarium's AWA license was pending renewal, ALDF and others sent USDA a letter explaining that the conditions in which Lolita is held are inhumane and violate the AWA, and therefore renewal of the Seaquarium's license would be unlawful. Nonetheless, USDA granted the renewal. ALDF and the other groups then challenged USDA's renewal of the license as arbitrary and capricious in violation of the APA. USDA argued that license renewal does not require an exhibitor to demonstrate compliance with the AWA—that is only required for initial license issuance. The court deferred to this interpretation and did not engage with the evidence of the Seaquarium's AWA violations whatsoever. *See Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206 (11th Cir. 2015).

106. Then in 2016, after the Seaquarium changed ownership, ALDF and others similarly challenged USDA's decision to add the Seaquarium as an additional site under the new owner's existing AWA license despite the Seaquarium's noncompliance with AWA standards with respect to Lolita. In 2021, the Eleventh Circuit reversed the district court's dismissal of the case, which is now pending. *See People for Ethical Treatment of Animals, Inc. v. United States Dep't of Agric.*, 851 F. App'x 896, 897 (11th Cir. 2021); *People for Ethical Treatment of Animals, Inc. v. United States Dep't of Agric.*, 1:16-cv-24793-MGC (S.D. Fl. May, 18, 2016).

107. Faced with USDA's continual failure to rescue Lolita from her suffering, in 2018 ALDF and others also brought a case against the Seaquarium, arguing that the Seaquarium is perpetrating an unlawful "take" in violation of the Endangered Species Act ("ESA") by harming and harassing Lolita through her inadequate living conditions. The court held there was no "take" because the ESA regulations "do[] not cover situations in which 'significant' impairment of essential behavioral patterns occurs, but neither injury nor death results." *See People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 905 F.3d 1307, 1311 (11th Cir. 2018).

108. Then, on June 8, 2021, a USDA inspector reported dozens of direct and critical AWA violations related to Lolita and other animals at the Seaquarium. Among other things, the inspection documents that Lolita's trainer was putting Lolita at a direct health risk by acting directly contrary to the attending veterinarian's recommendations. Lolita's trainer decreased the amount of feed given to Lolita despite the objection of the facility's attending veterinarian based on seasonal abnormalities in Lolita's health, concerns that she would not be getting enough water (which marine mammals extract from their food), and that lack of food volume would cause Lolita distress. Also contrary to the veterinarian's instructions, the Seaquarium deliberately fed Lolita and other animals rotting fish. The trainer also disregarded the veterinarian's instruction

to required Lolita to perform head-in entry jumps, given her advanced age and that Lolita had injured her lower jaw on her enclosure, likely during a performance. The attending and associate veterinarians also disapproved of a plan to move two Pacific white-sided dolphins into Lolita's pool given her medical and behavioral issues. Additionally, the inspector documented violations related to the Seaquarium's failure to provide shade for many animals, which resulted in Lolita and five dolphins suffering from eye lesions. Lolita also had injuries indicate of chlorine burns due to the chlorine setting in her pool being too high.

109. The June 8, 2021 inspection also documented other AWA violations involving failure to provide adequate medical care and feed to other animals, dangerous disrepair of the facilities (including that which resulted in a dolphin breaking her ribs), children being held over the edge of the orca and dolphin show pool, unsafe chlorine levels and inaccurate chlorine records (including that resulting in a manatee developing severe clinical presentation of nematode larval migrans with a secondary bacterial infection), and numerous instances of dolphins suffering serious injury or even death due from other dolphins.

110. Despite the serious violations found at this inspection, not a single animal was confiscated.

111. In 2022, the Seaquarium again changed ownership. USDA granted the new owners an AWA license that does not include Lolita. The new owners represent that they do not plan to exhibit Lolita, but nonetheless, she remains indefinitely at the Seaquarium under the same conditions USDA has already found to be inadequate to meet AWA standards.

112. USDA has essentially abandoned Lolita at this point. Indeed, Lolita is omitted from USDA's February 22, 2022 inspection report for the Seaquarium despite still being

confined there. ALDF continues to advocate for Lolita to be rescued and rehomed to a sanctuary or at minimum a facility with no AWA violations.

113. Had USDA exerted its statutory authority to confiscate Lolita upon the termination of the license to exhibit Lolita—especially in light of the scathing 2017 OIG report and 2021 inspection report—she would not have to continue to suffer. Moreover, ALDF would not have to continue to expend significant resources advocating for Lolita’s rescue. These circumstances illustrate the dire need for the agency to exert the full extent of its statutory confiscation authority upon license termination.

114. Yet another illustration of the agency’s failure to exert its confiscation authority and protect animals in need involves Moulton Chinchilla Ranch (“MCR”), a Minnesota chinchilla breeding facility that supplied chinchillas for use in research.¹¹ From 2013 to 2018, USDA inspectors repeatedly documented extensive animal suffering at MCR, including chinchillas with eyes swollen, weeping, and sealed shut; a thin, unresponsive chinchilla missing part of her leg who was brutally killed by having her neck broken; and a dead chinchilla left on top of a cage for so long that her decaying body had to be peeled off of the cage. During this time, USDA did not confiscate a single animal from the noncompliant facility.

115. Despite years of documented AWA violations, USDA waited until November 2018 to pursue administrative enforcement against MCR. Further delays followed, and it was not until October 2021 that an Administrative Law Judge (“ALJ”) revoked MCR’s dealer license, calling the facility’s 213 “willful” violations “absolutely astounding.”¹² The ALJ even

¹¹ Nancy Blaney, *Why the USDA’s failure to enforce the Animal Welfare Act has ‘reached a tipping point’*, AlterNet (Aug. 27, 2022), <https://www.alternet.org/2022/08/usda-fails-animal-welfare-act/>, also available at <https://perma.cc/W759-TB4U> (permanent link created Sept. 14, 2022).

¹² *Id.*

expressed regret that the process of enforcement against MCR took so long, stating: “It should not have taken this long for us to get to this point.”¹³ Nonetheless, MCR was fined a mere \$18,000 and was permitted to keep the nearly 700 chinchillas languishing in its custody.

116. Then in November 2021, yet another USDA inspection documented multiple failures to comply with AWA standards, including lack of adequate veterinary care and staffing. And again, USDA confiscated none of the animals.

117. It was not until February 2022 that MCR voluntarily “got[] rid of” all of the chinchillas and was “no longer raising them.”¹⁴ Had USDA confiscated the chinchillas either at the commencement of enforcement proceedings in 2018 or even the license revocation in 2021, the chinchillas would have been relieved of their suffering much earlier and the relocation of the animals could have been overseen by the agency. This situation illustrates the lengthy timeline on which the agency operates, which prolongs the risk of suffering faced by animals in noncompliant facilities while USDA fails to exert its confiscation authority despite initiating enforcement.

C. Plaintiffs’ Petition for Rulemaking

118. On July 19, 2016, ALDF petitioned USDA to establish animal confiscation and relocation procedures under the AWA pending enforcement that could result in license revocation or suspension, or upon the relinquishment, suspension, or termination of a license for any reason.

¹³ *Id.*

¹⁴ PETA, *Breaking: Gone! All Chinchillas out of Moulton Chinchilla Ranch* (Feb. 9, 2022), <https://www.peta.org/media/news-releases/breaking-gone-all-chinchillas-out-of-moulton-chinchilla-ranch/>, also available at <https://perma.cc/ART8-NZP7> (permanent link created Sept. 14, 2022).

119. The petition documents the issues inherent in abandoning animals in situations so dismal they lead to the agency revoking or terminating an AWA license. As demonstrated by the Cricket Hollow situation, simply revoking an entity's AWA license does not protect animals. In fact, revocation often only removes AWA protections—including regular USDA inspections monitoring compliance with the AWA—and potential income to pay for care for animals, such that license revocation without animal relocation causes conditions to worsen. The combination of the USDA's lackadaisical enforcement of the AWA coupled with its lack of adequate animal relocation procedures leads to increased animal neglect, suffering, and death.

120. Five-and-a-half years after ALDF filed the petition for rulemaking, USDA still had not issued a decision on it. Accordingly, on January 20, 2022, ALDF sued USDA for unreasonably delaying response to the petition, in violation of the APA. *Animal Legal Defense Fund v. Vilsack*, Case No. 1:22-cv-00133 (D.D.C. Jan. 20, 2022).

D. USDA's Denial of Plaintiff's Petition for Rulemaking

121. After ALDF challenged the agency's unreasonable delay in responding to the rulemaking petition, on March 31, 2022, USDA finally issued its decision denying the petition. Plaintiff's unreasonable delay case was then voluntarily dismissed as moot.

122. USDA's primary reason for denying the petition was that it does not have the statutory authority to promulgate the proposed amendments; it may only confiscate animals who are directly suffering (as opposed to animals who are at risk for suffering).

123. USDA also reasoned that "[t]he petition also relies heavily on outdated data and APHIS practices that are no longer utilized since the petition was filed," without explaining how USDA has changed its practices to remedy its prior failures as demonstrated by the historic

examples. Contrary to the agency's assertions, agency records post-dating the petition show that the problem persists to this day.

124. USDA also stated that, assuming it has authority to promulgate the requested regulations, it "would not be the best use of APHIS' limited resources" because "[t]he amendments could [] lead to a dramatic expansion in administrative proceedings," and the agency would rather "focus its confiscation efforts on the animals most in need," failing to acknowledge that the animals the petition seeks to help are indeed in dire need.

CLAIM FOR RELIEF

Denial of Plaintiff's Petition for Rulemaking in Violation of APA, 5 U.S.C. § 706(2)

125. Plaintiff repeats and incorporates herein by reference each of the allegations set forth above.

126. The purpose of the AWA is "insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment" 7 U.S.C. § 2131. Accordingly, Congress instructed USDA to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." *Id.* § 2143(a)(1). Congress broadly authorized USDA "to promulgate such rules, regulations, and orders as [the agency] may deem necessary in order to effectuate the purposes of [the AWA]." *Id.* § 2151.

127. This broad mandate and grant of statutory authority includes the power to promulgate regulations for the confiscation upon license revocation, termination, suspension, and relinquishment, and during the enforcement process. USDA has both a mandatory duty to promulgate regulations for confiscation when an animal is suffering, 7 U.S.C. § 2146(a), as well as additional permissive authority to promulgate confiscation regulations to "insure that animals

. . . are provided humane care and treatment,” *id.* § 2131. There is no limit in the AWA on Defendants’ authority to promulgate confiscation regulations in circumstances that would effectuate the purposes of the AWA.

128. Indeed, Defendants’ failure to provide for the confiscation of animals in circumstances that USDA knows will cause animal suffering—but where the animals are not immediately suffering in front of a USDA inspector—contravenes the “humane care and treatment” purpose of the AWA.

129. Accordingly, Defendants’ primary reason for the denial of Plaintiff’s rulemaking petition—that the agency purportedly does not have the authority to promulgate the proposed regulatory amendments—is both “arbitrary and capricious” and “not in accordance with law” in violation of the APA. 5 U.S.C. § 706(2)(A).

130. Given that Defendants have the statutory authority to promulgate the requested regulations, USDA’s other reasons for the denial are likewise in violation of the APA as “arbitrary, capricious, [and] an abuse of discretion.” *Id.* As detailed above, Defendants’ denial of Plaintiff’s rulemaking petition failed to consider important aspects of the problem that were presented in the petition, offered explanations that run directly counter to the evidence before the agency (including its own records), and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

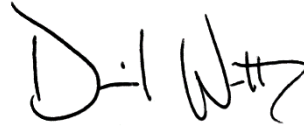
131. Defendants’ denial of Plaintiff’s petition for rulemaking has injured and continues to injure Plaintiff and its members as described herein.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an order:

- a) Declaring that Defendants' denial of Plaintiff's petition for rulemaking to be arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. 706(2)(A);
- b) Declaring that Defendants have the statutory authority to promulgate regulations providing for confiscation of animals who are at direct risk of suffering;
- c) Ordering Defendants to set aside their denial of Plaintiff's rulemaking petition;
- d) Ordering Defendants to render a new decision on Plaintiff's petition for rulemaking consistent with the Court's opinion by a Court-ordered deadline;
- e) Retaining jurisdiction of this matter until Defendants have fulfilled all statutory and Court-ordered obligations;
- f) Awarding Plaintiff its attorneys' fees and all other reasonable costs for this action;
and
- g) Granting Plaintiff such additional relief as the Court may deem just and proper.

Respectfully submitted this 17th day of October 2022.



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Attachment 2

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

THE ANIMAL LEGAL DEFENSE FUND

PETITIONER

**PETITION FOR RULEMAKING TO AMEND ATTENDING VETERINARIAN RULE
TO CLARIFY REQUIREMENT OF SPECIES-SPECIFIC EXPERIENCE**

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July ____, 2016

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APPENDIX

Declaration of Jennifer Conrad, DVM

I. Notice of Petition

Honorable Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave SW
Washington, DC 20250

Kevin Shea, Administrator
Animal and Plant Health Inspection Service
U.S. Department of Agriculture, Whitten Building
1400 Jefferson Drive, SW
Washington, DC 20250

PETITIONER:

Animal Legal Defense Fund
170 East Cotati Avenue
Cotati, CA 94931

Dear Secretary Vilsack and Administrator Shea,

The Animal Legal Defense Fund (ALDF) hereby petitions the Secretary of Agriculture and the Administrator of the Animal and Plant Health Inspection Service (APHIS), pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) and United States Department of Agriculture (USDA) regulations, 7 C.F.R. § 1.28, to amend APHIS' "attending veterinarian" regulation to clarify and explicitly incorporate the experience and training standards set out in the definition of "attending veterinarian."¹ See 9 C.F.R. § 2.40. The proposed regulatory text, included herein, is necessary to promote animal welfare as required by the Animal Welfare Act, 7 U.S.C. § 2143(a).² The proposed regulation is also necessary to protect public safety and consumer expectations. As explained below, the current "attending veterinarian" training and experience requirement lacks clarity, is rarely enforced or mentioned in APHIS guidance, and fails to protect animal welfare.

