

Blue Unit
Cleveland, OH
10-19-2010

(b)(6)(b)(7)(c)

Rudy – Asian Elephant

- S. BAR, on unloading trainer noted fresh abrasion above right eyebrow
- O. Exam at unloading revealed superficial abrasion ~1/4 X 3 inches parallel to right eyebrow and ~2 inches above right eyebrow
- A. Superficial abrasion above right eyebrow. Recommend to keep abrasion clean and apply silvadine cream to assist healing. This was completed on arrival at arena.
- P. Monitor and continue to clean area and apply silvadine cream until healed.

Record Entered in EARS

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Thu, Nov 18, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Rudy attributing abrasion above right eye to transport vehicle. Burnished bolts on walls are protruding and have sharp edges.		

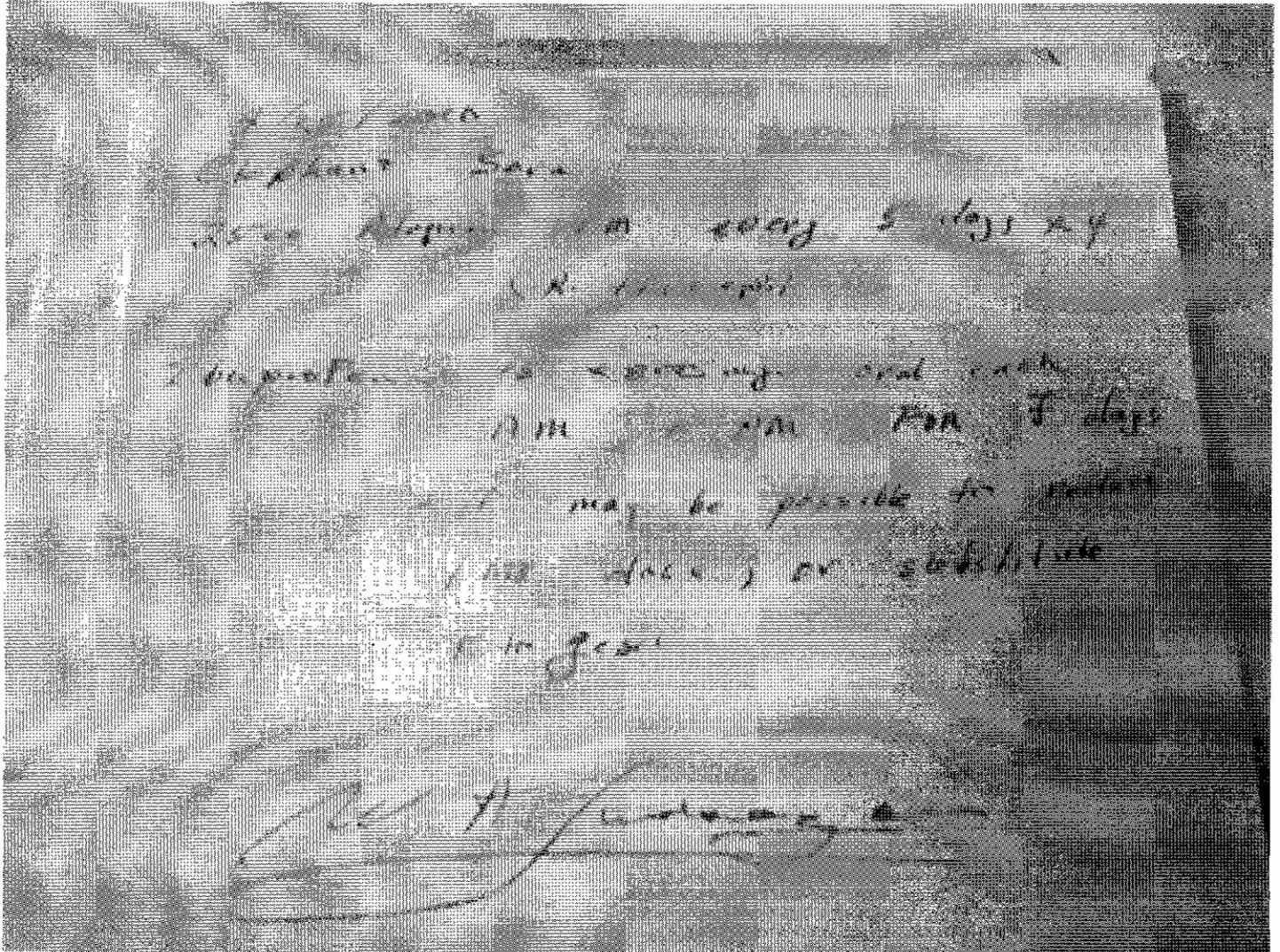
Vet visit to Sacramento
Blue 140th
September 6-11, 2010

(b)(6)(b)(7)(c)

Sara Elephant
S: BAR
D: Occasional stiffness
A: Open diagnosis
P: Continue to provide 25 tabs of etogesic on performance days as needed once daily.

This record has been added to EARS

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



<p>Photographer: Tracy Thompson</p> <p>Photo Taken: Fri, Oct 8, '10</p> <p>Inspection: 326101022350172</p> <p>Description: Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance</p>	<p>Legal Name: FELD ENTERTAINMENT INC</p>	<p>52-C-0137</p>
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Blue Unit
 Norfolk, VA
 April 17, 2010

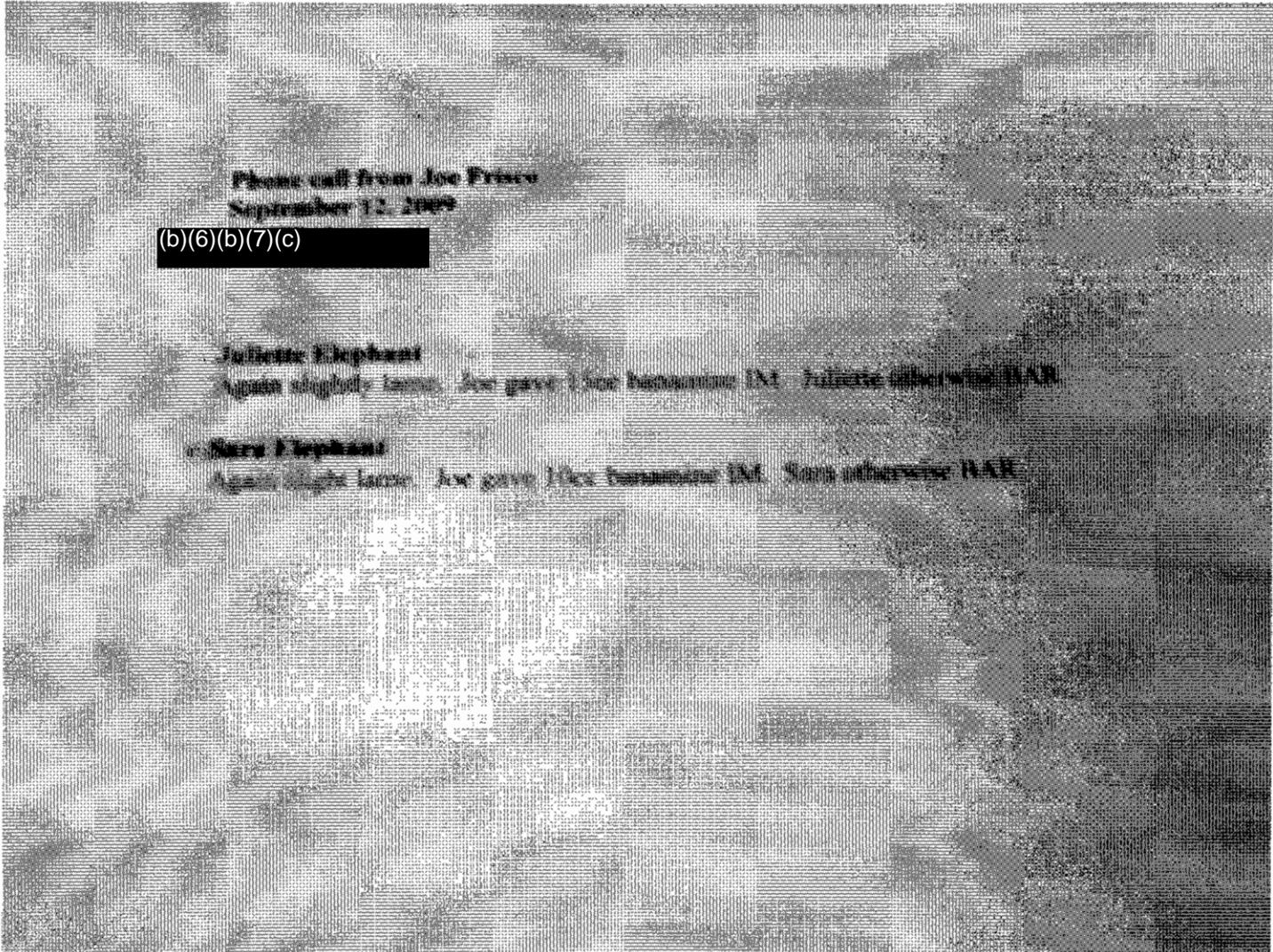
(b)(6)(b)(7)(c)

Sara Elephant

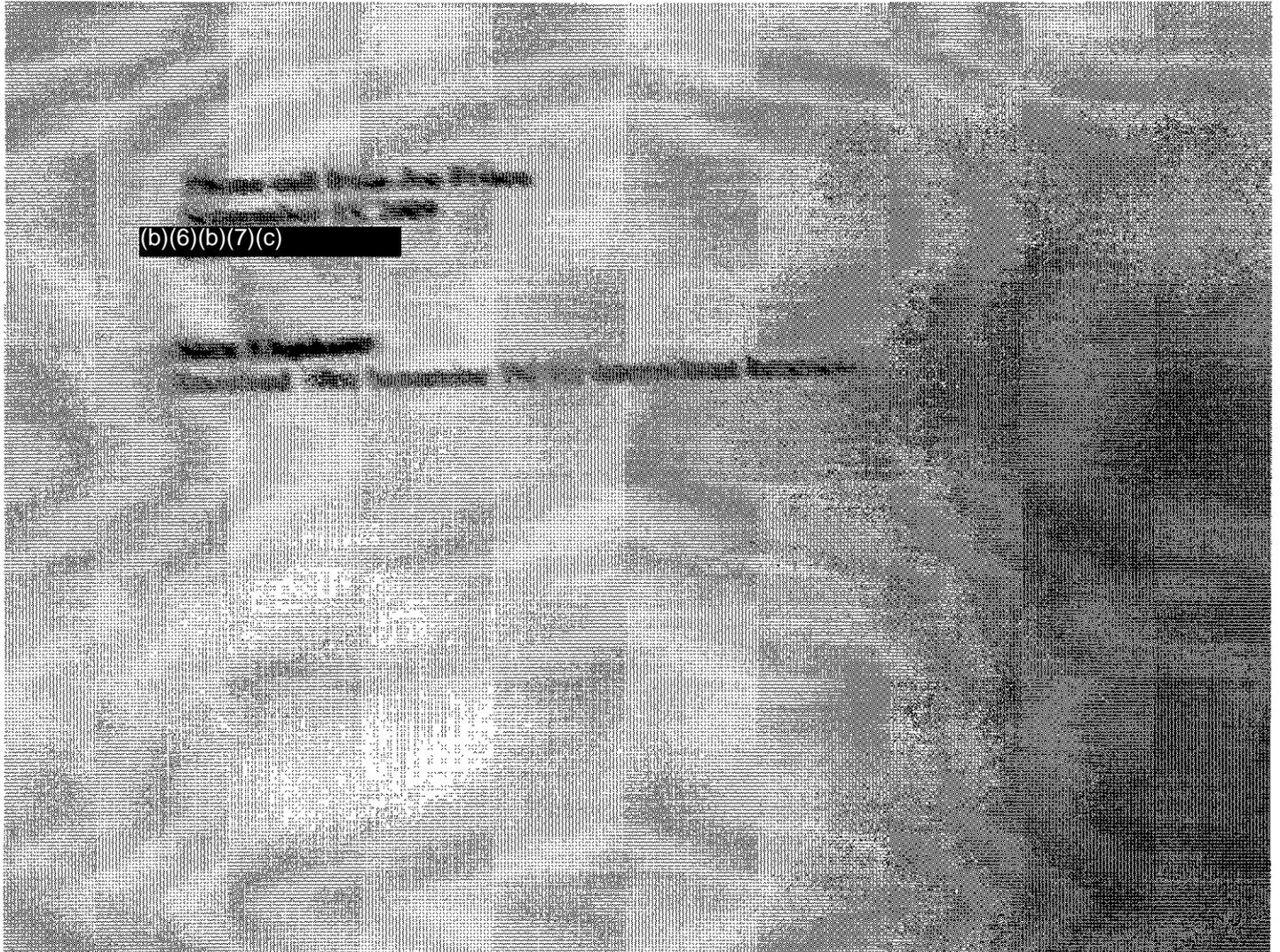
- S. BAK. Trained medical elephant was still
- D. Mild/moderate lameness right hind leg. Improves with Banamine.
- A. Lameness
- E. Monitor. Can give Banamine as necessary