¹ See generally U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition Government for a redress of grievances."); 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("James Madison made clear in the congressional debate on the proposed amendment that people 'may communicate their will' through direct petitions to the legislature and government officials."); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government.").

² The Secretary of Agriculture "shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." *Id.* These standards include "adequate veterinary care." 7 U.S.C. § 2143(a)(2)(A).

Description of Petitioners

The Animal Legal Defense Fund’s mission is to protect the lives and advance the interests of animals through the legal system. ALDF accomplishes this mission by filing high-impact lawsuits to protect animals from harm, providing free legal assistance and training to prosecutors to assure that animal abusers are punished for their crimes, supporting tough animal protection legislation and fighting harmful animal protection legislation, and providing resources and opportunities to law students and professionals to advance the emerging field of animal law. Founded in 1979 by attorneys active in shaping the emerging field of animal law, ALDF has blazed the trail for stronger enforcement of anti-cruelty laws and more humane treatment of animals in every corner of American life. Today, ALDF’s groundbreaking efforts to push the U.S. legal system to end the suffering of abused animals are supported by thousands of dedicated attorneys and more than 100,000 members and supporters.

Request for Regulatory Amendment

Petitioners respectfully request that USDA and APHIS move expeditiously to address the ongoing danger to animal welfare caused by licensed exhibitors’ exploitation of the current “attending veterinarian” rule. As currently drafted, 9 C.F.R. § 2.40(a) simply requires that exhibitors employ an “attending veterinarian who shall provide adequate veterinary care.” The lengthy definitional portion of the regulations, 9 C.F.R. § 1.1, defines “attending veterinarian” as one who “has received training and/or experience in the care and management of the species being attended.” *Id.* (emphasis added). Exhibitors nonetheless continue to use vets with sole experience treating, for example, cats and dogs, to diagnose and treat primates, exotics, and endangered species. As a result, these animals suffer. As such, Petitioners respectfully request prompt consideration of this proposal. 7 C.F.R. § 1.28; *see also* 5 U.S.C. § 555(b) (agencies must conclude a matter presented to them “within a “reasonable time”); *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (“A reasonable time for an agency action is typically counted in weeks or months, not years.”) (citing *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)); *Defenders of Wildlife v. U.S. Fish & Wildlife*, 797 F. Supp. 2d 949, 952 (D. Ariz. 2011) (The APA “imposes on agencies a general duty of timeliness in carrying out a required action.”).

Respectfully submitted by:

Jessica Blome, Senior Staff Attorney
Animal Legal Defense Fund

II. Introduction

Pursuant to the USDA’s mandate under the Animal Welfare Act (AWA), the USDA and APHIS license facilities that engage in actions that substantially affect interstate commerce, including “exhibitors” and “dealers.” *See* 7 U.S.C. § 2132(h) & (f). The agency likewise must adopt

regulations “to govern the humane handling, care, treatment, and transportation” of animals possessed by these licensees, including adequate veterinary care. 7 U.S.C. § 2143(a) & (a)(2)(A).

As the USDA recognizes, adequate veterinary care is critical to animal welfare. To that end, the USDA has required since 1989 that an attending veterinarian must have training and/or experience in the care and management of the species he or she will be attending. *See* 9 C.F.R. § 1.1; 54 Fed. Reg. 36112. Nonetheless, exhibitors and others subject to USDA regulation continue to retain un- or under-qualified attending veterinarians to treat exotic and endangered species. Without a veterinarian experienced in the care and management of their particular species, animals do not receive necessary preventative care such as vaccinations, nor proper diagnosis and treatment. As recent, publicized events at Cricket Hollow Zoo in Manchester, Iowa demonstrate, the use of unqualified attending veterinarians comes at a high cost to animal welfare and public safety. Cricket Hollow housed 300 animals, including endangered species such as lions, tigers, wolves, and lemurs. The attending veterinarian had ample experience in treating dogs and cats, but had no prior experience treating lemurs, lions, or tigers. *See Kuehl v. Sellner*, N. D. Iowa No. C14-02034, ECF # 21-1 at ¶¶ 100-104, 41 (describing veterinarian’s comments that he had only seen lemurs “on national geographic,” is “not a big monkey person,” and had no experience with big cats). Eleven endangered species have died at Cricket Hollow, many from preventable illnesses—due in no small measure to lack of preventative care and lack of diagnostic expertise. *Id.* ¶¶ 21, 41, 52-55, 95. As a result of Petitioner’s lawsuit requesting declaratory and injunctive relief, the United States District Court for the Northern District of Iowa concluded that Cricket Hollow had not complied with its obligation to provide adequate veterinary care to the endangered tigers, and ordered that the lemurs and tigers in the Zoo’s possession be transferred to an appropriate facility capable of meeting those animals’ special needs. *See id.*, ECF # 83 at 66, 71-72. The case also highlights why species-specific, rather than general experience, is critical. There, the attending veterinarian treated wolves with de-wormers but never administered essential vaccines, despite his claim that he “extrapolated” the wolf treatments from those he knew for dogs. *Id.* ECF # 21-1 at ¶¶ 65-66. Such events are contrary to the USDA’s obligation to ensure the humane care and handling of animals and pose a risk to public health and safety.

The current regulation, the “attending veterinarian rule,” merely restates the AWA itself: the attending veterinarian must provide “adequate veterinary care.” 9 C.F.R. § 2.40(a). The lengthy definitional portion of the regulations, however, defines “attending veterinarian” as one who “has received training and/or experience in the care and management of the species being attended.” 9 C.F.R. § 1.1 (emphasis added). The regulation as written suffers from two key deficiencies. First, the definition of “attending veterinarian” is unmoored from the Subpart describing adequate veterinary care, making it difficult for even a well-intentioned exhibitor (or busy inspector) to clearly reference the experience and training standards required. Second, requiring unspecified “training and/or experience” in a particular species renders the standard vague and thus subject to abuse.

III. Legal Background and Authority to Amend Regulations

Congress enacted the AWA “to insure” that animals used “for exhibition purposes or for use as pets are provided humane care and treatment.” 7 U.S.C. § 2131. This protection inures not only to the animals themselves, but also to individuals who may suffer aesthetic and emotional harm from observing animal suffering. *See Am. Soc’y For Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003); *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 432-34 (D.C. Cir. 1998); *Hill v. Coggins*, No. 2:13-CV-00047-MR-DLH, 2014 WL 2738664, at *4 (W.D.N.C. June 17, 2014).

All animal dealers and exhibitors must obtain a license from the Secretary of Agriculture, and each must demonstrate “that his facilities comply with the standards promulgated by the Secretary.” 7 U.S.C. § 2133; 9 C.F.R. §§ 2.1(a)(1), 2.3(a) & (b). Renewal, on the other hand, is accomplished by mere say-so—a dealer or exhibitor must certify that “to the best of the applicant’s knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards.” 9 C.F.R. § 2.2(b). The APHIS has authority to inspect licensed facilities to ensure AWA compliance, and APHIS is also responsible for a large volume of inspections and re-inspections. *See* 7 U.S.C. § 2147; 9 C.F.R. § 2.126.³

Under the AWA, the “Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.” 7 U.S.C. § 2151. One specific mandate requires that the USDA adopt standards governing humane handling of animals, including requirements for “adequate veterinary care.” 7 U.S.C. § 2143(a)(1), (2).

Under this authority, the APHIS has adopted the following rule regarding veterinary care, generally referred to as the “attending veterinarian rule”:

Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section [and] shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

9 C.F.R. § 2.40(a) & (a)(2). Dealers and exhibitors must also maintain programs of “adequate veterinary care,” or PVCs, including “appropriate facilities, personnel, equipment, and services,” *id.* § 2.40(b)(1), “appropriate methods to prevent, control, diagnose, and treat diseases and injuries,” *id.* § 2.40(b)(2), “adequate guidance . . . regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia,” *id.* § 2.40(b)(4), and “adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.” *id.* § 2.40(b)(5). As discussed in more detail below, the USDA has long recognized that because different species have different needs and health requirements, an

³ *See generally* Animal Welfare Act Inspections, USDA APHIS, available at <http://www.aphis.usda.gov/> (last visited Sept. 17, 2015) (click on “Animal Welfare,” then “Animal Welfare Act,” then “Animal Welfare Act Inspections” in “related links”) (describing risk-based system to determine minimum inspection frequencies).

attending veterinarian without sufficient training and experience in the species attended cannot plausibly provide adequate care. *See also* 9 C.F.R. § 2131(a) (requiring that the licensees who maintain wild or exotic animals themselves demonstrate “adequate experience and knowledge of the species they maintain”).

IV. The USDA has recognized for more than 25 years that species-specific training and experience is a necessary requirement to ensure animal welfare.

As previewed above, 9 C.F.R. § 1.1 provides the following definition:

Attending veterinarian means a person who has graduated from a veterinary school accredited by the American Veterinary Medical Association’s Council on Education, or has a certificate issued by the American Veterinary Medical Association’s Education Commission for Foreign Veterinary Graduates, or has received equivalent formal education as determined by the Administrator; has received training and/or experience in the care and management of the species being attended; and who has direct or delegated authority for activities involving animals at a facility subject to the jurisdiction of the Secretary.

Id. (emphasis added). This definition was added in the August 31, 1989 final rule. *See* 54 Fed. Reg. 36112 (Aug. 31, 1989). In response to commentary on the amendment when it was first proposed, the USDA stated:

The initially proposed definition of “attending veterinarian” would require training and/or experience in the care and management of the species being attended. We received 407 comments ... stating that this requirement is vague. Five dealers commented that veterinarians should not be required to have experience with the particular species being attended. We disagree since the variation among the different species of animals requires that the attending veterinarian be familiar with the different requirements to promote the animals’ welfare. We also believe the terms “care and management” are commonly understood and applied in animal husbandry and are adequate to provide guidance to attending veterinarians. Accordingly, we are retaining this requirement in the revised definition.

Animal Welfare—Definition of Terms, 54 Fed. Reg. 10822, at 10825 (March 15, 1989) (emphasis added). When the final rule was promulgated, the USDA again rejected challenges to the species-specific experience requirement:

We received 55 comments ... stating that the requirement that the attending veterinarian have experience in the care and management of the species being attended would limit the pool of qualified veterinarians, and that experience with similar species should be

sufficient. We disagree for the reasons set forth in the supplementary information accompanying the revised proposal (54 FR 10825). It is not our objective to severely limit the number of veterinarians who would be qualified to serve as attending veterinarians, and we do not believe that requiring some degree of familiarity with the animal being attended will do so. We proposed this requirement because different species have different requirements and needs that must be fulfilled in order to promote their health and well-being. For these reasons, we require that the attending veterinarian have training or experience in the care and management of the different species of animals being attended.

Animal Welfare; Definition of Terms, 54 Fed. Reg. 36112, at 36114 (Aug. 31, 1989) (emphasis added).

Current APHIS practice likewise recognizes that different species have different dietary, medical, and welfare needs. *See* Animal Care Policy Manual (March 14, 2014), Policy 16.1 (describing appropriate diet for non-domestic felids); Information Sheet on Declawing and Tooth Removal (USDA Animal Care, August 2006) (recognizing that “declawing or the removal of the canine teeth (fangs) in wild or exotic carnivores or nonhuman primates is no longer considered to be appropriate veterinary care unless prescribed by the attending veterinarian for treatment of individual medical problems”); Animal Care Tech Note: Proper Giraffe Care in Cold Weather (USDA APHIS, undated) (describing special care required of giraffes in temperatures below 50 degrees in order to ensure healthy immune system and prevent hypothermia). The PVC Form (Form 7002) similarly sets out separate plans for different classifications of animals. This system is not arbitrary—it is based on recognition that animal welfare can be ensured only by species-appropriate care and treatment.

The requirement of species-specific knowledge has important implications for public health as well. Different species are, of course, susceptible to different illnesses, some of which are communicable to humans. As just one example, the herpes B-virus is deadly to humans but is often present in macaques. *See* Declaration of Jennifer Conrad, DVM (“Conrad Decl.”), ¶ 11, attached hereto. In fact, more than three quarters of adult macaques carry the virus. *See* Ostrowski *et al.*, B-virus from Pet Macaque Monkeys: An Emerging Threat in the United States?, *Emerging Infectious Diseases* (Vol. 4, No. 1, Jan.-March 1998), at p. 117. CDC guidelines for safe handling were created in 1987 after monkey handlers died after exposure to the virus through bites. *Id.* at 117 and 119. Further, members of Congress have recognized the increased risk of zoonotic diseases posed by exotic and wild animals: one finding in a bill proposed in 2013 recited that “wildlife disease expertise and resources are critical to protecting both animal and human life” and that “[w]ildlife veterinarians have been actively involved in preventing, detecting, and responding to . . . important exotic, dangerous, and zoonotic diseases.” *See* H.R. 2796, Wildlife Veterinarians Employment and Training Act, § 2(4) & (5) (introduced July 23, 2013).

Given these risks, it is critical that attending veterinarians be informed and up-to-date as to species-appropriate vaccination, preventative care, and parasite control. *See* Compendium of

Measures To Prevent Disease Associated with Animals in Public Settings, National Association of State Public Health Veterinarians, Inc. (March 25, 2005), CDC 54(RR04);1-12, *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5404a1.htm> (recommending, *inter alia*, TB screening for elephants and primates); *see also* Managing Zoonotic Risk in Zoos and Wildlife Parks, British & Irish Assoc. of Zoos and Aquariums (May 2011), *available at* www.biaza.org.uk/uploads/Animal_Management/zoonoticrisk.pdf (describing “zoonosis,” or infectious disease that can be transmitted between humans and animals); AZA Accreditation Standards § 11.1.12 (2015 ed.) (requiring training and procedures regarding zoonotic diseases). This concern holds true not just for animal-human disease but also the potential spread of disease between different species when multiple species are housed in the same areas:

you have to be extremely careful as far as biosecurity which is basically the cleaning and housekeeping and storage of various items essentially because you have some species that have or carry as a normal part of there bacterial flora organisms that may be not harmful to them but would be harmful to a species adjacent to them. So as far as every aspect of the Animal Welfare Act from cleaning, to ventilation, to sanitation, to food storage the potential for cross-contamination is amplified when you have a variety of species housed in the same room.

In Re: Pet Paradise, Inc., 51 Agric. Dec. 1047, 1073-74 (U.S.D.A. Sept. 16, 1992) (Testimony of Thomas Gomez, D.V.M.).

As detailed below, based upon these concerns and the common-sense approach already endorsed by the USDA, Petitioner proposes that the USDA make the “species-specific” experience requirement more explicit in the regulatory text, instead of burying the requirement in a lengthy definitional section. Petitioner also requests that the regulation be amended to establish a minimum standard for sufficient “training and/or experience.” Finally, Petitioner proposes that the regulations require not only the licensee but also the attending veterinarian to sign the request for license renewal under 9 C.F.R. § 2.2(b), with the attending veterinarian certifying that he or she is the attending veterinarian for the facility, complies with 9 C.F.R. 2.40, and has reviewed and signed a PVC for the facility. As discussed below, these clarifications and changes are necessary to ensure adequate veterinary care.

V. The Current Standard is Vague and Difficult to Enforce, and in Reality, is Neither Enforced nor Emphasized in Licensee Guidance.

The regulation as currently written fails to adequately inform licensees that an attending veterinarian must have species-specific experience and/or training, and provides no benchmark for the required training and experience. Anyone reading 9 C.F.R. § 2.40 will simply see that a licensee must have an attending veterinarian who provides adequate care for the animals, without further explanation. This is best illustrated by APHIS’s own failure to mention anywhere in its existing guidance for both licensees and inspectors that attending veterinarians must have experience and/or training in the animals they are treating.

For example, the USDA Animal Welfare Inspection Guide devotes an entire chapter to the PVC and attending veterinarian, yet nowhere does it state that the attending veterinarian must have species-specific experience. *See id.* Chapter 6. Likewise, the most recent Animal Care Policy Manual mentions that an attending veterinarian and PVC are required, yet again omits the requirement that the attending veterinarian must have species-specific experience. *See id.* § 3.4 (APHIS March 14, 2014). Similarly, Form 7002, the Program of Veterinary Care (PVC) form, merely comments that “Animal Welfare Regulations, Title 9, Subchapter A, Part II, Subpart C, Section 2.33 and Subpart D, Section 2.40 require a [PVC],” and recites the attending veterinarian’s information and license number, along with a plan of care. No information on the form references the necessary qualifications of an “attending veterinarian,” and no certification or acknowledgment of experience is shown—even though the plan of care itself classifies animals by type. The preventative care program set out in the PVC is “expected to be in accordance with professionally accepted veterinary practice (e.g., appropriate vaccinations, diagnostic testing) [and] should include zoonotic disease prevention measures.” Animal Care Policy Manual § 3.4 (APHIS March 14, 2014). Yet an attending veterinarian without species-specific training and experience will be hard pressed to determine which vaccinations, testing, and disease prevention measures are appropriate and warranted.

While the published APHIS guidance fails to incorporate the relevant qualifications, so too have enforcement actions failed to address whether attending veterinarians have the experience required by 9 C.F.R. § 1.1 (perhaps because, as referenced above, the APHIS Inspection Guide does not mention the species-specific requirement). For instance, while many enforcement actions address a dealer or exhibitor’s failure to consult a veterinarian, establish a PVC, or ensure that the animals receive regular and appropriate treatment, a Westlaw search for “species being attended”—the relevant regulatory language—and “attending veterinarian” yields just one result. *See In Re: Martine Colette, Wildlife Waystation, & Robert H. Lorsch*, 67 Agric. Dec. 998, 1027-28 (U.S.D.A. Aug. 4, 2008) (observing that full time veterinarian had not “received training or experience in the care and management of the species being attended”).⁴

In sum, APHIS licensees are not adequately informed and are not being held accountable. All of this is traceable to a lack of clarity in the regulation. And as explained below, improper veterinary care has grave implications for animal welfare.

VI. The Current Standard Fails To Protect Animal Welfare.

As the Cricket Hollow Zoo example demonstrates, much suffering could be prevented by requiring the attending veterinarian to participate in the annual renewal process. This simple fix alerts veterinarians if there are any lacunae in their qualifications that must be remedied, and ensures that APHIS licenses and renews only those licensees who have a qualified attending veterinarian in the first place. This serves as a critical prophylactic measure: without this certification, gaps in knowledge and training may not show until animals have suffered and died due to inadequate care. Simply put, however well-intentioned they may be, domestic animal or

⁴ Another citation references this issue with respect to a research facility and litigation relating to termination of a grant, but not violation of a particular regulation. *See Inst. for Behavioral Res. - Dr. Edward Taub*, DAB 538 (1984) (H.H.S. May 31, 1984) (stating that one basis NIH cited for finding that petitioner provided inadequate veterinary care was that the attending veterinarian was “not experienced in the care and treatment of laboratory primates”).

livestock vets without experience and/or training in exotic animal care are generally not equipped to ensure proper preventative care (such as immunizations), diagnostics and treatment, nutrition, care and maintenance, and species-appropriate euthanasia. Conrad Decl. ¶ 5. Moreover, APHIS's resources are limited. A qualified attending veterinarian is an important ally for animal welfare who will have more frequent contact with a licensee than APHIS inspectors might, who can intervene if species-appropriate care and treatment is not being provided by the licensee itself, and who can contact the authorities if any animals are suffering neglect or abuse. See Conrad Decl. ¶ 12.

Though Cricket Hollow may be the best-developed record of inappropriate medical care, it is far from the only example. See also *In Re: Gus White, Also Known As Gustave L. White, III, Doing Bus. As Collins Exotic Animal Orphanage, Respondent*, Docket No. 12-0277, 2013 WL 4679445, at *18 (U.S.D.A. Apr. 26, 2013) (apparent "attending veterinarian" believed that her health maintenance program at the facility was just for the "cats and dogs" there, no formal treatment plan was in place, leopard had to be euthanized due to failure to properly treat conditions, other animals died from lack of treatment, and still others had unresolved serious medical conditions). The AWA docket is replete with examples of animals receiving insufficient preventative care and treatment, and suffering from inhumane and inappropriate euthanasia due to the failure to involve a knowledgeable attending veterinarian in the care of these animals. Most recently, in July 2015, a complaint was filed against Woody's Menagerie, AWA license No. 33-C-0218, due to several violations, including a goat that died of infection after not receiving vet care for nine days, a lion that was inhumanely euthanized by the owners rather than a vet for a treatable condition, a bear that was unable to walk, and multiple other animals in poor condition. See AWA Docket Nos. 15-0147, 15-0148, 15-0149. The Natural Bridge Zoo has been involved in ongoing legal proceedings after USDA inspectors found that 35 animals were in need of veterinary treatment.⁵

Other examples call into question whether the attending veterinarian was truly knowledgeable and/or consulted about the relevant species:

- An exhibitor opted to transport three unweaned tigers (two of which had not even opened their eyes yet), by truck, from Iowa to Colorado, for a photo shoot. All three cubs died the day after the photo shoot, and did not receive veterinary care even when they had been visibly suffering for days. *In Re: Craig A. Perry, an Individual; Perry's Wilderness Ranch & Zoo, Inc., an Iowa Corporation; & Le Anne Smith, an Individual, Respondents*, AWA Docket No. 05-0026, 2013 WL 8213618, at *10 (U.S.D.A. Sept. 6, 2013). This licensee purportedly had an attending veterinarian.
- An elephant died horrifically, and around 1000 pounds underweight, after subsisting on an inappropriate diet including rabbit pellets, and not receiving adequate urgent medical care. Her two herd mates likewise were malnourished and had not received adequate skin and foot care – which is critical for elephant health and well-being. *In Re: John D. Davenport, d/b/a King Royal Circus*, 57 Agric. Dec. 189 (U.S.D.A. May 18, 1998). This

⁵ See, e.g., <http://blog.humanesociety.org/wayne/2015/04/natural-bridge-zoo-permit-revoked.html/natural-bridge-zoo-investigation>.

licensee ostensibly had an attending veterinarian, but it is implausible that *any* veterinarian knowledgeable about elephants would condone such care.

- Animals did not receive annual vaccinations or treatment for maladies such as “a chronic draining abscess” and “fly infested ear edges with open lesions.” *In Re: Dennis Hill, an Individual, d/b/a White Tiger Foundation; & Willow Hill Ctr. for Rare & Endangered Species, LLC, an Indiana Domestic Ltd. Liab. Co., d/b/a Hill’s Exotics*, AWA Docket No. 04-0012., 2004 WL 2336367, at *16-18 (U.S.D.A. Oct. 8, 2004).
- The exhibitor had no records of the deaths or the causes of deaths of a badger, a llama, a black leopard, a bear, a lion, and a jaguar, all of which died within one calendar year. The bodies of the badger (that had died “sometime in December 2000”) and a tiger were discovered by APHIS employees near the end of January, 2001. *In Re: Lorenza Pearson, d/b/a L & L Exotic Animal Farm in Re: Lorenza Pearson*, AWA Docket No. 02-0020., 2009 WL 2134028, at *6 (U.S.D.A. July 13, 2009). This same exhibitor failed to provide heartworm preventative to bears housed outdoors. *Id.* at * 8.
- Other exhibitors’ failure to provide proper ongoing veterinary preventative care and diagnostics led to immense suffering and death, nearly all of which was preventable. *See In Re: Gloria Lee Gilbert, an Individual, & Roger Gilbert, an Individual, Doing Bus. As A Little Petting Zoo & All Events Entm’t, Respondents*, AWA Docket No 13-0294 (also assigned AWA Docket No. 13-0295), 2014 WL 1466725, at *2 (U.S.D.A. Mar. 19, 2014) (failure to have adequate veterinary care where respondents failed to provide not only sufficient preventative care such as vaccinations, deworming, de-licing, and hoof trimming but also adequate veterinary care for respiratory problems, excoriated vulvas, abscesses, and other skin conditions); *In Re: Great Cats of Indiana, Inc., an Indiana Corporation; Laurob, LLC, an Indiana Ltd. Liab. Co., & Robert B. Craig & Laura Proper, Individuals Doing Bus. As Great Cats of Indiana, Respondents*, AWA Docket No. 07-0183, 2010 WL 715175, at *3-4 (U.S.D.A. Jan. 4, 2010) (describing myriad veterinary violations, including animals dying without proper veterinary care, open wounds and malnutrition, unhealed wounds on a cougar’s paw from a prior amputation procedure, lack of deworming and other parasite prevention and treatment); *In Re: Tiger Rescue, A California Corporation; John Hans Weinhart, an Individual; Marla Smith, an Individual; & Wendelin R. Ringel, an Individual, Respondents*, AWA Docket No. 07-0184, 2008 WL 4675789, at *5 (U.S.D.A. May 9, 2008) (citing failure to maintain programs of adequate veterinary care and referencing “53 dead felid cubs”); *In Re: Cheryl Morgan, an Individual, d/b/a Exotic Pet Co.*, AWA Docket No. 05-0032., 2006 WL 2006165, at *5-6 (U.S.D.A. July 6, 2006) (describing failure to provide veterinary treatment for animals suffering from hypothermia, prolapsed rectum, and other ailments).
- Similarly, where experienced vets are not involved, animals are in danger of suffering both unwarranted and inhumane euthanasia. *See In Re: Chris McDonald & Donia McDonald As to Chris McDonald d/b/a McDonald Farm, & Donia McDonald*, 64 Agric. Dec. 738, 743 (U.S.D.A. Jan. 4, 2005) (describing licensee’s attempt to euthanize a tiger by shooting it, and licensee’s instruction to a sheriff’s officer to shoot another tiger “because respondents feared the animal would escape its enclosure”); *In Re: Lorenza Pearson, d/b/a L & L Exotic Animal Farm in Re: Lorenza Pearson*, AWA Docket No.

02-0020., 2009 WL 2134028, at *13 (U.S.D.A. July 13, 2009) (only means of euthanasia for black bears was a .22 caliber rifle)

To be sure, some of the examples cited above involve bad actors or others who may not be consulting with or adhering to veterinary recommendations at all. This is why it is critical to not only make clear that species-specific experience is required, but also to require that the attending veterinarian sign any renewal certification, in order to ensure that a qualified attending veterinarian continues to work with the facility. *Cf. In Re: Hope Knaust, Stan Knaust, & the Lucky Money, A P'ship, Respondents*, Docket No. 12-0552, 2013 WL 6702579, at *3 (U.S.D.A. Nov. 15, 2013) (commenting that attending veterinarian had signed a PVC in 2008 and had not visited the facility since except “possibly to sell it some hay in 2009”). The records required by AWA and related regulations “are an important indicator of the level of . . . veterinary care provided by exhibitors,” and can be improved. *In Re: Volpe Vito, Inc., d/b/a Four Bears Water Park & Recreation Area*, 56 Agric. Dec. 166 (U.S.D.A. Jan. 13, 1997).