**This record has been entered into EARS.

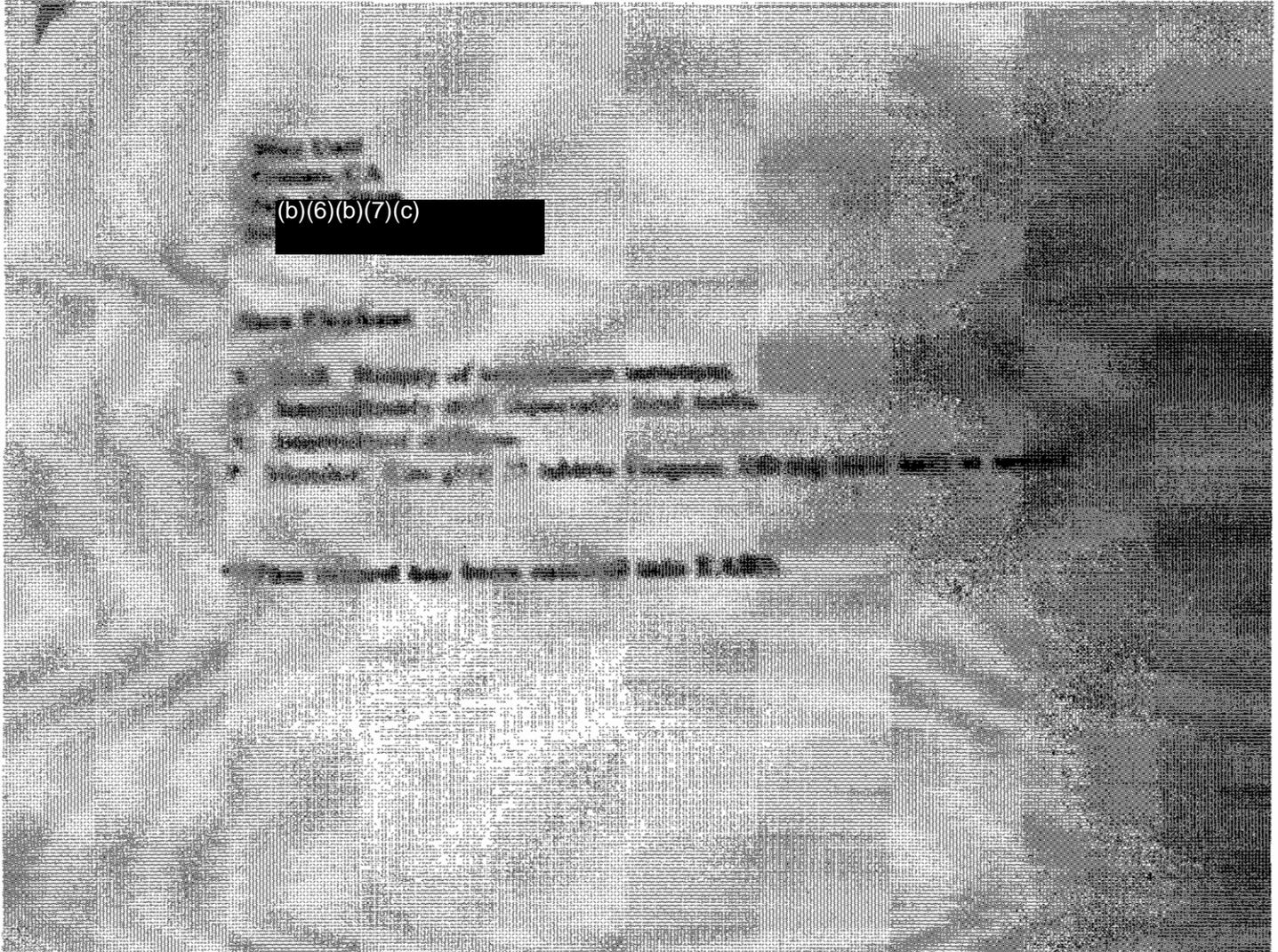
Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



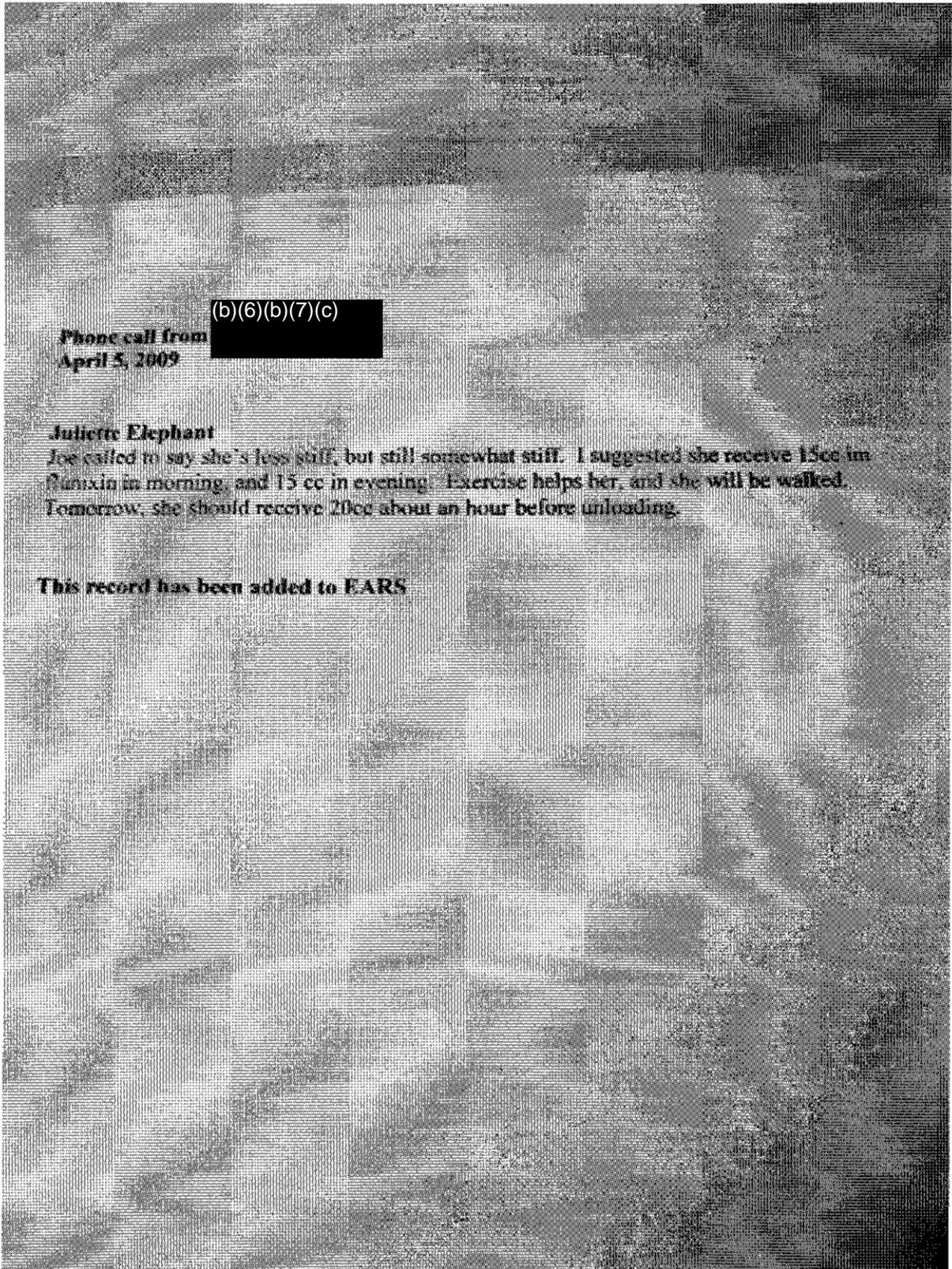
Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



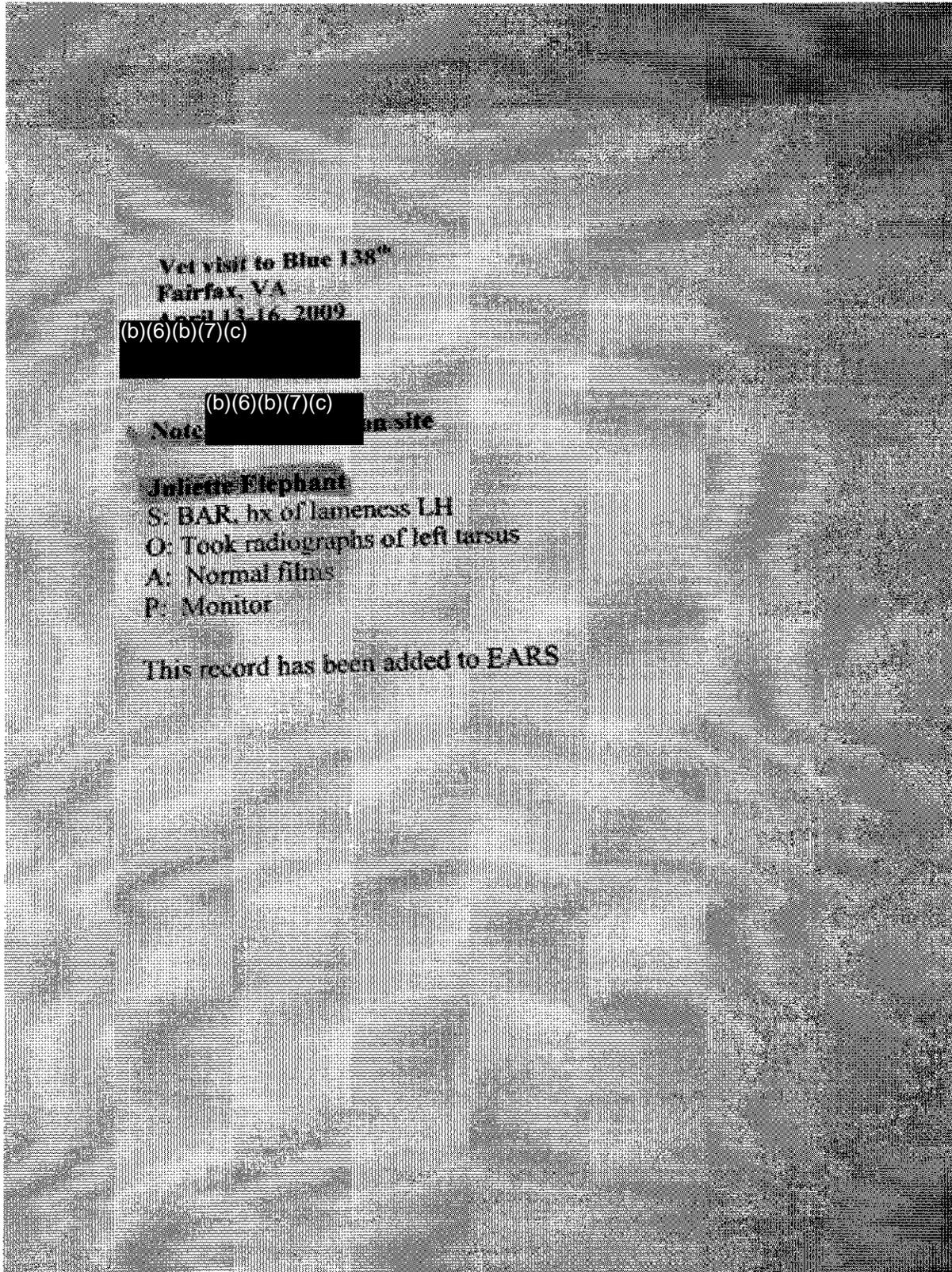
Phone call from (b)(6)(b)(7)(c)
April 5, 2009

Juliette Elephant

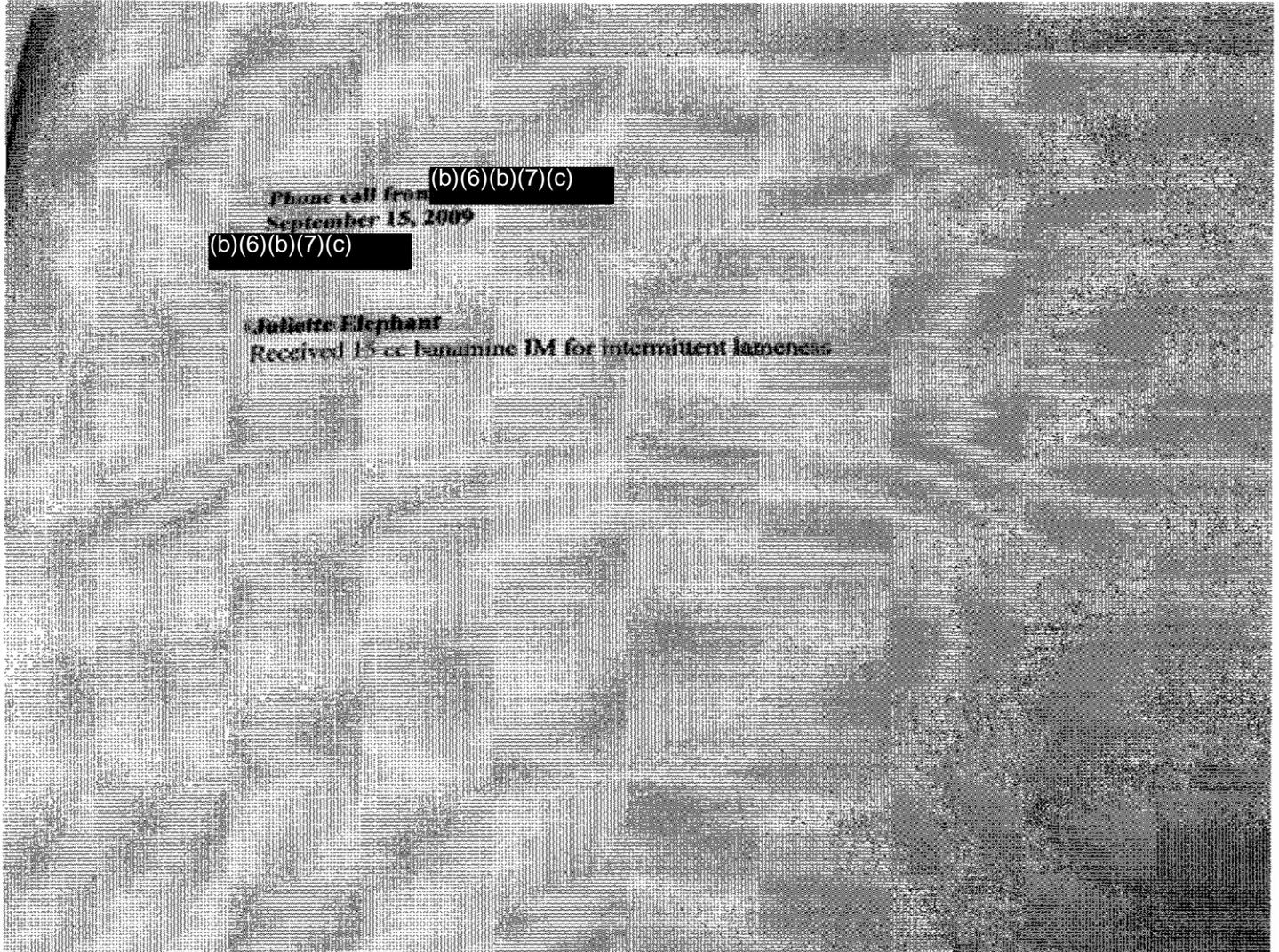
Joe called to say she's less stiff, but still somewhat stiff. I suggested she receive 15cc im Flunixin in morning, and 15 cc in evening. Exercise helps her, and she will be walked. Tomorrow, she should receive 20cc about an hour before unloading.

This record has been added to EARS

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics, particularly prior to unloading from transport vehicle.		



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics,		



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics,		

Blue Unit

Ontario CA

July 19, 2010

(b)(6)(b)(7)(C)

Elephant "Asha"

S: scraped forehead on trailer ride from train to building this afternoon

O: 2 small superficial abrasions over R eye

A: minor scrapes

P: cleanse wounds, apply antibacterial ointment (Silvadene); allow healing by second intention

Photographer: Tracy Thompson

Legal Name:

52-C-0137

Photo Taken: Fri, Oct 8, '10

FELD ENTERTAINMENT INC

Inspection: 326101022350172

Description: Record on 8 yr old Asian elephant Asha with abrasion over right eye attributed to transport trailer. Burnished bolts on walls are protruding and have sharp edges.

Yet Visit to Blue 13Rth
Baltimore, MD
April 14, 2009

(b)(6)(b)(7)(c)

Juliette Elephant

S: BAR

O: Stiff on LH. No obvious abnormalities noted

A: Open diagnosis

P: Gave 20cc banamine IM. Told handlers to use 15cc banamine IM BID through Sunday. Exercise seems to improve stiffness, so encouraged handlers to walk her. Will reevaluate in Fairfax.

This record has been added to EARS

Photographer: Tracy Thompson

Legal Name:

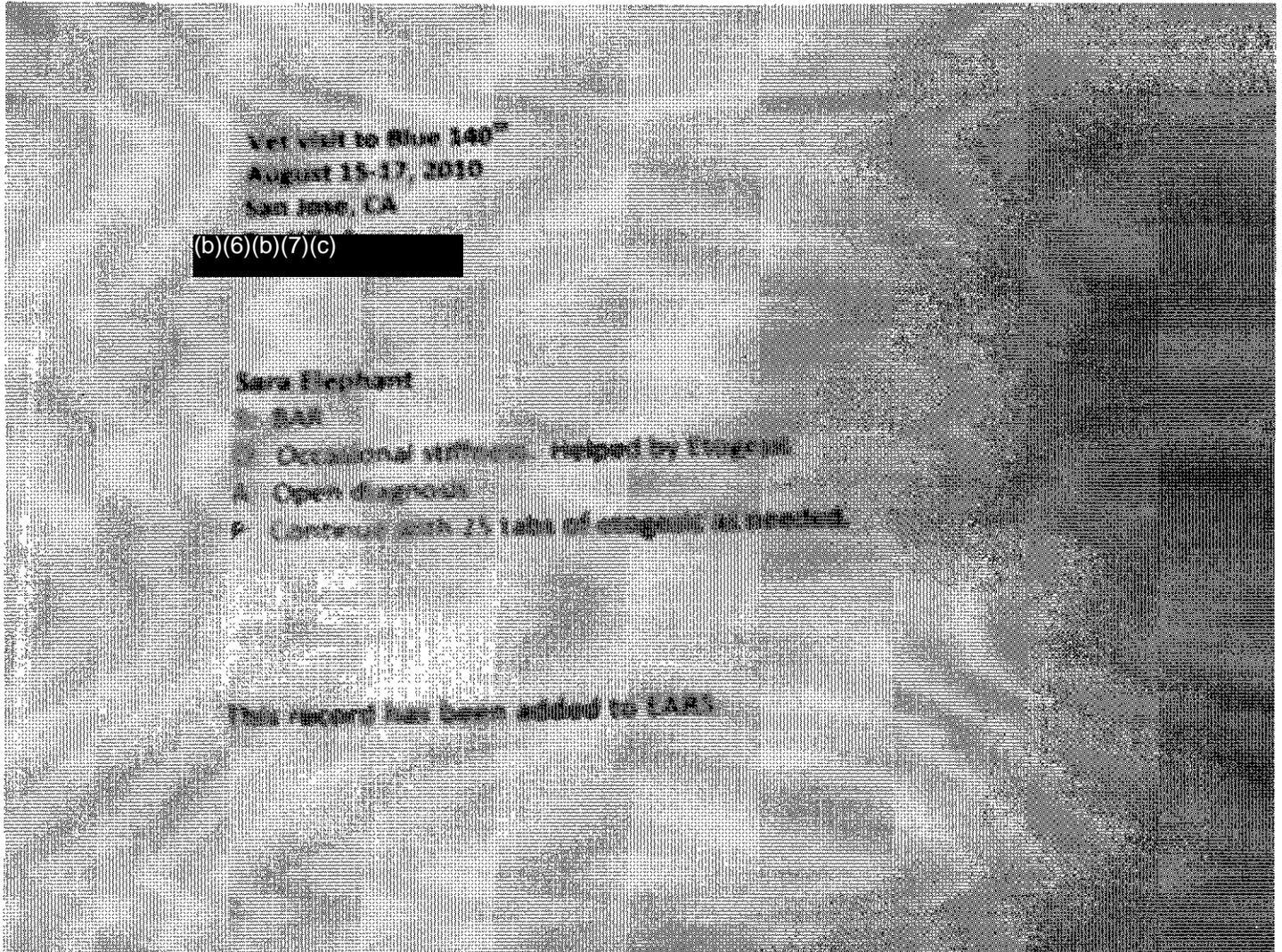
52-C-0137

Photo Taken: Fri, Oct 8, '10

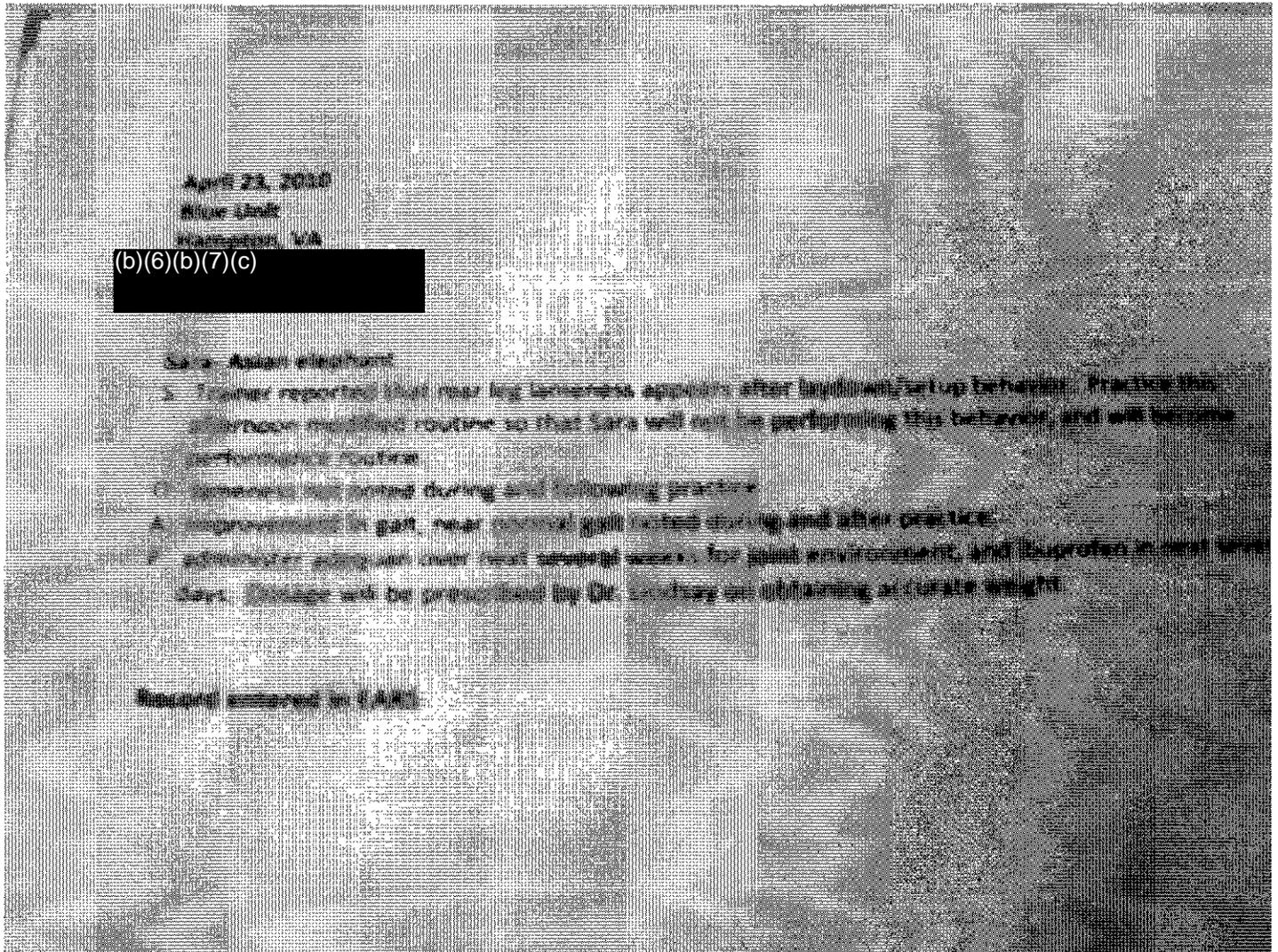
FELD ENTERTAINMENT INC

Inspection: 326101022350172

Description: Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics.



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		



Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 9 yr old Asian elephant Sara with continued lameness/stiffness and chronic treatment to facilitate performance		

Phone call from Joe Frisco
April 7, 2009

(b)(6)(b)(7)(C)

Juliette Elephant

Joe called to say Juliette is almost completely back to normal and no longer seems to be stiff. He gave flunixin before the walk into Fairfax, but not this morning as she did not seem to be uncomfortable or stiff. She will continue to be both exercised, as this helps her, and monitored for stiffness.

**** This record has been added to EARS.**

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics,		

Phone call from Joe Frisco
September 12, 2009

(b)(6)(b)(7)(c)

Juliette Elephant

Again slightly lame. Joe gave 15cc banamine IM. Juliette otherwise BAR.