In short, the current regulation does not ensure animal welfare. The use of attending veterinarians without species-specific know how poses a risk to not only the animals but also public health. A veterinarian who is not informed about species-specific zoonotic disease will be ill-prepared to address diagnosis, prevention and treatment of that disease, let alone to ensure it is not transmitted to humans (or recognize it before it is transmitted). Conrad Decl. ¶ 11. Finally, consumer expectations are harmed when they see sickly or suffering animals—such an experience is heart-wrenching for those who visit non-compliant facilities. Petitioner therefore respectfully requests that the USDA amend the regulations as proposed below.

VII. A baseline level of species-specific training and experience is necessary for animal welfare.

Traditional veterinary medical education does not prepare a veterinarian to treat exotics and endangered species. Conrad Decl. ¶ 6; *see also* Zoological Companion Animals – ACZM Residency Program, University of California, Davis (“As traditional veterinary medical education only briefly examines zoological companion animal husbandry, anatomy, and physiology, a training program designed for graduate veterinarians to specialize in and to advance the field of companion avian and exotic animal medicine via clinical practice, teaching and research is needed.”).⁶ Instead, a veterinarian treating big cats and other exotic animals is generally expected in the industry to have specialized training. Conrad Decl. ¶ 6. To obtain this experience or training, a veterinarian should pursue one of two paths. *Id.* First, he or she can complete a residency in Zoological Medicine through an accredited veterinary school. *Id.* Second, he or she can pursue experience through apprenticeship with a reputable and recognized zoo, along with continuing education. *Id.*

Many veterinary schools offer internships or residencies in zoological medicine. *See* <http://www.aazv.org/?339>. The American College of Zoological Medicine, a specialty organization for certification of veterinarians with special expertise in zoological medicine,

⁶ The website is available at http://www.vetmed.ucdavis.edu/vmth/small_animal/cape/residency_program.cfm.

provides board certification in this specialty. *See* <http://www.aczm.org/>. In order to qualify for this certification, candidates must either complete a three-year ACZM-compliant residency or other graduate program, or must complete a minimum of six years post-graduate experience in zoological medicine. *See* ACZM, Credentials Information for ACZM Board Eligibility.⁷ Petitioner recognizes the reality that not all exhibitors will be able to consult with a board-certified zoological DVM and does not propose that the regulation impose such a requirement. Nonetheless, the level of experience required for such certification provides some juxtaposition for the minimum level that USDA-APHIS should require.

Moreover, other entities—including the USDA itself—recognize that ongoing and/or specialized training is needed in order to ensure animal welfare. For instance, APHIS inspectors take zoo animal inspection courses focusing on the needs of primates and elephants:

Q. Can you tell us what training courses you've had relative to the Animal Welfare Act?

A. I've had several courses during my PVPC training and in REAC. I have attended the basic animal care training course. I have attended the animal transportation course. I've attended the records keeping inspection course. And the best course which I felt really gave me insight into my job was the zoo animal inspection course held at the Atlanta Zoo which focused mainly on primates and elephants.

In Re: Volpe Vito, Inc., d/b/a Four Bears Water Park & Recreation Area, 56 Agric. Dec. 166 (U.S.D.A. Jan. 13, 1997) (APHIS inspector testimony). The American Association of Zoo Veterinarians and the European Association of Zoo and Wildlife Veterinarians likewise offer annual conferences and other continuing education opportunities. Moreover, California requires that its exhibitors (or full time employees of the exhibitor) have at least two years of “full-time . . . hands-on experience caring for the [relevant] restricted species” in that exhibitor’s possession. *See* Cal. Code Regs. tit. 14, § 671.1(c)(1); *see also id.* § 671(a) & (c) (defining restricted species to include numerous non-domestic animals, including big cats and other species often included in exhibitor facilities).

Without some specialized training and experience, an attending veterinarian cannot adequately care for exotic animals and/or endangered species. Anesthesia of large and exotic animals is often required for diagnostics and poses special concerns. Conrad Decl. ¶ 7. For instance, unlike the diagnostic process for domestic cats, a veterinarian generally must anesthetize a seriously ill big cat in order to accurately perform diagnostic work. *Id.* The veterinarian must therefore have training and experience in the appropriate anesthetic drugs and dosage, method of administering the anesthesia, and monitoring vital signs and welfare of the animal during the anesthesia. *Id.* As another example, elephants must not be allowed to fall forward on their sternums when anesthetized, because they can suffocate in that position—they must instead be oriented to lie on their side. *Id.*

Similarly, accurately interpreting an animal’s bloodwork requires an understanding of normal baseline levels for that particular species. Conrad Decl. ¶ 8. The blood levels of certain substances generally considered a marker of kidney function are often significantly higher in big cats than those in domestic felines, because unlike domestic felines, big cats eat a diet of pure

⁷ This file is available at http://www.aczm.org/content.aspx?page_id=22&club_id=366916&module_id=49001.

protein. *Id.* As such, a veterinarian accustomed only to interpreting blood work of domestic felines may erroneously conclude that the big cat is in renal failure, when in actuality the reading is normal. *Id.* An incorrect conclusion regarding renal failure could lead to the unnecessary euthanasia of an ultimately healthy animal. *Id.*

Finally, ensuring the welfare of animals as a veterinarian extends beyond diagnostics and treatment. Conrad Decl. ¶ 9. Species specific knowledge and background in the natural history of a particular species is important to understanding not only proper veterinary care, but also the dietary, environmental, and social needs of that particular species. *Id.*

VIII. Proposed Amendments to Attending Veterinarian Rule.

As discussed above, simple changes will pose limited additional burden on APHIS and will better ensure animal welfare. Petitioner therefore respectfully requests the following amendments to existing regulations:

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

- (a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.
 - (1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; **and**
 - (2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use; **and**
 - (3) Each dealer and exhibitor shall assure that the attending veterinarian has received training and/or experience in the care and management of the species being attended, as required by 9 C.F.R. § 1.1, which shall constitute at least six months of full-time (or the equivalent part-time) training and/or experience in the species being attended.**

§ 2.2 Acknowledgement of regulations and standards.

- (a) Application for license renewal. APHIS will renew a license after the applicant certifies by signing the application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards, **and the attending veterinarian certifies, by signing the application form, that he or she is the attending veterinarian for the facility, meets the requirements of 9 C.F.R. § 2.40, and has reviewed and signed a program of veterinary care for the facility within the past 12 months.** APHIS will supply a copy of the applicable regulations and standards to the applicant upon request.

IX. Conclusion

In sum, although the USDA has acknowledged—for more than 25 years—the need for attending veterinarians to possess species-specific training and experience, the lack of clarity in the existing regulation, and resulting lack of APHIS enforcement, pose a grave danger to animal welfare. Petitioner therefore respectfully requests that USDA/APHIS promptly act to clarify and strengthen the attending veterinarian regulation, 9 C.F.R. § 2.40, as provided above.

~#4835-7449-0921 v.3 - 33999/01183~

Attachment 3

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

THE ANIMAL LEGAL DEFENSE FUND AND COMPASSIONWORKS INTERNATIONAL

PETITIONERS

**PETITION FOR RULES TO REQUIRE RECORDKEEPING AND REPORTING OF
ANIMAL MORTALITY BY ANIMAL WELFARE ACT LICENSEES**

September 8, 2022

NOTICE OF PETITION FOR RULEMAKING

Via Electronic Mail and Certified Mail/Return Receipt Requested

September 8, 2022

Thomas Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250
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Kevin Shea, Administrator
Animal Plant Health & Inspection Service
4700 River Road, Unit 84
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Dear Secretary Vilsack and Administrator Shea,

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) (“APA”), and the United States Department of Agriculture’s (“USDA”) implementing regulations, 7 C.F.R. § 1.28, Petitioners Animal Legal Defense Fund (“ALDF”) and CompassionWorks International (“CWI”) hereby petition for issuance and amendment of a rule under the Animal Welfare Act, 7 U.S.C. §§ 2131 et seq. (“AWA”).

Petitioners are interested persons under the APA and seek issuance and amendment of current rules to require that AWA licensees record and every three years report to the Animal Plant Health & Inspection Service (“APHIS”) all instances of animal mortality occurring under their care. Petitioners and their members have aesthetic, moral, recreational, and procedural interests in the welfare of the nation’s captive animals.

Thank you for your consideration. We look forward to your prompt response.

Respectfully submitted,

Ashley Ridgway, Litigation Fellow
Daniel Waltz, Managing Attorney
ANIMAL LEGAL DEFENSE FUND

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I. INTRODUCTION

Pursuant to the Administrative Procedure Act and the United States Department of Agriculture’s (“USDA”) implementing regulations, 7 C.F.R. § 1.28, the Animal Legal Defense Fund (“ALDF”) and CompassionWorks International (“CWI”) (collectively, “Petitioners”) petition the Secretary of Agriculture, through the Animal and Plant Health Inspection Service (“APHIS”), to issue a rule under the Animal Welfare Act, 7 U.S.C. §§ 2131 et seq., (“AWA”). The petitioned-for rule would require AWA licensees to record, and every three years report to APHIS, all instances of animal mortality occurring under their care.¹

Although Petitioners assert the recordkeeping requirement should already exist in the regulations, it is not enforced in practice and Petitioners thus seek this rulemaking for clarification and added strength. The current, lacking enforcement regime prevents APHIS from effectively monitoring AWA-licensed facilities and the animals who live and die at them. AWA-licensed dealers and exhibitors are required to maintain records regarding all animals “in his or her possession,” “transported, sold, euthanized, or otherwise disposed of,” including the date of disposal.² Although the regulation requires that these licensees record instances of euthanasia, this category is not broad enough to encompass all animal deaths which can lend insight into conditions at the facility more generally. The regulations do not clearly indicate whether all animal deaths fall under, or necessarily result in, “disposal.”³ In practice, APHIS does *not* require licensees to record all animal deaths, and in turn the licensees do not. Because the current AWA enforcement scheme does not explicitly require licensees to record animal mortality outside of euthanasia, licensees may

¹ If USDA declines to pursue notice-and-comment rulemaking on this issue, it might instead issue guidance clarifying that the term “disposed,” as used in the “otherwise disposed of” clause of 9 C.F.R. § 2.75, encompasses all animal mortalities, thus highlighting the requirement of AWA-licensees to keep record of all animal deaths.

² 9 CFR § 2.75(b)(1).

³ “Disposal” is not defined in the AWA. *See* 9 CFR § 1.1.

have several annual deaths resulting from potential AWA violations which go unnoticed and uninvestigated by USDA.

II. PETITIONERS

Petitioner Animal Legal Defense Fund is a non-profit organization with over 300,000 members and supporters that is dedicated to protecting the lives and advancing the interests of animals through the legal system. Each year, ALDF spends substantial resources advocating on behalf of animals whose treatment is governed by the AWA, including animals used for exhibition, entertainment, research, breeding, and other commercial purposes. Through investigations and public records requests, ALDF monitors the care provided to AWA-covered animals and disseminates pertinent information to ALDF members and other interested persons. Upon discovering AWA violations, ALDF advocates for the revocation and non-reissuance of the offender's license, as well as for USDA to confiscate the animals so that they may be sent to sanctuaries. For example, in 2021, ALDF legally challenged the USDA's renewal of exhibitor and dealer Robert Sawmiller's AWA license, and also asked USDA to revoke his license.⁴ As part of ALDF's challenge to USDA's decisions to license Sawmiller, ALDF sent the agency evidence demonstrating Sawmiller's chronic AWA violations, including animal deaths. Specifically, ALDF used state public records to show that while Sawmiller transported five brown bears from a zoo in Iowa to one of his facilities, two bears died, likely from transportation stress.⁵

CompassionWorks International is a nonprofit animal advocacy organization primarily focused on raising awareness regarding exotic animal cruelties found within the entertainment and captivity industries. CWI both regularly uses information provided by APHIS regarding licensing and current inspection reports to spread awareness and implement strategic actions for animals, and also acts as a liaison between concerned citizens who have witnessed exotic animal abuse and

APHIS. For CWI to perform its mission comprehensively, CWI must receive accurate and specific information from APHIS regarding licensees and their animals, yet on numerous occasions critical errors have been found that impede progress toward optimal animal care and advocacy.

III. AUTHORITY TO AMEND REGULATIONS & LEGAL BACKGROUND

A) Authority to Amend Regulations

Under the AWA, the “Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.” 7 U.S.C. § 2151. Pursuant to the USDA’s mandate under the AWA, APHIS licenses facilities that handle and hold animals in captivity to “insure” animals used “for exhibition ... are provided humane care and treatment.” *See id.* § 2132(h) & (f); *Id.* § 2131. The agency likewise must adopt regulations “to govern the humane handling, care, treatment, and transportation” of animals possessed by these licensees, including adequate veterinary care. *Id.* § 2143(a) & (a)(2)(A). The proposed regulatory language below is necessary to promote animal welfare as required by the AWA. *See* 7 U.S.C. § 2143(a); *see also generally id.* §§ 2131 et seq.

Further, the Secretary is expressly authorized by the statute to prescribe recordkeeping requirements and associated retention requirements for dealers and exhibitors. 7 U.S.C. § 2140. The statute makes clear that these records “shall be made available at all reasonable times for inspection and copying by the secretary.” *Id.* The time of license renewal is a reasonable and logical time for such records to be made available through a report.

B) Legal Background

1. Recordkeeping Regulations

Regulations under the AWA require licensees to keep records documenting animals who are “purchased or otherwise acquired,” “transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor.” 9 C.F.R. § 2.75. Current

regulations leave “disposal” undefined. Such records shall be kept for one year, or longer in the case of an investigation. *Id.* § 2.80.⁶ Dealers and exhibitors must also employ an attending veterinarian to provide adequate veterinary care to the animals including “direct and frequent communication [...] on problems of animal health, behavior, and wellbeing. [...]” *Id.* § 2.40. Those records must be kept for a period of one year. *Id.* § 2.80.

There is no current requirement for exhibitor or dealer licensees to submit a report including mortality figures.

2. Inspection Guidance and Mechanisms

APHIS’s Animal Care department (AC) “uses a risk-based inspection system to support its focused inspection strategy, allowing more frequent and in-depth inspections at facilities with a higher risk of animal welfare concerns, and fewer at those that are consistently in compliance.”⁷ Facilities that meet the criteria for low-frequency inspections are “subject to inspection once every year, or every 2–3 years, or in some cases only when [APHIS] receive[s] a complaint.”⁸ This inspection system relies on APHIS’s complete and accurate knowledge of animals’ conditions under the care of licensees.

At each inspection, the APHIS inspector takes inventory of animals present at the facility and reviews the facility’s own inventory count. When accurate observational counts are impossible, APHIS directs its inspectors to evaluate the facility’s records, “including records of acquisition, disposition, and animals on hand.”⁹ In any case, where “there is a greater than 10% difference” in inventory numbers, the inspector

⁶ This one-year baseline retention requirement was likely created to align with the length of an AWA license. Until the new licensing rule issued in 2020, AWA licenses expired after one year, after which APHIS would have to make a renewal decision. In 2020, the agency promulgated a final rule that extended the length of AWA licenses to three years, *see* 85 Fed. Reg. 28797 (May 13, 2020), but did not adjust the length of the record retention requirement.

⁷ Risk Based Inspection System, USDA.gov, Nov. 18, 2020, <https://perma.cc/4L9N-NS5T>.

⁸ *Id.*

⁹ USDA, Animal Care Inspection Guide, at 2-17, <https://perma.cc/H798-NPVY>.

should follow up with questions to clarify the discrepancy and if unsatisfied by the answers, pursue further instruction from a superior at USDA.¹⁰

The clarification of the requirement that licensees keep records of all animal mortality, if enforced accordingly, would greatly enhance the APHIS inspection scheme by calling attention to problematic facilities. A signed declaration from APHIS Animal Care Inspector Randall Coleman illustrates the benefits of improved recordkeeping. Even though he had inspected the AWA-licensed Pennsylvania roadside zoo Farmers' Inn at least four times, Coleman had no memory of the facility beyond his inspection notes.¹¹ Moreover, even though Farmers' Inn had multiple animal deaths,¹² many of which went unnoticed (or at least unnoted) during inspections,¹³ Coleman did not recall speaking to his “colleagues or supervisors about whether the agency should take an enforcement action against” the facility.¹⁴

Had comprehensive mortality records or reports existed for Farmers' Inn, issues at the facility may have garnered more attention from APHIS. Then, in accordance with the risk-based inspection system, APHIS would have undertaken more frequent and detailed inspections and cited the facility for any violations found. The mortality records would have also created a more robust paper trail to supplement inspection reports and inspectors' memories years later.

3. License Renewal

Under the current regime, a new license is needed whenever a licensee's 3-year license expires.¹⁵ Licensees seeking renewal must submit a completed application

¹⁰ *Id.*

¹¹ Exhibit 1. Declaration of Randall Coleman, *Animal Legal Defense Fund v. Kimberly Ann Lucas d/b/a Farmers' Inn* (Case No. 2:19-cv-40). July 29, 2020. ¶¶ 4,6. This declaration was USDA's response to a deposition subpoena issued during a lawsuit concerning grossly deficient treatment of animals at the Pennsylvania animal exhibitor named Farmers Inn.

¹² Exhibit 2. Animal Births, Deaths and Acquisitions; created by Farmers' Inn for discovery related to *Animal Legal Defense Fund v. Kimberly Ann Lucas d/b/a Farmers' Inn* (Case No. 2:19-cv-40). (including, for example, 9 unknown or unnatural deaths).

¹³ Exhibit 3. Paula Gladue, VMD, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Kimberly A Lucas, 1 (June 17, 2019).

¹⁴ *Supra*, n. 11. ¶¶ 7, 9

¹⁵ *New Licensing Rule (APHIS-2017-0062)*, ANIMAL PLANT HEALTH INSPECTION SERVICE, USDA <https://perma.cc/4YEL-8CBZ>.

form to the appropriate office. 9 C.F.R. § 2.1(d)(1). License applicants must “demonstrate compliance with the Act and the regulations and standards[.]” *Id.* § 2.3. APHIS may terminate a license any time during the renewal process. *Id.* § 2.12.

IV. PROPOSED CLARIFICATION TO ANIMAL WELFARE ACT LICENSEE RECORDKEEPING REQUIREMENTS

Petitioners propose the following additions, marked in bold, to the text of 9 C.F.R. § 2.75(b):

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

[...]

(v) The date of purchase, acquisition, sale, **death**, or disposal of the animal(s);

Additionally, petitioners propose that APHIS inspect these records during all routine and focused inspections and note missing records in inspection reports.

V. PROPOSED EXTENSION OF RECORD RETENTION POLICY

Petitioners further propose that APHIS make the following alterations, marked in bold, to 9 C.F.R. § 2.80 in accordance and to be consistent with the new three-year licensing regime:

- (a) No dealer, exhibitor, broker, operator of an auction sale, carrier, or intermediate handler shall, for a period of **3** years, destroy or dispose of, without the consent in writing of the Administrator, any books, records, documents, or other papers required to be kept and maintained under this part.
- (b) Unless otherwise specified, the records required to be kept and maintained under this part shall be held for **3** years after an animal

dies, is euthanized or disposed of and for any period in excess of three years as necessary to comply with any applicable Federal, State, or local law. [...]

VI. PROPOSED ANIMAL WELFARE ACT LICENSEE REPORTING REQUIREMENT

Petitioners also propose the addition of a new reporting requirement for dealer and exhibitor licensees. Because licenses are valid for three years, APHIS should require that mortality reports be submitted every three years, along with the application for license renewal. *See* 9 C.F.R. § 2.5 (“A license issued under this part shall be valid and effective for 3 years unless...”). The report should be submitted with the application for renewal of licensure and include the following information from the preceding 3-year span:

- a) common names and inventory numbers of all animals under licensee’s care or living at licensee’s facility;
- b) comprehensive records for each animal purchased or acquired, transported, sold, euthanized, deceased, or otherwise disposed of, along with a brief explanation of each instance.

The requirement of this report could logically be placed under 9 C.F.R. § 2.1(d)(1).

VII. FACTUAL BACKGROUND AND SUPPORT FOR RULEMAKING

The agency’s lack of death recording or reporting requirements for AWA licensees in practice, despite the broad language in 9 C.F.R. § 2.75, allows animal deaths to go unnoticed by APHIS, compromising government oversight of animals at these facilities and inhibiting the AWA’s central purpose of “insur[ing] that animals intended ... for exhibition purposes are provided humane care and treatment.” 7 U.S.C. § 2131. Where detailed recordkeeping of animal deaths and causes of death could present red flags to APHIS and spur further investigation into questionable care at problematic AWA-licensed facilities, the lack of such records and reports leaves both APHIS (and, in turn, advocacy organizations like ALDF which rely on

APHIS for investigation and enforcement and often seek APHIS's public records) without valuable information paramount to analyzing the safety and fitness of the facilities. The current recordkeeping requirements leave three primary avenues for APHIS (and organizations like ALDF) to monitor and track animal deaths at AWA-licensed facilities: (A) inventory numbers supplied by the licensees themselves which are often impossible for APHIS to double-check during short inspection visits, (B) often incomplete acquisition and disposition records, and (C) veterinary records. None of the three are comprehensive, and a more efficient and direct pathway to monitor animal mortality is the requirement that AWA-licensees record each animal death. Without this solution, animal trafficking runs rampant without consequence.

A) APHIS Uses Licensee-Provided, Often Un-Verifiable Inventory Records to Track Animal Deaths, but Such Records are Insufficient to Create a Reliable Picture of Annual Mortality Rates.

The AWA regulations currently require licensees to keep inventory records for animals “on hand,” or in their custody. 9 C.F.R. § 2.75. That inventory becomes an important facet of each APHIS inspection of the licensed facility, as APHIS inspectors check it against their site observations. Indeed, the USDA acknowledges in guidance that “[b]ecause the inventory is a record of what Animal Care inspectors observed, the inventory included in the report may be different than the total number of animals maintained by the facility.”¹⁶ The guidance further notes facilities will have countable species, difficult to count species, and even “circumstances where accurate counts are impossible.”¹⁷ In other words, by USDA's own account, a facility's inventory record may conflict with inventory as observed by inspectors. When discrepancy over 10% occurs, the guidance calls for the inspector to probe the licensee for more information and, if dissatisfied with the response, escalate the issue to a superior.¹⁸ Even with perfect adherence to this guidance, without mortality records,

¹⁶ USDA, Animal Care Inspection Guide, at 2-16, <https://perma.cc/H798-NPVY>.

¹⁷ *Id.*

¹⁸ *Id.*

up to 10% of a facility's animals could die and go unreported without scrutiny by APHIS inspectors.

i. Fur-Ever Wild

When Terri Petter, owner and operator of AWA-licensed menagerie and wolf fur-harvesting facility Fur-Ever Wild, was deposed as part of a lawsuit in 2012, she indicated that when she took inventory of animals in her custody, she only retained the most recent inventory sheet and threw out the previous one. This meant she did not keep all inventory records for the statutory minimum of one year, such that her inventories were an even less reliable source of information for APHIS.¹⁹ She also stated that no regulatory authorities, including APHIS, required her to report a change in animal population immediately after a death.²⁰ Had APHIS required comprehensive mortality records or reports for each wolf in the custody of Petter, it would have found suspiciously high mortality rates at Fur-Ever Wild, including infanticide likely caused by poor husbandry practices, and the facility's unnecessary killing of wolves for the simple reason they were "aggressive."²¹ With information about wolf mortality at Fur-Ever Wild, APHIS could have more frequently inspected and investigated the facility and had the chance to prevent unnecessary deaths of other wolves.

ii. The Preserve

In 2021, an unaccounted-for elephant death occurred at an AWA exhibitor called The Preserve. An APHIS inspector included an elephant named Dixie in an official inspection count, even after she died.²² The month before the agency's official

¹⁹ Exhibit 4. Excerpt of Deposition of Teresa Petter at 51, lines 12-23, December 19, 2012, *in Teresa Lynn Petter v. Town of Eureka* (19HA-CV-12-112).

²⁰ *Id.* At 50, lines 7-25.

²¹ Exhibit 5. Supplemental Report of Dr. Jennifer Conrad, DVM, at 4 in *Animal Legal Defense Fund v. Fur-Ever Wild* (17-CV-4496) (citing Petter Dep. Transcript, 52-57; 78-79; 83-90; 84-88; 94-98; 148; 155, 2018).

²² Exhibit 6. Elizabeth Pannill, VMO, VMD, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Gary Johnson, 2 (Mar. 31, 2021).

inventory, The Preserve had removed Dixie's name from its website and shared in a private phone call with an activist from Elephants Austin²³ on February 7, 2021, that Dixie had passed away. Thus, APHIS created an inaccurate record based on incomplete facility-provided information during an inspection, which could have been avoided by the requirement that exhibitors record or report animal deaths. The inaccurate inventory counts can allow for a variety of problems, from illegal trafficking to inadequate vet care to unnecessary deaths, all without APHIS ever noticing anything is amiss. This experience at The Preserve also illustrates how observational inventories can be difficult for inspectors to accurately accomplish, and therefore they alone are an unreliable and insufficient mechanism to track animal mortality.

iii. Carson & Barnes Circus

In a May 17, 2021 routine inspection report for Carson & Barnes Circus, the APHIS inspector listed 23 present elephants by name, but noted 24 elephants on the following page.²⁴ Any number of issues could explain this inconsistency: the inspector may have miscounted the elephants for his inventory, Carson & Barnes may have simply failed to change their inventory reports, Carson & Barnes may have procured a new elephant who was counted but unnamed in the report, or the inspector may have mistakenly omitted one elephant's name from the list. At the prior full inspection, in 2019, APHIS noted twenty-one elephants and listed them by name.²⁵ One elephant, Obert's name is missing from the 2021 inspection report, but was included in the 2019 report. No matter the source of the discrepancies between inventory and named elephants on the inspection reports, the implication is clear: the current system leaves cracks large enough for an elephant to fall through.

²³ *Liberate and Save!*, Elephants Austin, <https://perma.cc/US76-6PWD>.

²⁴ Exhibit 7. Michael Tygart, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Carson & Barnes Circus (May 17, 2021).

²⁵ Exhibit 8. Michael Tygart, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Carson & Barnes Circus (July 18, 2019).