Sara Elephant

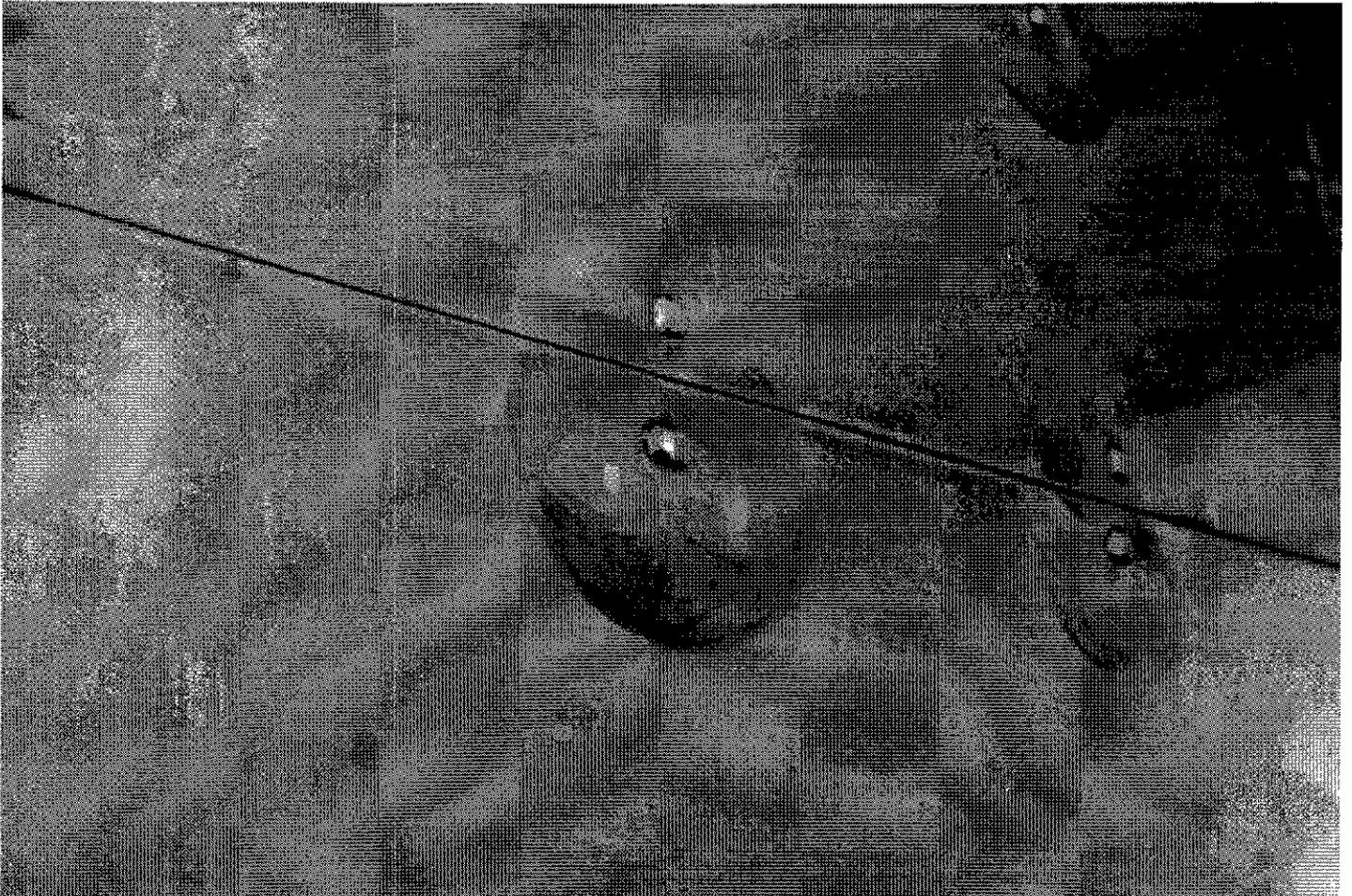
Again slight lame. Joe gave 10cc banamine IM. Sara otherwise BAR.

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 8 yr old Asian elephant Juliette with chronic stiffness/lameness requiring repeated treatment with analgesics,		

Phone call from (b)(6)(b)(7)(c)
February 10 and February 11, 2009
Atlanta, GA, Blue 138th

Kelly Ann Elephant
Joe thought Kelly Ann was colicking; wasn't eating or drinking, seemed mildly depressed. Asked him to give 30cc banamine IM. In morning, Joe said after banamine, she defecated three times and seemed fine. I will be on unit later this week to recheck her.

Photographer:	Tracy Thompson	Legal Name:	52-C-0137
Photo Taken:	Fri, Oct 8, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	Record for 14 yr old Asian elephant Kelly Ann with report of possible colic incident to be evaluated by veterinarian but no written documentation to show this was completed.		



Photographer:	Dr Tami Howard	Legal Name:	52-C-0137
Photo Taken:	Thu, Nov 18, '10	FELD ENTERTAINMENT INC	
Inspection:	326101022350172		
Description:	3.137 (a) (2) Closeup photo of type of bolts in elevated compartment of elephant transport vehicle. Some bolts have sharp edges.		



United States
Department of
Agriculture

Office of the
General
Counsel

Washington,
D.C.
20250-1400

January 14, 2011

David L. Durkin
Olsson Frank Weeda Terman Bode Matz PC
1400 16th Street, N.W., Suite 400
Washington, D.C. 20036

Re: Feld Entertainment, Inc. (License No. 52-C-0137)

Dear Mr. Durkin:

I write in response to your December 31, 2010, letter on behalf of Feld Entertainment, Inc. ("Feld"), to Dr. Robert Gibbens, Animal and Plant Health Inspection Service (APHIS), to appeal the reports of the inspection conducted by APHIS on November 18, 2010, pursuant to its authority under the Animal Welfare Act (AWA).

First, at the outset, I note that many of Feld's complaints concern the simultaneous inspection conducted by the City of Chicago, Illinois. As I am sure you are aware, the USDA does not represent the City or its personnel, and is not responsible for the City's enforcement of its own laws and ordinances. Please know that the AWA specifically authorizes the Secretary to

"cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject." 7 U.S.C. § 2145(b).¹

As Feld's complaints about the Chicago Police Department and its personnel do not relate to the AWA, and the violations cited by APHIS's inspectors, I do not address them.

Second, regarding Feld's complaint that the November 18, 2010, inspection "exceeded APHIS AC's statutory and regulatory authority," I disagree. The AWA requires the Secretary to "make such investigations or inspections as he deems necessary" to determine whether exhibitors have violated or are violating the AWA or its regulations and standards, and requires exhibitors to give USDA officials access to their premises, animals and records, at all reasonable times, to conduct such inspections. 7 U.S.C. § 2146(a). The regulations promulgated under the AWA require exhibitors, during normal business hours, to allow APHIS officials to enter their place of business, examine records required to be kept, make copies of records, inspect the facilities, property and animals, as necessary to enforce the AWA and the regulations and standards, and document the conditions and areas of noncompliance. 9 C.F.R. § 2.126(a). The regulations define "business hours" as "a reasonable number of hours between 7 a.m. and 7 p.m." 9 C.F.R. § 1.1. Feld is an

¹To that end, APHIS has routinely conducted inspections in conjunction with, and accompanied by, State and local officials.

exhibitor under the AWA, and therefore is required to permit inspection during business hours. Although Feld contends that APHIS first attempted to inspect at 6:30 a.m., APHIS's personnel report that they did not attempt to inspect before 7:00 a.m. What appears to be undisputed, however, is that no inspection was allowed to commence until well after 7 a.m.²

Third, regarding Feld's Fourth Amendment claims that the November 18, 2010, inspection was a "pre-dawn raid" and "a Constitutionally impermissible pretextual administrative search," I disagree both with the factual assertions and the legal assertion. Again, the inspection was within the agency's statutory authority, consistent with the regulations, and reasonable.³ Although Feld's reference to the *Bivens* case is acknowledged, I do not see its relevance to this inspection.

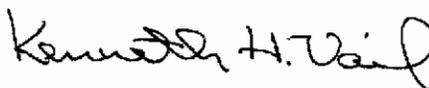
Fourth, I acknowledge Feld's notice that it objects and does not consent to any future unannounced inspection in which an APHIS investigator is present absent Feld's counsel. Please know that the AWA authorizes the Secretary to conduct unannounced investigations and inspections, and it is well settled that it is not up to the exhibitor to determine which APHIS personnel may participate. See *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998), *appeal dismissed sub nom. Hansen v. U.S. Dep't of Agric.*, 221 F.3d 1342 (Table) (8th Cir. 2000).

Fifth, regarding Feld's appeal of the veterinary care citation, it was not, as stated in your letter, based upon "Inadequate Medical Records," but rather, in part, on Feld's own veterinary medical records. According to Feld's records, its veterinarian had previously recommended diagnostics and prescribed analgesics for an elephant, Sara, and Feld did not act on those recommendations (or document any countervailing veterinary recommendations).

Sixth, regarding the primary enclosure citation, photographs reveal the bolts, and Feld's records noted that animals contained in the same enclosure had sustained injuries while housed therein.

In sum, the inspection report will stand as written.

Very truly yours,



Kenneth H. Vail
Assistant General Counsel
Marketing Division

²APHIS conducts three types of AWA inspections: prelicense, attempted, and routine. The November 18, 2010, inspection was a routine inspection.

³Sixteen years ago, the Court of Appeals considered and rejected a similar challenge to the Secretary's authority to conduct such unannounced inspections under the AWA. *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994).

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Respondent, Pro se.

Initial Decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.), and the regulations and standards issued thereunder (9 C.F.R. § 1.1 et seq.). On January 18, 1995, Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) issued an Initial Decision and Order imposing a cease and desist order, assessing a civil penalty of \$7,500, and suspending Respondent's license for 60 days because Respondent, inter alia, failed to keep primary enclosures sanitary and in suitable condition; failed to keep food and water receptacles clean; failed to provide adequate veterinary care; failed to establish and to maintain an appropriate program for disease control and prevention, and euthanasia, under the supervision of a veterinarian; failed to maintain and to make reasonably available his records; and failed to have a proper license for those regulated activities which require a license.

On March 21, 1995, Complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).^[FN^a] Complainant, without requesting an increase in the sanction, appealed from the Chief ALJ's Initial Decision on three points of alleged error: the inadequate veterinary care violations of September 23 and October 4, 1989, and recordkeeping violations on October 4, 1989; exhibiting without a license on April 27 and 28, 1990; and inadequate veterinary care involving the leopard, Siam. On March 21, 1995, Respondent appealed, and asked for oral argument, which is discretionary (7 C.F.R. § 1.145(d)). On April 19, 1995, Complainant filed a reply. On May 1, 1995, Respondent also filed a reply, which, inter alia, asked that "full consideration be given to the points" set forth in Respondent's original appeal (Respondent's Reply at 2).^[FN^{aa}] The case was referred to the Judicial Officer for decision on May 2, 1995.

Respondent's request for oral argument is denied, inasmuch as this record has more than enough detailed evidence for a reasoned decision, and oral argument would seem to serve no good purpose.

Based upon a careful consideration of the record, I agree with Complainant that the Chief ALJ erroneously decided the Complainant's three allegations of error, supra. The Initial Decision and Order is adopted as the final Decision and Order with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This administrative proceeding is in disposition of the Amended Complaint against respondent, Otto Berosini, an exhibitor of lions, tigers and other "big cats." The Amended Complaint charges him with violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159, "the Act"), and the regulations and standards issued in its implementation (9 C.F.R. § 1.1 et seq.). The violations are alleged to have occurred during the period of September 23, 1989, through July 21, 1993. Respondent has chosen to represent himself pro se. Complainant has been represented by Donald A. Tracy, Office of the General Counsel, U.S. Department of Agriculture.

*3 On May 24-25, 1994, I conducted an oral hearing in Las Vegas, Nevada, where Mr. Berosini officially resides. The hearing record consists of 817 pages of transcribed testimony and numerous exhibits received at the hearing. Complainant's exhibits include inspection reports and other documents collected together as Complainant's Exhibit A, which is indexed and identifies each document by a number ("Cx A-7," etc.); photographs collected together, as Complainant's Exhibit B ("Cx B"); and an inspection report (not part of those shown on the index) which has been marked as Complainant's Exhibit C ("Cx C"). Respondent's exhibits were identified by numbers ("Rx 1," etc.). Briefing was completed on November 18, 1994.

Upon consideration of the record evidence and the arguments of the parties, I have concluded that Mr. Berosini

committed numerous violations of the Act, and the regulations and standards which require the issuance of an order requiring him to cease and desist from these violations, both now and in the future, assessing a civil penalty against him in the amount of \$7,500.00, and suspending his license as an animal exhibitor for 60 days.

Pertinent Statutory Provisions and Regulations

1. Exhibitor's License

7 U.S.C. § 2134:

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

9 C.F.R. § 2.1(a)(1):

(a) (1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license.

2. Access to Facilities and Records For Inspection

7 U.S.C. § 2146(a):

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any . . . exhibitor . . . has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such . . . exhibitor. . .

9 C.F.R. § 2.126:

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

*4 (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

3. Recordkeeping and Identification of Animals

7 U.S.C. § 2140:

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Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

7 U.S.C. § 2141:

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe; Provided, That only live dogs and cats need be so marked or identified by a research facility.

9 C.F.R. § 2.50(c):

(c) A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section, or

(2) By identifying each dog or cat with:

(i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;

(ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and

(iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

9 C.F.R. § 2.75(a)(1) and (b)(1):

(a) (1) Each . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

*5 (v) The date a dog or cat was acquired or disposed of, including by euthanasia;

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- (vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;
- (vii) A description of each dog or cat which shall include:
 - (a) The species and breed or type;
 - (b) The sex;
 - (c) The date of birth or approximate age; and
 - (d) The color and any distinctive markings;
- (viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;
- (ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

....

(b) (1) Every . . . 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. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

- (i) The name and address of the person from whom the animals were purchased or otherwise acquired;
- (ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
- (iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;
- (iv) The name and address of the person to whom an animal was sold or given;
- (v) The date of purchase, acquisition, sale, or disposal of the animal(s);
- (vi) The species of the animal(s); and
- (vii) The number of animals in the shipment.