* * *

Fur-Ever Wild, The Preserve, and Carson & Barnes present just three examples of how reliance on licensee-generated inventory records, checked against often-inconsistent observational inspector inventory counts, disserves both APHIS and the animals it is charged with protecting. Indeed, as the regulatory regime stands in practice, nefarious facilities can replace deceased individuals with illegally trafficked individuals of the same species and this practice might go unnoticed by APHIS because both inspector-observed and licensee-recorded inventories may appear as expected. Both illegal trafficking and unnecessary deaths for myriad reasons can, and do, go unchecked under the current scheme.²⁶

B) APHIS uses Acquisition and Disposition Records to Track Animal Deaths, but Such Records are Insufficient to Create a Reliable Picture of Annual Mortality Rates

An APHIS inspector noted in a recent inspection report concerning AWA licensee and owner of two Texas roadside zoos Jason Clay, “Acquisition and disposition records are required so that animals being used in regulated activities can be accurately tracked to ensure their legal acquisition, proper care, and humane transportation.”²⁷ It is important for APHIS to know exactly how many animals are under the care and custody of each licensee to account for the welfare of each animal. Without the requirement of comprehensive mortality records, APHIS officials can only try to keep track of the whereabouts and condition of each animal through acquisition, disposition, and euthanasia records. However, acquisition and disposition records are not always complete or accurate and therefore do not provide

²⁶ For example, Jason Clay, an AWA licensee and owner of two roadside zoos in Texas has repeatedly used his license to traffic wildlife in violation of the AWA. USDA has cited Clay for failure to provide both acquisition and disposition records multiple times. However, the lack of records did not spur enforcement action. Rather, Clay appears to have been discovered as an accomplice to Bhagavan “Doc” Antle’s trafficking crimes. *See* Exhibits 9, 10, 11 (Clay’s) USDA Inspection Reports; Exhibit 12, Indictment of Bhagavan Antle, Andrew Jon Sawyer, Meredith Bybee, Charles Sammut and Jason Clay, 4:22-cr-00580-CRI.

²⁷ Exhibit 11. Brenton Cox, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Jason Clay, 4 (Sept. 23, 2021). The inspection report notes missing disposition records for over 70 animals at the facility.

a reliable substitute for requiring comprehensive mortality records. If death outside of euthanasia is not required in disposition records, disposition records will fail to record some of the most telling instances of mortality at problematic facilities, depriving APHIS of valuable information. Even if acquisition and disposition records were always complete and accurate, they would not provide the most efficient mechanism for tracking animal mortality. When APHIS cannot accurately monitor mortalities, egregious AWA violations can occur without consequences.

i. Olympic Game Farm

A 2017 inspection report for AWA-licensed Washington state roadside zoo, Olympic Game Farm, shows no written record for the animals at the facility at all, prompting APHIS inspector Diane Forbes to remark, “[r]ecords enable the inspection process and provide traceability of animals, which can help protect their welfare.”²⁸ In a later deposition about Olympic Game Farm, Dr. Forbes confirmed that, although “[a] death of an animal [...] is a problem,” the USDA would not necessarily receive information about the death of an animal in licensee custody “unless someone reported it to us.”²⁹ In fact, when probed in the deposition about discrepancies in inventory numbers between, 2018 and 2019 inspection reports of the facility, Dr. Forbes admitted she did not know how to account for the missing animals. When asked what happened to a pig who appeared on the 2018 inspection report but not on the 2019 report, Dr. Forbes replied, “I do not know.”³⁰ When asked the same about a tiger, she replied, “apparently it may have died. I don’t know that. It may have.”³¹ Similarly, when asked about one missing wolf, and another missing brown bear, she replied, respectively “I’m pretty sure that’s what the veterinarian told me, that one

²⁸ Exhibit 13. Diane Forbes, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Olympic Game Farm, 1 (April 3, 2017).

²⁹ Exhibit 14. Excerpts of Deposition of Diane Forbes, DVM, at 68, Dec. 16, 2019 (Q: “Are [licensees] supposed to report [animal deaths] in their history?” A: No. I mean in an inspection report, right. Or in a complaint or somehow that we would get some information. I don’t know we would, the USDA would get that information unless someone reported it to us.”).

³⁰ *Id.* at 136.

³¹ *Id.* at 137.

of them had died,”³² and “I don’t know. Maybe it – perhaps it died. I don’t know that.”³³ The uncertainty of what happened to the licensee’s animals—coupled with the assumption that they likely died—should ring alarm bells for an agency that believes the death of an animal can be a serious problem.

Since the USDA does not require mortality records and reports in practice, the agency has no direct way to know of deaths worth further investigating as potential AWA violations. If mortality records existed for APHIS to review, the agency could have flagged Olympic Game Farm as posing a substantial risk to its animals and pursued more frequent and thorough inspections to ensure humane care.

ii. The Farmers’ Inn

A 2019 inspection report for The Farmers’ Inn noted that acquisition or birth records were missing for 21 animals newly present since the previous inspection report.³⁴ If licensees are not required to record animal mortality numbers, and fail to record accurate birth and acquisition numbers, inventory numbers alone may not illuminate the fact that animals have died at the facility at all. For example, if a facility inventories 20 animals one year but fails to record the sale of 2, death of 1, and birth of 3, the inventory may remain at 20 the following year and the questionable activities will go unnoticed by APHIS inspectors and the public.

More recently, as part of discovery in an ongoing lawsuit, Farmers’ Inn created a record of the deaths of various animals in its care. The record showed that 7 animals had died of what Farmers’ Inn deemed “natural causes” in the past two years, and 10 had died from “unnatural and/or unknown cause” during the same period.³⁵ Yet another 4 animals were “humanely euthanized by veterinarian.”³⁶ The “unnatural/unknown” deaths included 7 birds killed by “carbon monoxide from malfunctioning

³² *Id.*

³³ *Id.* at 140.

³⁴ Exhibit 3. Paula Gladue, VMD, United States Department of Agriculture Animal and Plant Health Inspection Service Inspection Report for licensee Kimberly A Lucas, 1 (June 17, 2019).

³⁵ Exhibit 2. Animal Births, Deaths and Acquisitions; created by Farmers Inn for discovery related to *Animal Legal Defense Fund v. Kimberly Ann Lucas d/b/a Farmers Inn* (Case No. 2:19-cv-40).

³⁶ *Id.*

furnace,” as well as 2 anteaters killed by a “suspected virus from unknown source.”³⁷ Unfortunately, even in this account by the facility, dates are missing for all “deaths from unnatural and/or unknown causes.” This record did not exist until the commencement of legal proceedings, and therefore was never considered by APHIS inspectors. In fact, the 17 deaths not by euthanasia were not required to be recorded at all, per APHIS’ interpretation of its regulations.

Between 2016 and 2021, no notes other than inventory numbers were included in inspection reports for Farmers Inn. APHIS did not inspect Farmers Inn in 2017 nor 2020. Were death records or reports required by USDA, the agency could have sought more detailed documentation with dates corresponding to each death. This example highlights a clear opportunity for improvement in the regulatory scheme to allow earlier detection of problematic facilities and patterns of animal mortality. With earlier detection comes more frequent and targeted inspections³⁸ and the possibility for earlier intervention by APHIS through citations or, if necessary, the removal of animals in question. When other animals’ lives are at risk, this type of information could be paramount to their protection by the agency tasked with protecting them.

C) APHIS Uses Veterinary Records to Track Animal Deaths but Those Records Are Insufficient to Create a Reliable Picture of Annual Mortality Rates.

Even a close monitoring by APHIS of veterinary records is inadequate to keep track of animal mortality. Although licensees are required to have an attending veterinarian “who shall provide adequate veterinary care to its animals[,]” the AWA does not require licensees to report animal deaths to their attending veterinarian. 9 C.F.R § 2.40. While the AWA does require daily observation of all animals to ensure health and well-being, “daily observation of animals may be accomplished by someone other than the attending veterinarian.” *Id.* “[D]irect and frequent communication [between licensee and veterinarian] is required,” *id.*, but there is no formal mortality reporting requirement or system. For example, when attending veterinarian

³⁷ *Id.*

³⁸ See Inspection Guidance and Mechanisms, *supra* section III(b)(2).

Benjamin Wise was deposed regarding Pennsylvania AWA exhibitor The Farmers' Inn, he stated that the facility does not notify him of all animal deaths.³⁹ When probed further into why the facility does not notify him, he responded, "I don't know why they would notify me."⁴⁰

Similarly, in an email to AWA-licensed Texas facility Tiger Creek, APHIS Veterinary Medical Officer and inspector Cynthia DiGesualdo stated "You don't need to let me know about cats that come in or die or are euthanized unless there is something unusual that might make the media. For example... if a cat got out of an enclosure and you had to shoot it."⁴¹ Both Dr. Wise's testimony and Dr. DiGesualdo's email illuminate the fact that attending veterinarians and, in turn, APHIS inspectors do not always know about all animal mortalities at the facilities they oversee. Thus, a reliance on veterinary records is an inadequate and insufficient way to monitor animal mortality.

D) Animal Trafficking Flourishes Under the Current Regime.

The current lack of death-reporting requirements and lack of death-record enforcement allows animal deaths to go unnoticed, which in turn allows illicit wildlife trafficking to flourish. Facilities can replace animals who die with illegally trafficked individuals of the same species, and without death records, APHIS is none the wiser. For example, consider a facility that has four tigers during an inspection. If soon thereafter one dies—without a record being produced—and the facility buys another tiger through trafficking, APHIS may still see four tigers on the inventory at the next inspection—corroborated through their own visual count—and have no reason to suspect any individuals died. In addition, licensees who also moonlight as dealers can illegally sell their animals under the radar and if ever asked about it by USDA, say

³⁹ Exhibit 15. Excerpt from the Deposition of Benjamin Wise, 123, October 16, 2020 in *Animal Legal Defense Fund v. Kimberly Ann Lucas d/b/a Farmers Inn* (Case No. 2:19-cv-40)).

⁴⁰ *Id.* at 124.

⁴¹ Exhibit 16. Email from Cynthia DiGesualdo DVM, Veterinary Medical Officer, USDA APHIS Animal Care, to Tiger Creek Wildlife Refuge (September 27, 2017 12:10 PM).

“Oops, I don’t remember. I suppose those animals died,” since USDA would not ordinarily receive notification of the deaths anyway.

i. *United Nations Office on Drugs and Crime Report*

Illegal trafficking is a major issue in the captive wildlife industry—so much so that a recent United Nations Office on Drugs and Crime (“UNODC”) report recommended that countries “adopt comprehensive provisions at [the] federal level to ensure that laws and regulations on possession, breeding, and trading are regularly updated... and consistently applied.”⁴² UNODC notes that many privately-owned commercial facilities in the U.S. engage in breeding of big cats in particular and that “to reduce the cost of maintaining adult tigers, many are sold, sometimes on the black market to collectors, unaccredited zoos, or are killed by their owners.”⁴³ The UNODC report casts doubt on the current regulatory regime by highlighting the Greater Wynnewood Animal Park, whose owner was convicted of eight Lacey Act violations, the illegal sale of tiger cubs in interstate commerce, and false documentation hiding the sale of thirteen animals. Moreover, there is evidence that criminal traffickers use licensed breeding facilities to illegally supply their trades.⁴⁴

ii. *AWA-Licensee Jason Clay*

The current dearth of information available to USDA—as outlined above—makes it possible for licensees like Jason Clay⁴⁵ to continue trafficking animals without consequence. Drastic fluctuations in inventory and species at Clay’s facilities—often without proper documentation—indicate his prolific breeding and trafficking ventures. For instance, at the time of its 2022 complaint to USDA regarding Clay, ALDF identified missing disposition records for 16 species totaling 72 individual

⁴² Exhibit 17. Excerpts of United Nations Office on Drugs and Crime, World Wildlife Crime Report: Trafficking in protected species, May 2020, p.26. <https://perma.cc/FAB3-XZAP>.

⁴³ *Id.* at 86, (citing S. Guynup, *Captive tigers in the U.S. outnumber those in the wild. It’s a problem. National Geographic Society* (2019) <https://perma.cc/8H57-W7G4>).

⁴⁴ *Id.* at 13, 26.

⁴⁵ *See supra* notes 26, 27.

animals at just *one* of Clay’s two facilities.⁴⁶ Statements from one of Clay’s former employees, included in a complaint to USDA, detail the issue: “[T]hey sell them. People come and buy monkeys, and kinkajous. Some animals just disappear. And I know a lot of animals are born and they don’t write up any paper work [sic] on them or report them in case they die or choose to sell them.”⁴⁷

Clay is just one example of an AWA-licensed symptom of the pervasive trafficking industry, allowed to fester under current AWA-regulatory oversight.⁴⁸

VIII. COMPREHENSIVE MORTALITY RECORDS AND REPORTS FOR ALL AWA-LICENSED FACILITIES ARE AN IMPORTANT ADDITION TO USDA’S REGULATORY REGIME

APHIS’s proactive and diligent monitoring of comprehensive animal mortality—through mandatory recordkeeping and reporting—at all licensed facilities could save animals from suffering and death by allowing the agency’s early identification of animal deaths and mortality patterns and trends. It is important for the regulatory scheme to include comprehensive records of every animal mortality because unnecessary, suspicious, unusual, or a pattern of animal deaths can serve as a red flag to APHIS that certain facilities pose threats to “humane care and treatment.” *See* 7 U.S.C. § 2131(1). For instance, at one of AWA licensee Jason Clay’s exhibitor facilities, where a young giraffe and pigmy hippopotamus died without veterinary records available for APHIS to review, the inspector noted, “When animals die acutely and suspiciously, as seems to be the case with the giraffe and the hippo, the veterinarian should be notified [...] *Determining the cause of death can be important*

⁴⁶ *See* Exhibits 9, 10, 11, 18. USDA APHIS Inspection Reports for Clay’s facilities.

⁴⁷ Exhibit 19. USDA APHIS Animal Care – Animal Welfare Complaint, Sep. 10, 2021 (regarding Clay’s facility “East Texas Zoo and Gator Park”).

⁴⁸ *See also e.g., Wildlife World Zoo, Aquarium & Safari Park trafficked 43 endangered species in the past two years*, ROADSIDE ZOO NEWS, (March 8, 2022) <https://perma.cc/ML6K-93AD?type=image>; *A chimpanzee disappeared from DeYoung Family Zoo in the past three months, records show*, ROADSIDE ZOO NEWS (March 22, 2022) <https://perma.cc/25DA-PSE6?type=image> (“Out of the 31 [] animals sent to DeYoung Zoo, 16 of the animals are suspected to be missing, according to USDA inspection reports.”; “Records provided by the Michigan Department of Agriculture and the USDA indicate other animals have disappeared from DeYoung Zoo in the past two years ...”; “What is clear is that DeYoung Zoo has a well-documented history of making endangered species disappear.”).