4. Veterinary Care

9 C.F.R. § 3.134(a) and (b):

(a) Programs of disease prevention and parasite control[,] euthanasia, and adequate veterinary care shall be established and maintained under the supervision of a veterinarian.

(b) Animals shall be observed every day by the person in charge of the care of the animals or by someone working under his direct supervision. Sick or diseased, stressed, injured, or lame animals shall be provided with veterinary care

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or humanely destroyed. . . .

9 C.F.R. § 2.40:^(FNI)

(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.

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

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

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; Provided, however, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and Provided, further, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

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

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

5. Wholesome Food

9 C.F.R. § 3.129(a):

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

6. Humane Care and Sanitary Conditions

9 C.F.R. § 2.100 (a):

(a) Each . . . exhibitor . . . shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals.

9 C.F.R. § 3.125(c) and (d):

(c) Storage. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) Waste disposal. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris, shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(a) and (b):

(a) Shelter from sunlight. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

*7 (b) Shelter from inclement weather. Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

9 C.F.R. § 3.130:

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

9 C.F.R. § 3.131:

(a) Cleaning of enclosures. Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

(b) Sanitation of the enclosures. Subsequent to the presence of an animal with an infectious or transmissible disease, cages, rooms, and hard-surfaced pens or runs shall be sanitized either by washing them with hot water (180 F. at source) and soap and detergent, as in a mechanical washer, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with saturated live steam under pressure. Pens or runs using gravel, sand, or dirt, shall be sanitized when necessary as directed by the attending veterinarian.

(c) Housekeeping. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

(d) Pest control. A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. § 3.132:

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A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

7. Structural Strength, Primary Enclosures and Perimeter Fencing

9 C.F.R. § 3.125(a):

(a) Structural strength. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.128:

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

Findings of Fact

*8 1. Otto Berosini is an individual whose mailing address is 5015 West Sahara, Suite 125, Las Vegas, Nevada 89109. His legal name is Otakar Berousek. He took the name, Otto Berosini, after leaving his native Czechoslovakia with his circus owner and animal trainer father and his seven brothers and sisters who were performing acrobats. In 1959, when he was 14 years old, Mr. Berosini and his family came to the United States for the first time, to perform for eight months with the Ringling Brothers Circus. They permanently returned to the United States, in 1964, to again perform with Ringling Brothers at the World's Fair. His father, and later his brother, trained and exhibited gorillas, chimpanzees and other primates. Otto Berosini decided to exclusively work with big cats (lions, tigers, leopards and panthers), which he, together with his wife, Gladys, trained and went on the road to exhibit throughout the United States.

2. At all times material herein, Otto Berosini operated as an exhibitor as defined in the Act and the regulations. He was licensed as required from December 22, 1982, until December 12, 1989, when his . . . license expired. His next license was issued on July 5, 1991, which he voluntarily canceled on July 5, 1992. He was licensed once again on April 26, 1993, and currently holds license number 88-C-100 (Tr. 466-468).

3. On September 23, 1989, APHIS inspected respondent's temporary facility at Community Park, Pahrump, Nevada.

4. On October 4, 1989, APHIS reinspected respondent's temporary facility at Community Park, Pahrump, Nevada.

5. On April 27, 1990, APHIS inspected respondent's temporary facility at Superior, Arizona.

6. On April 27 and 28, 1990, respondent exhibited his animals at Superior, Arizona.

7. On December 5, 1990, respondent exhibited his animals at Alamo, Nevada.

8. On January 23, 1991, APHIS inspected respondent's temporary facility in Lincoln County, Nevada.

9. On October 4, 1991, APHIS inspected respondent's facility at Pahrump, Nevada.

10. On November 7, 1991, APHIS inspected respondent's facility at Pahrump, Nevada.

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11. On December 18, 1991, APHIS inspected respondent's facility at Pahrump, Nevada.
12. On February 4, 1992, APHIS inspected respondent's temporary facility at Jean, Nevada.
13. On April 23, 1992, APHIS inspected respondent's temporary facility at Las Vegas, Nevada.
14. On May 11, 1992, APHIS inspected respondent's facility at Las Vegas, Nevada, and on May 12, 1992, confiscated a sick leopard named Siam.
15. On July 21, 1993, APHIS sought to inspect respondent's facility, but was refused.

Findings on Exhibiting When Unlicensed

16. On April 27 and 28, 1990, respondent exhibited animals without a license in Superior, Arizona. (Cx A-100, Cx A-101). Several letters were mailed by APHIS to respondent, [one dated February 15, 1990,] notifying him that he had not submitted the correct fee and that his license had expired. (Cx A-102, Cx A-103, Tr. 467).
- *9 17. On December 5, 1990, at Alamo, Nevada, respondent again performed (Cx A-97, Cx A-98) and testified that he was unaware that he did not have a license. (Tr. 37, 38).
18. On July 5, 1991, respondent obtained a license which he voluntarily canceled on July 5, 1992, by not submitting a renewal application.
19. On February 24, 1993, respondent applied anew for an exhibitor's license which required various pre-licensing inspections before issuance. Although he was granted a license on April 26, 1993, respondent had exhibited his animals in Kingman, Arizona, on April 16 and 17, 1993, while still unlicensed.

Findings on Refusal to Permit Inspection

20. On May 11, 1992, three APHIS officials, Mr. Greg Wallen, Mr. J. David Neal, and Dr. V. Wensley Koch, were denied access to respondent's facility and were, therefore, unable to conduct an inspection.
21. On July 21, 1993, two APHIS officials, Mr. Greg Wallen and Mr. J. David Neal, were denied access to respondent's facility for purposes of conducting an inspection.

Findings on Recordkeeping and Identification of Animals

22. On October 4, 1989, when APHIS inspected respondent's Pahrump, Nevada, facility, records showing the acquisition, disposition, and identification of animals were not available. Respondent was [directed] to institute the necessary recordkeeping system [by October 20, 1989]. (Cx A-109B).
23. On April 27, 1990, APHIS inspected respondent's facility and records in Superior, Arizona, and respondent was again unable to produce records showing the acquisition, disposition, and identification of animals. Performing dogs exhibited by respondent's daughter were not included in the recordkeeping system. (Cx-100).
24. On January 23, 1991, APHIS attempted to inspect respondent's Lincoln County, Nevada, facility and records, but no one was present. (Cx A-96).

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25. On November 7, 1991, when APHIS inspected respondent's Pahrump, Nevada, facility and records, respondent stated he was unable to produce records showing the acquisition, disposition, and identification of animals because they were being kept at another location. (Cx A-67).

26. On February 4, 1992, when APHIS inspected respondent's facility and records at Jean, Nevada, respondent was unable to produce records showing the acquisition, disposition, and identification of animals. (Cx A-60).

27. On April 23, 1992, when APHIS inspected respondent's Las Vegas, Nevada, facility and records, records showing the acquisition, disposition, and identification of animals were not available. (Cx A-43).

28. On May 11, 1992, when APHIS again inspected respondent's Las Vegas, Nevada, facility and records, respondent was still unable to produce records showing the acquisition, disposition, and identification of animals. (Cx A-27).

Findings on Veterinary Care and Wholesome Food

29. On September 23, 1989, when APHIS inspected respondent's temporary facility in Pahrump, Nevada, respondent did not have a program of adequate veterinary care for his animals. Respondent was . . . [directed to institute the necessary system by] October 20, 1989. (Cx A-109A).

*10 30. On April 27, 1990, when APHIS inspected respondent's temporary facility in Superior, Arizona, respondent did not have a program of adequate veterinary care for his animals. (Cx A-100).

31. On January 23, 1991, when APHIS inspected respondent's temporary facility in Lincoln County, Nevada, respondent did not have a program of adequate veterinary care for his animals. (Cx A-96).

32. On January 23, 1991, when APHIS inspected respondent's temporary facility in Lincoln County, Nevada, respondent's animals were being fed animal carcasses and/or remains, insufficient in terms of quantity and quality to maintain them in good health. (Cx A-96; Tr. 760).

33. On February 4, 1992, when APHIS inspected respondent's temporary facility in Jean, Nevada, respondent did not have a program of adequate veterinary care for his animals. (Cx A-60).

34. On February 4, 1992, when APHIS inspected respondent's temporary facility in Jean, Nevada, respondent's animals were being fed animal carcasses and/or remains, insufficient in terms of quantity and quality to maintain them in good health. (Cx A-60).

35. On April 23, 1992, when APHIS inspected respondent's temporary facility in Las Vegas, Nevada, respondent did not have an adequate program of veterinary care for his animals. (Cx A-43).

36. On April 23, 1992, when APHIS inspected respondent's temporary facility in Las Vegas, Nevada, respondent had failed to provide veterinary care to animals in need of such care. One African lion was observed with diarrhea and another was limping on its right front leg. A spotted leopard with pus-like nasal drainage was observed vomiting. (Cx A-43).

[36. (a) At least as early as April 22, 1992, respondent's leopard, Siam, was very ill with frequent regurgitation (spitting up of food which has not yet reached the stomach). (Tr. 486.)

(b) On April 23, 1992, Dr. Peter Perron examined Siam and took x-rays and did a Barium test. (CX 212-213.) Dr. Perron also consulted with Dr. Murray Fowler, one of the nation's leading experts on exotic cats. (Tr. 46-47, 213.)

- (c) On April 30, 1992, Dr. Perron directed Mr. Berosini to alter Siam's diet, begin a medication call Tagamet, and bring the cat in for important daily weight checks. (Tr. 214.)
- (d) On May 4, Dr. Perron re-emphasized to Mr. Berosini the need to bring the cat in for daily checks, but Mr. Berosini did not follow the doctor's directions. (Tr. 215-16.)
- (e) Mr. Berosini did not bring the cat back to the veterinarian until May 7, 1992. (Tr. 214.)
- (f) Dr. Perron's associate, Dr. Reed, examined Siam and found the cat lethargic and dehydrated. (Tr. 215.)
- (g) Mr. Berosini did not follow the doctor's instructions. (Tr. 217.)
- (h) On May 11, 1992, Dr. Wendy Koch, an APHIS veterinary official, saw Siam's condition and instructed Mr. Berosini either to hospitalize or euthanize the leopard. (Tr. 488.)
- (i) Mr. Berosini took the leopard to a veterinarian who stated that he, the doctor, was not qualified to be attending veterinarian for a leopard. (Tr. 491.)
- *11 (j) On May 12, 1992, Dr. Koch notified Mr. Berosini of APHIS' intent to confiscate Siam to prevent it from further unrelieved suffering. On May 12, 1992, after Mr. Berosini continued to take no steps to treat the leopard, APHIS confiscated Siam and had the leopard examined by Dr. Michael Simon. (Tr. 491-92; CX 31.)
- (k) APHIS then sent the leopard to Dr. Murray Fowler at the University of California at Davis. Dr. Fowler conducted an exhaustive series of tests and examinations and, because Siam's condition had gotten so bad, recommended euthanizing it. APHIS concurred and the cat was euthanized (CX-7, 111, 112; Tr. 50-52.)
- (l) Dr. Fowler, a recognized authority on wild animals and author of the leading textbook in the field, Zoo and Wild Animal Medicine (Tr. 46), stated that Siam had needed intensive treatment for weeks before he saw the cat on May 14. (Tr. 56-58.)
- (m) On May 11, 1992, Mr. Berosini, forced Siam to put on a performance (Tr. 492.)
- (n) Both Dr. Fowler and Dr. Simon state they would not have permitted the cat to perform in the condition it was in. (Tr. 58, 377.)]

37. On April 23, 1992, when APHIS inspected respondent's temporary facility in Las Vegas, Nevada, respondent's animals were being fed meat stored in water which drains juices from the food and reduces its nutritive value. (Cx A-43).

38. On May 11, 1992, when APHIS again inspected respondent's temporary facility in Las Vegas, Nevada, no animal food was present at the facility. (Cx A-27).

Findings on Sanitary Practices and Conditions

39. On January 23, 1991, when APHIS inspected respondent's Lincoln County, Nevada, facility:
- (a) The refrigerator in the animal trailer was not in use (Cx A-96);
 - (b) Animal and food wastes were not removed and disposed of so as to minimize vermin infestation, odors, and disease hazards. Food and animal waste were in open trash bags strewn around the facility (Cx A-96; Tr. 125);
 - (c) There were no water dishes in the animals' cages (Cx A-96; Tr. 352);
 - (d) All animal cages were dirty, with a heavy accumulation of hair, feces and food waste (Cx A-96; Tr. 352-353); and
 - (e) The facility was dirty and full of trash (Cx A-96; Tr. 353).
40. On December 18, 1991, when APHIS inspected respondent's facility at Pahrump, Nevada:
- (a) The refrigerator in the animal trailer for food storage was empty, dirty and full of flies and could not be used to store food (Cx B-56; Tr. 152);
 - (b) A great deal of feces was observable on the floors of animal cages (Cx B-56; Tr. 155);
 - (c) Food dishes were strewn about the animal trailer and the water dishes in the animal cages were turned upside down and empty (Cx B-56; Tr. 153);
 - (d) Animal cages were dirty and full of animal and food wastes (Cx B-56; Tr. 157); and
 - (e) The premises were not kept clean and free of trash accumulation (Cx B-56).

41. On February 4, 1992, when APHIS inspected respondent's temporary facility at Jean, Nevada:
- *12 (a) Food, animal waste and bedding were on the ground outside of the animal trailer (Cx A-60);
 - (b) All animal cages were dirty, with a heavy accumulation of hair, feces and food waste (Cx A-60; Tr. 178, 742); and
 - (c) The premises were not kept clean and free of trash accumulation (Cx A-60).
42. On April 23, 1992, when APHIS inspected respondent's facility in Las Vegas, Nevada:
- (a) Animal food was stored in an uncovered barrel of water and refrigeration was not provided for perishable food (Cx A-43);
 - (b) Uncovered plastic barrels containing trash, food and animal waste, and other debris were present at the facility (Cx A-43);
 - (c) Animals using the exercise arena did not have sufficient shade and individual cages were not continuously shaded (Cx A-43);
 - (d) The tarpaulins covering individual cages did not provide protection from wind and rain (Cx A-43); and
 - (e) There was an accumulation of flies on the animals and on their food (Cx A-43).
43. On May 11, 1992, when APHIS again inspected respondent's facility in Las Vegas, Nevada:
- (a) An uncovered plastic barrel containing trash, waste, and debris was located near animal cages (Cx A-27);
 - (b) A trench containing food and animal waste was located near animal cages (Cx A-27);
 - (c) Animals using the exercise arena did not have sufficient shade and some individual cages were not shaded (Cx A-27); and
 - (d) There was a heavy accumulation of flies which were annoying the animals. (Cx A-27).

Conclusions

1. Respondent violated the Act (7 U.S.C. § 2134) and the implementing regulation (9 C.F.R. § 2.1(a)) when he exhibited his animals without a license on [April 27 and 28, 1990,] December 5, 1990, and April 16-17, 1993.
2. Respondent violated the Act (7 U.S.C. § 2146) and the implementing regulation (9 C.F.R. § 2.126) when APHIS officials were refused permission to enter and inspect his facilities on May 11, 1992, and July 21, 1993.
3. Respondent repeatedly violated the Act (7 U.S.C. § 2140) and the implementing regulation (9 C.F.R. § 2.75(b)(1)) when he failed to maintain and produce at his current location complete records showing the acquisition, disposition, and identification of animals on [October 4, 1989,] April 27, 1990, November 7, 1991, February 4, 1992, April 23, 1992, and May 11, 1992.
4. Respondent violated 9 C.F.R. § 2.40 when he failed to maintain a program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine on [September 23, 1989, October 4, 1989,] April 27, 1990, January 23, 1991, February 4, 1992, and April 23, 1992.
5. Respondent violated 9 C.F.R. § 2.40 when he failed to provide veterinary care to animals in need of such care on April 23, 1992.
6. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.129(a) of the standards when he failed to provide wholesome and uncontaminated food of sufficient quantity and nutritive value to his animals on January 23, 1991, February 4, 1992, April 23, 1992, and May 11, 1992.
- *13 7. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.125(c) of the standards when he failed to adequately store supplies of food so as to protect them against deterioration, molding, or contamination by vermin and failed to refrigerate perishable food on December 18, 1991, and April 23, 1992.

8. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.125(d) of the standards when he failed to provide for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards on January 23, 1991, December 18, 1991, February 4, 1992, April 23, 1992, and May 11, 1992.

9. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.127(a) of the standards when he failed to provide sufficient shade to allow animals to protect themselves from direct sunlight on April 23, 1992, and May 11, 1992.

10. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.127(b) of the standards when he failed to provide adequate shelter from cold weather to animals he kept outdoors on April 23, 1992.

11. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.130 of the standards when he failed to provide an adequate supply of water to his animals on January 23, 1991, and December 18, 1991.

12. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.131(a) and (b) of the standards when he failed to keep the primary enclosures in which his animals were housed clean and sanitized on January 23, 1991, December 18, 1991, and February 4, 1992.

13. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.131(c) of the standards when he failed to keep the premises clean and free of trash accumulation on January 23, 1991, December 18, 1991, and February 4, 1992.

14. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.131(d) of the standards when he failed to establish and maintain an effective program for the control of pests on April 23, 1992, and May 11, 1992.

15. Respondent violated 9 C.F.R. § 2.100(a) of the regulations and 9 C.F.R. § 3.132 of the standards when he failed to employ a sufficient number of persons to maintain the prescribed level of husbandry practices on January 23, 1991.

16. There is a lack of sufficient proof of those counts of the Amended Complaint which alleged that respondent failed to provide his animals with requisite primary structures and perimeter fencing.

[17. From April 22, 1992, to May 12, 1992, the Respondent failed to provide adequate veterinary care to an animal (spotted leopard) in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40 (1992)).]

Discussion

Although Mr. Berosini committed numerous violations of the Act which include some of a most serious nature, [some] of the complaint's allegations are being dismissed as unsubstantiated, . . . or because there was no written standard in place to prohibit the conduct now alleged to be unlawful.

Unsubstantiated Allegations

*14

At the time of the October 4, 1989, inspection, APHIS expressed concern about the housing of animals in cages it considered appropriate only for travel when respondent was not in travel status. However, there is no regulation or written standard which sets time limitations on the use of transport cages by road show performers. Such standards appear to be needed, but in their absence, the counts in the Amended Complaint charging violations respecting pri-

many enclosures are being dismissed.

The lack of a specific regulation has also led me to dismiss the violations charged respecting the adequacy of perimeter fences. In so doing, I am giving the respondent the benefit of the reasoning recently advanced to dismiss similar allegations in the case of Patrick D. Hocter, . . . AWA Docket No. 93-10 (Oct. 14, 1994).^[FN(2)]

....

Inasmuch as January 23, 1991, was apparently a cold day in Lincoln County, Nevada, the charges by APHIS that respondent failed to refrigerate food and failed to have a program to control flies and insects in place on that date are dismissed. When APHIS inspected respondent's facility on November 7, 1991, respondent was charged with failing to provide needed veterinary care to "two cats." These charges are dismissed in that specific testimony was not given at the hearing (Tr. 169) and the inspection report is unrevealing. (Cx A-67). When APHIS inspected the respondent's facility at Pahrump, Nevada, on December 18, 1991, its inspector was ill and was unable to complete the inspection report. (Cx A-56). Although some photographs were taken (Cx B-56), the evidence is insufficient to support the allegations that respondent failed, at that time, to maintain a program of adequate veterinary care or had failed to provide needed veterinary care to animals in need of such care. There was also no evidence of probative value produced at the hearing to support the charge that the animals were not provided with food of sufficient quantity and quality on December 18, 1991.

....

APHIS has charged that on October 4, 1991, when it inspected his facility at Pahrump, Nevada, respondent had animals outdoors without adequate shelter from cold weather. . . . [T]his charge is dismissed. So too, on November 7, 1991, when APHIS inspected respondent's facility at Pahrump, Nevada, . . . the violations now charged [for various housekeeping problems] are being dismissed.

The Proven Violations

But after dismissing the foregoing charges of the complaint, Mr. Berosini is found to have nonetheless committed numerous violations of the Act, regulations, and standards. Some of the violations are of a most serious nature. The violations fit into six separate categories.

Exhibitor's License

The Act requires exhibitors to be licensed by the Secretary (7 U.S.C. § 2134) and restricts the issuance of licenses to those who have made application in the prescribed form and manner and have demonstrated that their facilities comply with the standards promulgated by the Secretary. The licensing requirements of the Act are at the center of this remedial legislation. Respondent's violation, continuing to operate without a license, with full knowledge of the licensing requirements, strikes at the heart of the regulatory program. In re Mary Bradshaw, 50 Agric. Dec. 499, 509 (1991); see also In re Rosia Lee Ennes, 45 Agric. Dec. 540, 546 (1986).

*15 Respondent's failure to have a license from December 12, 1989, to April 28, 1990, has been excused. However, when APHIS inspected his facility on April 27, 1990, respondent was specifically informed, both orally and in writing, that he did not have a valid license and needed to obtain one before exhibiting his animals. (Cx A-100). Respondent was also given an application and told to complete it and submit the application fee before exhibiting his animals. In clear defiance of these specific instructions, respondent was known to have exhibited his animals without a license as late as December 5, 1990.

Subsequently, on July 5, 1991, respondent obtained a license which he voluntarily canceled on July 5, 1992, by not submitting a renewal application. On February 24, 1993, respondent applied anew for an exhibitor's license which

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required various pre-licensing inspections before issuance. Although he was granted a license on April 26, 1993, respondent put on a performance in Kingman, Arizona, on April 16 and 17, 1993, before he received his license.

Access to Facilities and Records For Inspection

The success of the Animal Welfare Act regulatory program is critically dependent upon the ability of APHIS inspectors to conduct thorough inspections to monitor compliance with the applicable regulations and standards. In re Sema, Inc., 49 Agric. Dec. 176, 183 (1990).

On May 11, 1992, respondent's wife refused to allow APHIS officials to inspect the facility. (Cx A-27). On July 21, 1993, respondent denied access to Greg Wallen and J. David Neal because he had named those particular APHIS inspectors in a lawsuit; he states that he would have allowed other governmental officials to conduct the inspection of his facility. (Tr 717). I do not find that the circumstances asserted by respondent justify his refusal to allow Mr. Wallen and Mr. Neal to conduct their inspection.

Recordkeeping and Identification of Animals

On January 23, 1992, the APHIS official who inspected respondent's facility in Lincoln County, Nevada, was unable to verify whether respondent was in compliance with the recordkeeping and animal identification requirements because no one was present at the facility at the time of the inspection. As stated in In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 492 (1991) [aff'd, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993)] (not to be cited as precedent under 9th Circuit Rule 36-3): "[D]uring normal business hours, some employee or agent has to be available at each facility . . . , to give full and ready access to it and its records, for any unannounced APHIS inspection." I find that respondent violated the Act, the regulations and the standards, by failing to make his records and animals available for inspection by APHIS officials on that date and on many others.

Respondent has exhibited a stubborn and persistent pattern of noncompliance by refusing to adhere to the required procedures of recordkeeping and animal identification. (Findings of Fact, numbers 23-28). On several occasions, respondent told APHIS officials that the records were being kept at another location.

*16 The importance of all records, particularly those showing the source of all animals and their disposition, being made immediately available at the time of an unannounced inspection, cannot be overstated. To allow . . . the records [to be furnished] at a later date is to permit an opportunity for those records to be changed to conceal activities in violation of the Act.

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 489 (1991).

Veterinary Care

Respondent failed to initiate a program of veterinary care on numerous occasions after being told to do so by APHIS officials. (Findings of Fact, numbers 30, 31, 33, 35). Respondent must maintain an appropriate veterinary care program with an attending veterinarian at all times which includes: 1) facilities and equipment; 2) methods to prevent, control, diagnose, and treat diseases and injuries of animals; 3) daily observation of all animals; 4) appropriate feeding (in both quantity and nutritive value); and 5) other information as required by 9 C.F.R. § 2.40.

[Much of the evidence at the hearing pertained to the health, treatment, and death of a spotted leopard, Siam, and whether he had been provided adequate veterinary care from March 7, 1992, to May 12, 1992. From my review of the testimony, nothing other than earlier euthanization could have relieved this animal's suffering. The veterinarians who examined Siam were under the misconception that he was suffering from an esophageal problem. Upon euthanization, and subsequent necropsy, it was discovered that Siam had cancer. However, respondent did not follow the instructions of the veterinarian to bring the leopard back to him for daily weight checks; perhaps this regimen would have provided earlier relief to this animal. No one recommended the leopard's euthanization until after its confiscation by APHIS when it was no longer in respondent's control. I find that 9 C.F.R. § 2.40 was violated with respect to respondent's care

and treatment of Siam, because the evidence is clear that respondent did not follow the instructions of the veterinarian for Siam.]

On April 23, 1992, when APHIS inspected respondent's temporary facility in Las Vegas, Nevada, respondent had failed to provide veterinary care to animals in need of such care. One African lion was observed with diarrhea and another was limping on its right front leg. A spotted leopard with pus-like nasal drainage was observed vomiting. (Cx A-43).

Wholesome Food

Under 9 C.F.R. § 3.129(a) of the standards, an exhibitor is required to feed his animals wholesome and uncontaminated food "of sufficient quantity and nutritive value to maintain all animals in good health." Animals must be fed at least once a day. On numerous occasions, respondent failed to provide his animals with food of sufficient quantity and nutritive value to maintain them in good health. (Findings of Fact, numbers 32, 34, 37-38). On May 11, 1992, no food was present at respondent's facility in Las Vegas, Nevada. (Finding of Fact, number 38).

Humane Care and Sanitary Conditions

*17 ["T]he [principal] purpose[] of the Animal Welfare Act is to provide for the humane care of animals.[" In re Craig Lesser and Marilyn Lesser, 52 Agric. Dec. 155, 160 (1993)[, aff'd, 34 F.3d 1301 (7th Cir. 1994)]. Animals must be maintained in climates and environments conducive to the continuance of their health. It is for this reason that they must be presented with uncontaminated water and clean surroundings. Perishable food should be refrigerated and of sufficient nutritive value for the animals. Animals should be protected from disease and insect infestation. They must also be given space for exercise and dry bedding for rest. See *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1075 (1992)[, aff'd, No. 92-3740, 1995 WL 309637 (7th Cir. May 19, 1995) (not to be cited per 7th Circuit Rule 53(b)(2))]. Exhibitors and dealers must employ a sufficient number of trained persons to maintain the prescribed level of husbandry practices required by the Act, regulations, and standards. 9 C.F.R. § 3.132.