*for the health of other animals at the facility.*⁴⁹ In this instance, the inspector noted that the attending veterinarian had not been contacted before or after the death of the hippo.⁵⁰


As the APHIS inspectors for Jason Clay's facilities and for Olympic Game Farm noted,⁵¹ animal deaths can be emblematic of ongoing animal welfare issues at a facility. However, under the current regulations as interpreted and enforced by USDA, AWA-licensed dealers and exhibitors need not report or even record each mortality at their facility. This allows deaths to occur completely unbeknownst to APHIS and remain under the agency's radar even after inspections and review of the currently required records. Especially where deaths are indicative of contagious disease, abuse, or poor husbandry practices, this prevents early detection and intervention to protect the welfare of animals at facilities regulated by the USDA, undermining the AWA's very purpose.

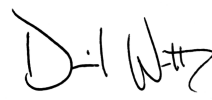
IX. CONCLUSION

For the above reasons, USDA should promulgate a new rule to require that AWA-licensees submit reports of, and retain records of, all instances of animal mortality to further APHIS's execution of the AWA's mission.

Respectfully,

ANIMAL LEGAL DEFENSE FUND


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⁴⁹ Exhibit 10, at 2 (emphasis added).

⁵⁰ *Id.*

⁵¹ See *supra* notes 13; 49-50 and accompanying body text.

Attachment 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

RISE FOR ANIMALS and
ANIMAL LEGAL DEFENSE FUND,

Plaintiffs,

v.

TOM VILSACK, Secretary of the United
States Department of Agriculture and
ELIZABETH GOLDENTYER, Deputy
Administrator of Animal Care,

Defendants.

Civil Action No.

**COMPLAINT FOR DECLARATORY
RELIEF AND VACATUR**

INTRODUCTION

1. Plaintiffs, two animal protection organizations, challenge a policy secretly implemented by the Animal and Plant Health Inspection Service (“APHIS”), a division of the United States Department of Agriculture (“USDA”), under which the agency relies on third-party accreditation by the Association for the Assessment and Accreditation of Laboratory Animal Care (“AAALAC”), a private trade association, to evade its statutory obligation to conduct full annual inspections of research facilities as required under the Animal Welfare Act (“AWA”), 7 U.S.C. § 2146. By deferring to a third-party accreditor under this policy (hereinafter “Partial Inspection Policy”), the agency contravened its statutory duties under the AWA to conduct full inspections of research facilities each year, ignored public opposition to incorporating third-party accreditation into its decision of how and when to inspect research facilities, and abandoned prior agency practice without providing a reasoned basis for doing so in violation of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. As a result of APHIS’s

actions, animals used in laboratory research at AAALAC accredited facilities—the overwhelming majority of major research facilities covered by the AWA—are now deprived of the AWA’s minimum safeguards against inhumane treatment.

2. This Partial Inspection Policy violates the plain language of the AWA, which provides that the USDA “*shall inspect each research facility at least once each year* and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.” 7 U.S.C. § 2146(a) (emphasis added).

3. The Partial Inspection Policy also constitutes an improper delegation of the USDA’s statutory obligation to a non-governmental entity that is funded by the very facilities the USDA is charged with inspecting to ensure compliance with all applicable AWA standards. Accordingly, the Partial Inspection Policy is “arbitrary and capricious,” an “abuse of discretion,” and “not in accordance with law” within the meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

4. Similarly, the new Partial Inspection Policy was issued despite overwhelming public opposition and evidence demonstrating that reliance on third-party accreditation as a basis for not conducting a full inspection of each research facility would result in far less protection of animals used in research. Because the agency revised its inspection policy contrary to overwhelming evidence and without any reasoned explanation, the agency’s issuance of the Partial Inspection Policy was also arbitrary and capricious and an abuse of discretion within the meaning of the APA.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 (2018).

PARTIES

6. Plaintiff Rise for Animals (“Rise”) is a nonprofit, tax-exempt 501(c)(3) organization whose mission is to reduce animal suffering. Rise seeks to end unnecessary animal experimentation, to promote and encourage the transfer of animals from laboratories to animal sanctuaries, and to reduce the suffering of laboratory animals. Rise also works to educate the public, lawmakers, and others about the needs of animals used in research and the suffering they endure by advocating that biomedical companies transition from animal testing to non-animal alternatives to achieve their research objectives.

7. APHIS’s unlawful Partial Inspection Policy impairs Rise’s mission to protect animals from inhumane treatment and to educate the public and policymakers about how animals are treated in research facilities. Because of the unlawful Partial Inspection Policy, APHIS inspectors no longer conduct full annual inspections of the vast majority of research facilities in this country, as required by the AWA. This means that the inspectors are not ascertaining if these facilities are, in fact, operating in compliance with all applicable AWA standards. As a result, the inspection reports the inspectors prepare—and that Congress requires be publicly disclosed, 7 U.S.C. § 2146a—do not contain complete information about whether these facilities are actually complying with all such standards, or whether they are operating in violation of those standards. As a result, Rise is deprived of information to which it is entitled under the AWA and that is critical to its ability to carry out its fundamental mission.

8. For example, one of Rise’s most important tools for its animal advocacy work is its “Animal Research Laboratory Overview” (“ARLO”) database. Rise uses ARLO to collect and publicly disseminate information about animal research facilities, including the kinds of research being conducted by these facilities, and whether such research is being conducted in compliance with all applicable state and federal laws, including the AWA. Rise heavily relies on the information contained in USDA inspection reports to update the database and maximize its effectiveness.

9. Rise also relies on APHIS inspection reports to determine how best to allocate its resources by focusing its educational and advocacy efforts on those facilities with the worst track records of AWA non-compliance.

10. Because Rise is now being deprived of this critical information as a result of the agency’s unlawful Partial Inspection Policy, it must instead pursue alternative, more time-consuming and resource-intensive measures to obtain the information it needs to maintain ARLO and effectively prioritize its work. For example, Rise must now submit more Freedom of Information Act (“FOIA”) requests, as well as requests under state open records laws, to obtain information about how the animals are being treated at AAALAC-accredited research facilities and whether the USDA is complying with its statutory obligation to ensure that these facilities are operating in compliance with applicable AWA standards. But even exhaustive records requests—e.g., for complaints lodged against facilities or requests by facilities for permission to use certain procedures or deviate from regulations—cannot replace full inspection reports if inspectors only perform partial inspections.

11. Rise’s informational and organizational injuries will be redressed if Plaintiffs prevail in this action because, as a result, the USDA will be required to conduct *full* annual

inspections of all research facilities as required by the AWA, which in turn will provide Rise with crucial information about whether these facilities are operating in compliance with all applicable AWA standards.

12. Plaintiff Animal Legal Defense Fund (“ALDF”) is a national non-profit, tax-exempt 501(c)(3) membership organization that uses the legal system to protect the lives and advance the interests of animals. ALDF accomplishes this mission by engaging in litigation, providing legal assistance and training to prosecutors, supporting strong animal protection legislation, combating legislation that is harmful to animals, and providing resources and opportunities to law students and professionals to advance the emerging field of animal law.

13. In pursuit of these activities, ALDF regularly relies on inspection reports generated as a result of the inspections of research facilities that APHIS is required to conduct pursuant to the AWA to review, monitor, assess, and inform the public about conditions at research facilities and whether the USDA is performing its statutory duties to ensure that these facilities are treating animals humanely and in compliance with all applicable standards. These inspection reports typically include information about whether a particular facility is operating in compliance, or non-compliance, with relevant AWA standards, as well as what is being done to correct any deficiencies. ALDF also relies on APHIS inspection reports to educate its members about these matters and to prioritize its advocacy efforts by focusing on those facilities that are in chronic violation of the AWA.

14. Under the Partial Inspection Policy, the USDA *prohibits* inspectors from conducting full inspections of any AAALAC-accredited facility each year. Thus, the USDA inspection reports no longer contain information that is critical to ALDF’s work.

15. Without this information, ALDF is forced to pursue other time-consuming strategies to obtain information to which they are legally entitled, including submitting FOIA requests to the USDA, pursuing state public records requests for information pertaining to research facilities, and soliciting information from others about animal mistreatment and neglect at specific facilities. Still, even exhaustive records requests and independent investigations cannot replace the information provided in full inspection reports. Having to seek and obtain information from other sources consumes significantly more staff time and resources than would be required if this information were publicly available in the inspection reports that the agency is required to publicly disclose and that would contain this information but for the USDA's unlawful Partial Inspection Policy. These resources have to be diverted from other activities and projects that ALDF would otherwise pursue to further the protection of animals.

16. ALDF's injuries are directly traceable to Defendants' unlawful Inspection Policy. If the USDA conducted full annual inspections of research facilities as required by the AWA, it would necessarily generate more comprehensive reports detailing instances of non-compliance with AWA standards, and also allow ALDF to more effectively monitor what the agency is doing to bring such facilities into compliance with the AWA.

17. ALDF's injuries will be redressed if Plaintiffs prevail in this action because the USDA will be required to conduct full annual inspections as required by the AWA, allowing ALDF to once again rely on inspection reports produced through such inspections—and mandated by Congress to be publicly disclosed—to further its work ensuring AWA-regulated facilities comply with animal welfare statutes, educating the public about non-compliance at such facilities, and monitoring whether the USDA is adequately complying with its statutory duties.

18. Defendant Tom Vilsack is the Secretary of the USDA, the federal agency responsible for devising and implementing the USDA's unlawful Inspection Policy.

19. Defendant Dr. Elizabeth Goldentyer is Deputy Administrator for the USDA's Animal and Plant Health Inspection Service's ("APHIS") Animal Care program and the official responsible for devising and implementing APHIS's unlawful Partial Inspection Policy.

**STATUORY AND FACTUAL BACKGROUND GIVING RISE TO PLAINTIFFS'
CLAIMS FOR RELIEF**

A. The Animal Welfare Act

20. Congress enacted the AWA in 1966 to "insure that animals intended for use in research facilities . . . are provided humane care and treatment." 7 U.S.C. § 2131(1). The statute was passed in response to "the shocking failure of self-policing by the medical community," 112 Cong. Rec. 13,893 (1966) (statement of Sen. Monroney), and specifically as a check on AAALAC-accreditation, which, as one Senator explained, was "setting a fox to watch the chicken coop," *id.* at 202 (statement of Sen. Clark).

21. To "insure" that animals used in research "are provided humane care and treatment," the statute requires the USDA to promulgate "standards to govern the humane handling, care, treatment, and transportation of animals." 7 U.S.C. § 2143. Those general standards include "minimum requirements" for "handling, housing, feeding, watering, sanitation, ventilation . . . [and] adequate veterinary care." 7 U.S.C. § 2143(a)(2)(A). The statute also requires the USDA to promulgate species-specific provisions, including a standard requiring a "physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a)(2)(B).

22. With respect to "animals in research facilities," the AWA includes additional requirements. 7 U.S.C. § 2143(a)(3). Standards covering animal experiments must "ensure that

animal pain and distress are minimized,” 7 U.S.C. 2143(a)(3)(A), and for procedures likely to produce such pain and distress, the principal investigator must “consider[] alternatives.” 7 U.S.C. § 2143(a)(3)(B).

23. To ensure that these standards are met, the AWA provides that “[t]he Secretary shall require each research facility *to show upon inspection*, and to report at least annually, *that the provisions of this chapter are being followed.*” 7 U.S.C. § 2143(a)(7)(A) (emphases added).

24. The AWA further provides that “[t]he Secretary *shall inspect* each research facility *at least once each year* and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary *until all deficiencies or deviations from such standards are corrected.*” 7 U.S.C. § 2146(a) (emphases added).

25. Congress has also mandated that the USDA affirmatively disclose to the public all information generated by such annual inspections in a searchable database. 7 U.S.C. § 2146(a). This disclosure mandate includes all inspection reports, “all reports documenting all Animal Welfare Act non-compliances observed by USDA officials,” all “enforcement records,” and “all reports or other materials documenting any non-compliances observed by USDA officials.” 7 U.S.C. § 2146(a)(b).

B. USDA Proposal and Public Opposition to USDA Reliance on Third-Party Accreditation

26. Within the USDA, APHIS is tasked with meeting the requirements of the AWA, including the statute’s mandates that the agency “shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.” 7 U.S.C. § 2146(a).

27. Prior to February 2019, the USDA interpreted this provision of the statute to require the agency to conduct a full inspection of each research facility at least once annually—i.e., an inspection of all aspects of the facility to ensure that it was operating in compliance with all applicable AWA standards.

28. In 2018, the agency solicited public comment on a potential new policy that would “recogniz[e] the use of third-party inspection and certification programs when determining APHIS inspection frequency at facilities licensed or registered under the Animal Welfare Act.” 83 Fed. Reg. 2959 (January 22, 2018). As explained in the proposal, the agency was contemplating a “potential reduction in the frequency of APHIS inspections” for facilities that had received third-party certifications from organizations other than the USDA. *Id.*

29. In response to this proposal, many commenters specifically urged the USDA not to rely on AAALAC accreditation as a basis for reducing the frequency of inspections of research labs.

30. AAALAC is a private, non-profit industry-led organization founded in 1965 that runs a voluntary accreditation program for animal research programs.

31. AAALAC does not employ the USDA’s AWA standards in determining whether to grant accreditation to a research facility. Instead, AAALAC states that its standards for accreditation are generally based on *The Guide for the Care and Use of Laboratory Animals* (Eighth edition) (National Research Council 2011), which employs a flexible performance and practice standard for assessing program outcomes, such as adequate sanitation, appropriate housing, or environmental enrichment. AAALAC site visitors use their judgment to determine if a research facility is meeting performance objectives, rather than ascertaining whether the

facility is operating in compliance with any specific AWA standard or any other engineering requirement.