The evidence adduced at the hearing demonstrates that respondent violated the standards governing food storage, waste disposal, shelter from sunlight and inclement weather, potable water, cleaning, sanitation, and housekeeping of primary enclosures, pest control, and number of employees. Respondent's failure to meet the requirements of the standards was a recurring problem. His repeated refusal to comply with the standards concerning humane care and sanitary conditions demonstrates a willful violation of the Act's requirements. See, e.g., *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988).

Sanctions

APHIS recommended, in addition to the issuance of a cease and desist order, a civil penalty of \$15,000.00 and the suspension of respondent's license for 120 days. I am entering the cease and desist order as requested. However, [some] of the violations contained in the Amended Complaint were not sustained. Therefore, the recommendations of APHIS were partially unfounded. I have reviewed the recommendation in light of the Act's direction that the Secretary give due consideration to the appropriateness of a civil penalty with respect to the size of the business, the gravity of the violations, the good faith of the respondent and the history of previous violations. 7 U.S.C. § 2149(b).

Apparently, respondent operated without incident from the time he was initially licensed in 1982 until the September 23, 1989, inspection. His business is small in size. On the other hand, some of his violations strike at the heart of the Act and his noncompliance with various regulations has been repeated and stubbornly persistent. I have taken each of these factors into consideration and have concluded that a civil penalty of \$7,500.00 and a 60-day period of license suspension is appropriate and needed in this case to assure that the respondent understands the gravity of his violations and to deter him from similar violations in the future.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

*18 Respondent^[FN3] lists the following arguments on appeal (Respondent's Appeal, p. 1 of 1; attached to Respondent's appeal is a document which purports to be a District of Nevada Federal District Court "Motion to Dismiss" and Brief (June 24, 1994), included presumably as support for Respondent's argument number 2 in his appeal):

I am requesting that you consider the enclosed brief and the fact that there is absolutely no doubt that;

1. There has been no mistreatment of any animals.
2. The Department of Agriculture lacks jurisdiction over this matter.
3. There have been no violation of any regulations.
4. There has been full cooperation with all government agencies.
5. Every expert and doctor has praised the conditions under which my animals have been kept.
6. I am requesting the opportunity to make oral argument.

I infer from this list--there being no additional arguments--that Respondent argues that the Chief ALJ's findings are not adequately supported by the record. The standard of proof in Animal Welfare Act cases is a preponderance of the evidence, which standard has been greatly exceeded by the evidence in this case (see, e.g., the AWA case of *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993)):

Respondents' appeal, in the main, consists of a refile of the brief previously filed before the ALJ. The ALJ properly rejected Respondents' contentions. Respondents argue that the ALJ's findings are not adequately supported by the record, but, as stated by the ALJ, the "proof in this case far surpasses the preponderance of the evidence, which is all that is required"^[FN2] (Initial Decision at 2).

^[FN2] See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Therefore, I find that Respondent's arguments 1, 3, 4, and 5 are without merit, and are rejected. Respondent's request in number 6 for an oral argument has been previously denied, *supra*.

This leaves Respondent's argument 2, which maintains, *inter alia*, that USDA lacks the jurisdiction to regulate Respondent's activities. In the first place, it would be inappropriate for me to rule on the constitutionality of the Act, since "[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer." *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979); see also *In re Saulsbury Orchard*, 47 Agric. Dec. 378, 379 (1988). If I were to rule on the issue, I would rule that there was no constitutional infirmity. That the Congress of the United States has authority under the United States Constitution to give USDA authority to regulate interstate activities within the purview of the Animal Welfare Act is not really subject to serious argument. However, because the Respondent is proceeding *pro se*, I will include Complainant's Reply to this argument, which I adopt as my own, as follows (Complainant's Reply to Respondent's Appeal at 1-2):

*19 Respondent's appeal essentially argues that the Federal Government lacks the authority to regulate the activities of an animal exhibitor. Respondent concedes that he travels interstate but states that because his shows each occur in only one state at a time, the Commerce Clause of the United States Constitution does not provide authority for the Animal Welfare Act and the regulation of exhibitors because "the Defendant (sic) is not involved in interstate commerce" (Respondent's Appeal, p. 15).

Since 1937, the Supreme Court has consistently upheld federal regulation based on the Commerce Clause, even when the activities were only intrastate, as long as there was some impact on interstate commerce. This is set forth in the Hornbook on Constitutional Law ([John E.] Nowak, [Ronald D.] Rotunda and [J. Nelson] Young, *Hornbook on Constitutional Law* § 4.9[at 153-54 (3d ed.) 1986]):

After *Wickard*, the tests for proper exercise of the commerce power were settled. First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a

close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity. Third, Congress could regulate--under a combined commerce clause-necessary and proper clause analysis--intrastate activities in order to effectuate its regulation of interstate commerce. The Court would not independently review the Congressional decision on economic relationships or policy.

See also: Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); U.S. v. Darby, 312 U.S. 100 (1941); and U.S. v. Sullivan, 332 U.S. 689 (1948).

[Respondent] moves his animals interstate and presents exhibitions in several states. This is a far greater interstate involvement than the Supreme Court requires. Therefore, respondent's appeal must be denied as the Animal Welfare Act is constitutional in its regulation of [Respondent].

Complainant appeals three purported errors in the Initial Decision and Order, but neither seeks increased sanctions nor appeals the dismissal of other violations dismissed by the Chief ALJ. The three corrections would clarify that persons regulated under the AWA: (1) Must be in compliance at all times and are not excused from a violation because they have been directed to correct it by a date in the future; (2) Must follow the reasonable medical instructions given by their veterinarian for the care of sick or injured animals; and (3) May not exhibit without a license, must inform APHIS of their location, and are responsible for receiving mail at the address they provide to APHIS.

1. Taking Complainant's requested corrections, seriatim, I agree with Complainant that the Chief ALJ erred in dismissing the violations concerning recordkeeping (Oct. 4, 1989) and inadequate veterinary care (Sept. 23, 1989, and Oct. 4, 1989) because the violations were supposedly "corrected by the due date." As Complainant correctly states, APHIS does not give time to come into compliance, the regulated party must be always in compliance. APHIS is properly concerned with compliance, and uses due dates, and other methods, to assist the regulated party to achieve compliance, and to stay in compliance. In exercising its prosecutorial discretion, APHIS might even forego the filing of a complaint when violations are promptly corrected; but, violations noted on a report do not cease to be violations because they are corrected. Rather, prompt corrections might mitigate the sanction for the original violations, or might forestall any increased sanctions (or additional complaints) for the noncompliance period which continued between the original violations and the correction due date.

*20 2. I also agree with Complainant that the only logical conclusion from the Chief ALJ's factual finding concerning the leopard, Siam, is that Respondent violated the veterinary care standard, because Respondent failed to follow his veterinarian's instructions for Siam. The Chief ALJ's discussion as to Siam is as follows (Initial Decision at 19-20):

Much of the evidence at the hearing pertained to the health, treatment, and death of a spotted leopard, Siam, and whether he had been provided adequate veterinary care from March 7, 1992, to May 12, 1992. From my review of the testimony, nothing other than earlier euthanization could have relieved this animal's suffering. The veterinarians who examined Siam were under the misconception that he was suffering from an esophageal problem. Upon euthanization, it was discovered that Siam had cancer. Although respondent did not follow the instructions of the veterinarian to bring the leopard back to him for daily weight checks, it is unclear how this would have provided relief to this animal. No one recommended the leopard's euthanization until after its confiscation by APHIS when it was no longer in respondent's control. I am therefore dismissing the charges that 9 C.F.R. § 2.40 was violated in respect to respondent's care and treatment of Siam.

The fact that Siam was later shown to have cancer--a condition which could have rendered any prescribed veterinary treatment nugatory--is nevertheless irrelevant. The Chief ALJ cites no authority for his decision to allow Respondent to disregard the veterinary advice for the big cat. The Respondent properly sought expert veterinary advice and then disregarded the advice. There is in this record no logical reason for Respondent to be exculpated, merely because the leopard could be expected to have died anyway. Such a decision, as Complainant suggests, could establish a precedent that the AWA-regulated entities are required to provide veterinary care, with the benefit of hindsight, only when they know that the animal will not otherwise die. Of course, veterinary treatment is not guaranteed to succeed (Tr. 42-43), but exhibitors should not be given such a loophole to allow them to ignore veterinary advice.

3. I also agree with Complainant that it was error for the Chief ALJ to dismiss the charge of exhibiting without a license on April 27 and 28, 1990. As Complainant points out (Complainant's Appeal, supra, at 5), the Chief ALJ had found the essential elements of this violation and placed them in his Findings of Fact--Findings on Exhibiting When Unlicensed, No. 16, as follows (Initial Decision at 10):

Findings on Exhibiting When Unlicensed

16. On April 27 and 28, 1990, respondent exhibited animals without a license in Superior, Arizona. (Cx A-100, Cx A-101). Several letters were mailed by APHIS to respondent, notifying him that he had not submitted the correct fee and that his license had expired. (Cx A-102, Cx A-103; Tr. 467).

Moreover, testimony by USDA Veterinary Area Supervisor Dr. Wendy Koch established that one of the letters informing Respondent of the license cancellation was dated February 15, 1990 (Tr. 467).

***21** The Chief ALJ erroneously accepted Respondent's defenses of a lack of notice and "confusion," because Respondent testified that he did not pick up his mail, and was earlier "confused" by the \$10 increase in his license fee. I agree with Complainant that Respondent's "confusion" should be recognized only in mitigation of any sanction imposed for this violation, because there is no question but that Respondent committed the violation. Since Complainant has not requested increased penalties for this violation, however, the sanction herein is not increased for this violation.

Complainant also argues the more serious Chief ALJ error of negating the effect of letter notices because Respondent did not "receive" the properly-posted letter notices. I agree with Complainant that this is error, because a Respondent may not frustrate bona fide regulatory operations by not picking up letter notices at the address which Respondent listed on his renewal application to receive such letters. The regulations address this type of situation, thus, the Complainant argues that the regulations require travelling exhibitors to notify APHIS of a change of address, to furnish APHIS with an itinerary, and to permit inspections of their travelling animals, as follows (Complainant's Appeal, supra, at 6-7 (emphasis in original)):

The ALJ's holding, if allowed to stand, could mean that a regulated person could avoid his obligations by, as here, not informing APHIS of his location and not picking up his mail. The regulations require exhibitors and others to notify APHIS of any change of address, 9 C.F.R. 2.8. Under the authority of 9 C.F.R. 2.125 (requiring regulated persons to furnish APHIS any information concerning their business), APHIS requires travelling exhibitors to furnish APHIS with their itinerary. In addition, 9 C.F.R. 2.126 requires regulated persons to permit inspections of their animals. This is impossible where a travelling exhibitor does not notify APHIS of his location.

As to Mr. Berosini's non-receipt of mail, this mail was sent to the address which Mr. Berosini himself provided to APHIS on his renewal application! Permitting a regulated person to avoid compliance responsibility by not collecting mail at his own address would gut any regulatory program and can not be what either Congress or the Secretary intended for the AWA program.

For these reasons, I find that Respondent exhibited his animals on April 27 and 28, 1990, after his license had been properly cancelled, and after APHIS had properly alerted Respondent to this fact by letter notices mailed to the address provided by Respondent. The unlicensed exhibition was a violation of section 4 of the AWA (7 U.S.C. § 2134) and section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)).

I have very carefully examined Respondent's Reply of May 1, 1995, in which Respondent again asserts innocence of the charges; bad faith by APHIS; undisclosed "evidence" in Respondent's possession which rebuts the charges; incredibility and untruthfulness of APHIS' witnesses; harassment of Respondent by APHIS personnel; and innocence, in particular, of any harm to Siam. All of the above issues were fully litigated and properly decided by the Chief ALJ (except for the three matters involved in Complainant's appeal) in a full evidentiary hearing. Respondent got a fair hearing, at which he chose to represent himself. Therefore, I reject these arguments because they have already been

fairly decided, and are otherwise without merit.

***22** In deciding this case, I note that the exhibits and testimony show that large, exotic cats apparently have no primary structure housing, but are kept indefinitely in very small, wheeled "transport cages," not a great deal larger than the animals themselves (see, e.g., Tr. 96-113). The Chief ALJ dismissed this issue for lack of regulations or standards on duration of confinement in transport cages, as follows (Initial Decision at 18):

At the time of the October 4, 1989, inspection, APHIS expressed concern about the housing of animals in cages it considered appropriate only for travel when respondent was not in travel status. However, there is no regulation or written standard which sets time limitations on the use of transport cages by road show performers. Such standards appear to be needed, but in their absence, the counts in the Amended Complaint charging violations respecting primary enclosures are being dismissed.

Although there was no appeal as to this issue, if a similar case reaches the Judicial Officer, a reasonableness standard will be applied. That is, when animals are transported to a new or "temporary" facility, they may only be housed in so-called "transport cages" for a reasonable time. After such reasonable time, which will be determined on a case-by-case basis, the space requirement standards (9 C.F.R. § 3.128) will be applied to the "transport" enclosures, which actually have become the primary spaces holding such animals, regardless of whether the primary enclosures could also be called "transport cages."