32. While AAALAC does not disclose the exact number of facilities it accredits, at least 667 facilities in the United States pay annual fees to be accredited by it. Accredited facilities include major universities, hospital systems, pharmaceutical companies, and biotechnology companies.

33. Once accredited by AAALAC, a facility is reviewed once every three years to maintain its accreditation. Further, once accredited, a facility may qualify for one of four different categories, i.e. full, conditional, deferred, or probation—all of which count as AAALAC accreditation.

34. Under “conditional” accreditation, a facility has to correct any deficiencies by the time of the next annual report, or later according to the Accreditation Council’s discretion.

35. Under “deferred” accreditation, an organization has two months to correct any deficiencies before being placed on probation.

36. Under “probationary” accreditation, a facility is given at least 12 months to correct a deficiency.

37. At no point during these various stages of accreditation does a facility lose its AAALAC accreditation. Therefore, a research facility that is under “conditional” accreditation, then “deferred” accreditation, and finally “probationary” accreditation, can continue to operate and remain “accredited” by AAALAC during that entire timeframe—upwards of 24 months.

38. AAALAC’s “Council on Accreditation,” the group that conducts site visits and program evaluations, comprises animal research practitioners drawn from the same scientific and

business community as the facilities seeking accreditation. Those facilities seeking accreditation fund AAALAC through initial application fees and subsequent annual fees.

39. In response to the USDA's proposed deference to third-party accreditors, commenters specifically advised the agency not to rely on AAALAC accreditation on the grounds that AAALAC lacks impartiality because it is funded by the same industry to which it grants accreditation, and its inspectors—called “site visitors” by AAALAC—are drawn from the same community.

40. Commenters also stressed that AAALAC accreditation by no means ensures compliance with the “minimum requirements” of the AWA. 7 U.S.C. § 2143(a)(2). For example, in response to the agency's request for public comment, People for the Ethical Treatment of Animals (“PETA”) submitted a peer-reviewed study demonstrating that AAALAC-accredited laboratories were cited for AWA violations *at a rate higher than non-accredited facilities*.

41. PETA also provided the agency with detailed examples of AAALAC-accredited facilities that had been cited by the USDA for multiple, serious AWA violations, such as failure to provide anesthesia to animals as required, failure to provide for the psychological well-being of non-human primates, and multiple examples of animals who died by starvation or dehydration.

42. The Humane Society of the United States also provided the USDA with specific examples of AAALAC-accredited institutions that violated the AWA numerous times without ever losing their AAALAC accreditation. For example, a research facility in Texas was cited multiple times by the USDA in 2011 and 2013 for serious AWA violations, yet this facility never lost its AAALAC accreditation.

43. Commenters knew about these blatant violations at AAALAC-accredited facilities because at the time these inspections were conducted, USDA inspectors were still conducting full annual inspections, as required by the AWA, and these full inspection reports were made available to the public in the USDA's Reading Room pursuant to the affirmative disclosure requirements of FOIA. 5 U.S.C. § 552(a)(2).

44. Commenters also raised concerns that AAALAC site visits are infrequent and scheduled in advance so facilities can "clean up their act before the site visit team arrives."

45. Other commenters complained that, should the USDA implement such a third-party accreditation policy, oversight of laboratories would suffer because information produced by third-party programs, including AAALAC, are not available to the public. AAALAC describes its site visits as confidential peer-review "visits," rather than formalized inspections, and the entire process is kept completely confidential. Thus, all evaluations, including evidence of deficiencies and incident reports, are kept confidential between AAALAC and the facility under review. AAALAC does not report deficiencies to any government agency, including APHIS, and it also assures the facilities that this process, including all documents and reports, is not subject to FOIA.

46. On May 25, 2018, the USDA announced that after having "carefully considered" feedback from key stakeholders and the public, it had decided *not* to recognize third-party inspections or certifications "when determining the Agency's own inspection frequency under the Animal Welfare Act," noting that the agency found the "vast majority" of the comments received "to not be in favor of establishing new criteria for recognizing third party inspection and certification programs."

C. Plaintiffs Discover that the USDA Has Secretly Implemented its New Inspection Policy.

47. On July 9, 2020, Rise (formerly New England Antivivisection Society) and ALDF filed suit in this Court challenging the USDA’s denial of their rulemaking petition to improve the AWA standard required to “promote the psychological well-being of primates” used in research. *New England Anti-Vivisection Society et al. v. Elizabeth Goldentyer*, No. 8:20-cv-02004-GJH (D. Md.). One of the reasons cited by the USDA for denying that petition was its assertion that:

APHIS inspectors evaluate a facilities’ compliance with the regulation during the inspection. *They examine and document all areas of care and treatment that are covered under the AWA, including the plan. The inspector also observes the regulated animals; inspects the facilities, including enclosure or housing materials space, and records.* If the inspector observes that the facility is not in full compliance with the AWA requirements, he or she *will explain all deficiencies and appropriately document the findings.*

USDA Petition Denial (October 10, 2019) (emphasis added).

48. However, at the time Plaintiffs received the agency’s denial of their petition, they had unconfirmed information that, with regard to AAALAC-accredited facilities, USDA inspectors were *not* conducting full inspections annually. If true, this would mean that, contrary to the USDA’s assertion, the inspectors were *not* “examin[ing] and document[ing] all areas of care and treatment that are covered under the AWA, including the plan,” and therefore, they were also not annually “observ[ing] the regulated animals” or “inspect[ing] the facilities, including enclosure or housing materials space, and records.” This also would necessarily mean that inspectors were not ascertaining whether the research facilities were “in full compliance with the AWA requirements” and hence were also not “document[ing]” any such “findings.”

49. Because Plaintiffs were unable to confirm that the USDA was no longer conducting full inspections of AAALAC-accredited labs each year, they stated in their

Complaint that, “on information and belief,” APHIS “recently informed its inspector of facilities accredited by the Association for Assessment and Accreditation of Laboratory Care (“AALAC”) that they may *choose* which aspects of a particular facility they wish to inspect” and that “[t]his means that the inspectors are not even required to inspect *all* of the animals, *all* aspects of the facility, or even the environmental enrichment plans currently being used by such facilities when completing the annual inspections that are required by the AWA. 7 U.S.C. § 2143(a)(2)(B).” Complaint, No. 8:20-cv-02004-GJH, ¶ 70.

50. To document that such a policy did in fact exist, Plaintiffs submitted a FOIA request to the USDA to obtain access to any records that would reflect the existence of the policy.

51. When the agency failed to respond to Plaintiffs’ FOIA request in a timely manner, Plaintiffs filed a FOIA suit in this Court to obtain access to those records. *New England Anti-Vivisection Society et al. v. Animal and Plant Health Inspection Service and United States Department of Agriculture*, No. 8:20-cv-03013-TDC (D. Md. filed October 16, 2020).

52. As a result of their FOIA case, Plaintiffs obtained hundreds of responsive records that showed that, despite the public’s overwhelming objection to the agency treating third-party certifications as a positive factor in its evaluation of research facilities, and the agency’s own pronouncement that it had decided *not* to implement any such policy, the USDA had nevertheless implemented a new Inspection Policy under which the agency no longer conducted full inspections of all facets of research labs that are accredited by AAALAC.

53. The documents released under FOIA show that in February 2019, APHIS “issued guidance that made it mandatory” for its inspectors to perform a “focused inspection at AAALAC-accredited research facilities.” Under this guidance, APHIS inspectors may *only*

inspect one of three facets of each facility—*either* (1) the “animals” being maintained at the lab, (2) the “facilities,” or (3) the “paperwork” each facility is required to maintain. In addition, under the new Policy, the inspector may also simply inspect a “sampling” of some or all of the above categories.

54. Under the new Policy, the USDA instructed its inspectors that when conducting their annual inspections of research facilities accredited by AAALAC, they are *prohibited* from conducting full inspections of each such facility, unless specifically requested to do so by the facility itself. APHIS inspectors may not even look at a single animal being used in research—including, for instance, thousands of primates who are subjected to grueling and painful research procedures—if the inspector chooses to review a mere “sampling” of the facility’s paperwork.

55. Pursuant to the new Partial Inspection Policy, inspectors are required to “rotate [their] focus for each visit.” This means that in the first year, the inspector may inspect only the animals; for the second year, the inspector may inspect only the facilities; for the third year, the inspector may inspect only the paperwork; and for the fourth year, the inspector may inspect a “sampling” of only *some* of one of these aspects of the facility.

56. Therefore, under this Partial Inspection Policy, *as many as four years may lapse before APHIS inspects a single animal that is the subject of the facility’s research.*

57. Pursuant to this Policy, inspectors are also not allowed to ask the facility for proof that it is AAALAC-accredited or inquire as to the facility’s current accreditation status. This means APHIS inspectors are prohibited from asking whether a facility has conditional, deferred, or probationary accreditation, any of which suggests known animal welfare deficiencies under AAALAC’s own accreditation scheme.

58. However, as explained *supra*, ¶¶ 32-36, research facilities can receive AAALAC accreditation through a “site visit” every three years and maintain good standing *even while on probation for serious deficiencies*.

59. According to APHIS, this “focused” inspection of an AAALAC-accredited facility “counts as the facility’s annual inspection,” as required by the Animal Welfare Act, 7 U.S.C. § 2146(a).

60. Pursuant to the agency’s new Partial Inspection Policy, APHIS has instructed its inspectors not to document on the inspection report “the area or areas the inspection was focused on.” This means that the inspection reports generated pursuant to this Policy do not contain this information, and the public will not know from the inspection report, (a) what the inspector inspected; or (b) whether the research facility is in compliance with all of the standards of care required by the AWA and its implementing regulations.

61. The documents obtained under FOIA further reveal that APHIS instructed its inspectors not to disclose the existence or the contours of the Partial Inspection Policy outside of the agency, stating that there would “be no stakeholder announcement” of the new Policy. Instead, APHIS instructed its inspectors to convey the Partial Inspection Policy only to the specific facilities that they inspect.

62. The documents obtained by Plaintiffs also demonstrate that APHIS has informed its inspectors that the Partial Inspection Policy and the way in which it is implemented would not be included in the agency’s publicly available Inspection Guide. In fact, the most recent version of the agency’s official Inspection Guide, issued in November of 2021, does not contain any mention of the new Partial Inspection Policy.

63. The USDA did not inform the public that it had instituted a new Partial Inspection Policy that applies to AAALAC-accredited research labs.

64. Because the USDA did not inform the public that it had implemented a new Partial Inspection Policy for research labs, it did not explain to the public the basis for its change in practice from doing full annual inspections of research labs to now only doing partial annual inspections of AAALAC-accredited research labs.

E. Additional Facts Giving Rise to Plaintiffs' Claim

65. Prior to February 2017, USDA inspection reports were made available to the public in the USDA's Reading Room pursuant to the affirmative disclosure requirements of FOIA. 5 U.S.C. § 552(a)(2). However, in February 2017, the USDA, under the Trump Administration, removed that information from the agency's public Reading Room.

66. On December 20, 2019, Congress amended the AWA to provide that APHIS "shall . . . make publicly available via searchable database, in their entirety without redactions except signatures . . . *all final Animal Welfare Act inspection reports, including all reports documenting all Animal Welfare Act non-compliances observed by USDA officials.*" 7 U.S.C. § 2146(a) (emphasis added).

67. Due to the agency's Partial Inspection Policy, inspectors are not conducting full inspections each year of AAALAC-accredited facilities. This makes it impossible for the USDA to fulfill its statutory duty to "conduct follow-up inspections *as may be necessary until all deficiencies or deviations from [AWA] standards*" are cured. 7 U.S.C. § 2146(a). Without a full inspection covering every aspect of a research facility including animals, premises, buildings, and records, the USDA cannot ascertain what "deficiencies" and "deviations" need to be corrected as required by the statute.

PLAINTIFFS' CLAIM FOR RELIEF

68. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 66as though fully alleged herein.

69. Defendants' Partial Inspection Policy violates the AWA which expressly provides that the USDA "shall" inspect each research facility annually for the purpose of ascertaining whether it is complying with all applicable AWA standards. 7 U.S.C. § 2146(a). Accordingly, the Inspection Policy is "not in accordance with law" within the meaning of the APA, 5 U.S.C. §706(2)(A).

70. Defendants' decision to implement the new Partial Inspection Policy was also arbitrary and capricious and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2), in light of all of the limitations that attend AAALAC accreditation and the fact that that AAALAC-accredited facilities have a *higher* rate of AWA violations than non-AAALAC-accredited facilities—all of which was explained and documented for the agency in comments on the agency's proposal to recognize third-party inspections or certifications.

71. APHIS also improperly revised its inspection policy without providing a reasoned explanation for this change in policy, and despite overwhelming evidence that deferring to AAALAC accreditation harms animals used in research, undermines the AWA, and deprives the public of information mandated by statute. For all of these reasons, the agency's decision to implement this new policy is arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706(2).

72. By deferring to AAALAC accreditation to fulfill its statutory obligation to inspect each research facility annually to ensure that it is in compliance with all applicable AWA standards, the USDA has unlawfully delegated its statutory obligation to a non-governmental

entity in violation of the AWA, 7 U.S.C. § 2146(a). This unlawful delegation of authority is also arbitrary and capricious, and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2).

73. The agency's violations of law injure Plaintiffs in the manner described in paragraphs 5 to 16 herein.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' Inspection Policy is unlawful;
2. Set aside the unlawful Inspection Policy;
3. Award Plaintiffs their costs and attorneys' fees; and
4. Award Plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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