At some point, it is not reasonable to consider what are really stationary housing facilities to be "transport" or "travel" facilities, merely because the facilities were at one time mobile, and could be mobile again. The animals require a certain amount of space for health reasons. A short time of close confinement in transport cages is not often deleterious to their health--hence the transport cage exception (9 C.F.R. § 3.137) to the space requirement standards (9 C.F.R. § 3.128).

However, it takes no great analytical skill to determine that unscrupulous operators could maintain animals in an artificially-constant "travel" status, in very small "transport cages," to the great detriment of the health of the animals. This has happened here. Pending clarifying standards, on a case-by-case, reasonable basis, travelling apparatuses, i.e., "transport cages," which are reasonably shown to be used as primary housing, shall be regulated under the space requirement standards in 9 C.F.R. § 3.128.

Similarly, although there was no appeal of the alleged violation of inadequate perimeter fences (Initial Decision at 18), I recently reversed the reasoning of the administrative law judge in Hctor, upon which the Chief ALJ specifically relies, which will cause the opposite result in any future decisions on inadequate perimeter fences (In re Patriek D. Hctor, 54 Agric. Dec. ___, slip op. at 15-24 (May 5, 1995), appeal docketed, No. 95-2571 (7th Cir. July 3, 1995)). Of course, the unappealed ALJ's ruling in Hctor, upon which the Chief ALJ relied, was not precedential, in any event, and would not have controlled subsequent cases before the Judicial Officer (see In re Unique Nursery & Garden Center (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 425 (1994), aff'd, 48 F.3d 305 (8th Cir. 1995); In re Charles Sims, 52 Agric. Dec. 1243, 1262 (1993); In re Hubert H. Smith Paeking Co., 52 Agric. Dec. 1025, 1036 (1993); In re Henry S. Shatkin, 34 Agric. Dec. 296, 314-15 (1975)).

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

It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, viz., that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., In re Spencer Livestock Comm'n Co., 46 Agric. Dec. 268, 435-62 (1987), aff'd on other grounds, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Act provides (7 U.S.C. § 2149(a), (b)):

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

In this case, the Animal and Plant Health Inspection Service recommended on appeal that the sanction should remain that imposed by the Chief ALJ: a 60-day suspension of Respondent's license, a \$7,500 civil penalty, and an Order that he cease and desist from further violations. I agree with Complainant that these sanctions adequately address Respondent's violations and accomplish the remedial and deterrent purposes of the AWA. Moreover, I find that these penalties are appropriate in the context of my holdings in similar proceedings meriting similar penalties.

*24 However, I hasten to add that the violations involved in the three matters involved in Complainant's appeal--the effect of correction due dates; mandatory implementation of a veterinarian's instructions for a sick animal; and exhibiting without a license after changing locations without informing APHIS, and not picking up mail at the old APHIS address--formed no part of the basis for assessing the penalties. That is, the penalties would be the same had these violations not been found. On the other hand, had the violations involved in these three matters been the only violations herein, they would have merited significant sanctions on their own, due to the serious nature of the violations.

Respondent violated the Act, regulations and standards thereunder more than 17 times. The violations were multiple and serious. They affected some animals directly and severely, and had a strong potential to affect the health of all the animals on Respondent's premises. The premises were consistently unclean. Proper nutritive food was not always available. Potable water, vermin control, trash removal, and, especially, proper veterinary care, were big, recurring problems. Each of the inspection reports included numerous violations of the regulations and standards, including failure to maintain proper sanitation. The continuation of the violations from 1989 to 1992 shows that Respondent did not make serious efforts to comply with the Act. Respondent received several warning letter notices.

The Chief ALJ properly applied the criteria of 7 U.S.C. § 2149(b): the size of the Respondent's business, the gravity of the violations, Respondent's good faith, and the history of previous violations. Considering these statutory criteria and Complainant's recommendation, I believe that a civil penalty of \$7,500 is appropriate, no part of which is based on Respondent's activities involved in Complainant's appeal, supra.

Additionally, I believe that Respondent's license should be suspended for 60 days.^[FN4] Here, again, no part of the suspension is based on Respondent's activities involved in Complainant's appeal. Finally, I believe that Respondent should be ordered to cease and desist from further violations.

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

Order

1. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

- (a) Failing to maintain complete records, showing the acquisition, disposition and identification of his animals;
- (b) Failing to keep primary enclosures for live animals clean and sanitized as required;
- (c) Failing to store food for live animals so as to protect from spoilage, contamination, and vermin infestation;
- (d) Failing to keep the premises clean and free of accumulations of trash;
- (e) Failing to provide for adequate running potable water for the animals' drinking needs, for cleaning, and for carrying out other husbandry requirements;
- *25 (f) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;
- (g) Failing to provide animals with adequate shelter from the sun;
- (h) Failing to provide animals with adequate shelter from the elements;
- (i) Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;
- (j) Failing to keep food and water receptacles clean and sanitized;
- (k) Failing to provide animals with adequate potable water;
- (l) Failing to maintain primary enclosures for animals in a clean and sanitary condition;
- (m) Failing to establish and maintain an effective program for the control of pests and rodents;
- (n) Failing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices;
- (o) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;
- (p) Failing to provide adequate veterinary care to animals in need of such care; and
- (q) Engaging in an activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$7,500. The civil penalty is to be paid by certified check or money order, made payable to the Treasurer of the United States and sent to the following address within 90 days after service of this Order on Respondent: Donald A. Tracy, Esq., United States Department of Agriculture, Office of the General Counsel, Marketing Division, 14th and Independence Avenue, S.W., Room 2014 -- South Building, Washington, D.C. 20250-1417.

3. Respondent's license as an exhibitor is suspended for a period of 60 days.

The suspension provisions shall become effective on the 35th day after service of this Order on Respondent. The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

FN4. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No. 103-354, § 212(a)(1), 108 stat.

3178, 3210 (1994)). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

FNaa. Since Respondent's original appeal was filed more than 35 days after service, it would have been dismissed on jurisdictional grounds (7 C.F.R. § 1.142(b)(4); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 529-30 (1994)). However, since Complainant obtained an extension of time and filed a timely appeal, Respondent's reply properly incorporated by reference his original appeal, and, therefore, it constituted a timely cross-appeal (7 C.F.R. § 1.145(b); *In re Unique Nursery & Garden Center (Decision as to Valkering U.S.A., Inc.)*, 53 Agric. Dec. 377, 378 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995)).

FN1 As of January 1, 1990, this regulation, as revised and renumbered, replaced 9 C.F.R. § 3.134(a) and (b). [

FN2 This Hctor decision was reversed on appeal to the Judicial Officer; therefore, future cases on perimeter fences will follow the reasoning in *In re Patrick D. Hctor*, 54 Agric. Dec. ___ (May 5, 1995), appeal docketed, No. 95-2571 (7th Cir. July 3, 1995), discussed in "Additional Conclusions by the Judicial Officer," *infra*.]

FN3 I note that the Chief ALJ admonished Respondent's (non-attorney) personal representative, Mr. Charles Puett, President of "Handicapped Accessibility Services of Nevada," of "the advisability of respondent being represented by counsel" (Summary of Prehearing Teleconference, Nov. 9, 1993). My examination of this record reveals that Respondent was accorded a full, fair and impartial hearing by the Chief ALJ, who constantly considered the fact that Respondent was proceeding pro se (Tr. 27-32).

FN4 No consideration is given as to whether it would be appropriate to issue an order continuing the suspension after the 60 days until Respondent demonstrates compliance with the Act, regulations and standards inasmuch as (i) Complainant did not request such a continuing suspension order, (ii) the Chief ALJ did not impose such a continuing suspension order, and (iii) Complainant did not appeal from the suspension order issued by the Chief ALJ.

54 Agric. Dec. 886, 1995 WL 560811 (U.S.D.A.)

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49 Agric. Dec. 176, 1990 WL 320952 (U.S.D.A.)

UNITED STATES DEPARTMENT OF AGRICULTURE (U.S.D.A.)

**1 IN RE: SEMA, INC.

AWA Docket No. 89-02.

Decision and Order filed June 28, 1990.

*

176

ANIMAL WELFARE ACT

Interference with investigators during course of investigation - Discovery.

The Judicial Officer affirmed the order by Chief Judge Palmer (ALJ) assessing a civil penalty of \$2,500, and directing respondent to cease and desist from various practices involving interfering with inspectors during the course of an inspection. The Department's inspectors have authority to take whatever photographs they regard as appropriate during the course of an inspection. When the cause of death of animals is coded in respondent's records, respondent must supply the inspectors with the code key. Discovery is not available under the Department's rules of practice.

Carol C. Priest and Mary Kyle Hobbie, for Complainant.

Robert D. Sokolove and Pamela D. Huang, Chevy Chase, MD, for Respondent.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Decision and order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. s 2131 et seq.), and the regulations issued thereunder (9 C.F.R. s 1.1 et seq.). On October 2, 1989, Chief Administrative Law Judge Victor W. Palmer (ALJ) issued an initial Decision and Order assessing a civil penalty of \$2,500, and directing respondent to cease and desist from various practices involving interfering with inspectors during the course of an inspection.

On November 2, 1989, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. ss 556 and 557 (7 C.F.R. s 2.35).^[FNI] The case was referred to the Judicial Officer for decision on February 14, 1990.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. s 1.145(d)), was requested by respondent, but is denied inasmuch as the issues *177 on appeal have been thoroughly briefed and oral argument would seem to serve no useful purpose.

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Based upon a careful consideration of the record, the initial decision is adopted as the final decision, with a few minor editorial changes, and a few additions included within brackets. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. s 2131 et seq., as amended ("Act"), instituted by a complaint filed on November 3, 1988, by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. The complaint alleges that the respondent, SEMA, Inc., wilfully violated section 16 of the Act, 7 U.S.C. s 2146 and section 2.126 of the regulations issued pursuant to the Act, 9 C.F.R. s 2.126, by repeatedly threatening, harassing and otherwise intimidating APHIS inspectors while they were engaged in an inspection of the SEMA facility.

****2** Respondent filed an answer on November 29, 1988, in which it denied violating the Act.

An oral hearing was held before me on May 3-5, 1989, in Washington, D.C. Carol C. Priest, Esq. and Mary Kyle Hobbie, Esq., Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant. Robert D. Sokolove, Esq. and Pamela D. Huang, Esq., Kornblut & Sokolove, Chevy Chase, Maryland, appeared on behalf of the respondent.

On July 3, 1989, respondent filed a petition to reopen the hearing for the submission of additional evidence. On July 31, 1989, complainant filed a reply objecting to the proposed reopening of the hearing. Upon consideration of the proposed evidence and the arguments of counsel for the parties, I concluded that the proposed evidence to be adduced at a reopened hearing would be either irrelevant or duplicative. Respondent's petition was therefore denied on August 18, 1989.

The parties have submitted proposed findings of fact, conclusions of law and supporting briefs. All proposed findings, conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, the proposed findings, conclusions and arguments have been rejected as irrelevant, immaterial or lacking legal or evidentiary basis.

***178** For the reasons set forth in the findings and conclusions which follow, an order is being entered directing the respondent to cease and desist from further violations of the Act and assessing the respondent a civil penalty in the amount of \$2,500.

Relevant Statutory Provisions and Regulations

7 U.S.C. s 2146(a) states in part:

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any . . . research facility . . . has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, [and] animals . . . of any such . . . research facility. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.

9 C.F.R. s 2.126 states in part:

Each . . . research facility . . . shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business to examine records required to be kept by the Act and the regulations in this part, and to make copies of such records, and permit Veterinary Services representatives to enter his place of business, to inspect such facilities, property and animals as such representatives consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter. The use of a room, table, or other facilities necessary for the proper examination of such records and inspection of such property or animals shall be extended to such authorized representatives of the Secretary by the . . . research facility, his agents and employees.

****3** 7 U.S.C. s 2149(b) states in part:

***179** Any . . . research facility . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Findings of Fact

1. SEMA, Inc., is a corporation engaged in the business of biomedical research with animal subjects, primarily non-human primates. Respondent's address is 2501 Research Boulevard, Rockville, Maryland 20850.
2. Respondent, at all times material herein, was registered under the Act as a research facility.
3. At the time of respondent's application for registration under the Act, respondent was apprised of the regulations and standards promulgated pursuant to the Act. Respondent agreed in writing to comply with these regulations and standards.
4. Virtually all of respondent's research is done under contract with the National Institutes of Health (NIH). SEMA personnel work closely with NIH project officers in many areas of SEMA's operations. As a consequence of this close relationship, recommendations and requests made to SEMA by NIH officers carry considerable weight.
5. On December 6, 1986, several persons, whose identities were unknown at the time of the hearing, gained entrance to the SEMA facility. Four primates and several documents were removed. A videotape was made within the facility and was later released as, or incorporated into, the film "Breaking Barriers". Dr. Jerc Phillips, SEMA's primary veterinarian, testified that documents taken from his office later were part of a derogatory report on SEMA's operations prepared by People for the Ethical Treatment of Animals (PETA), an animal rights organization. In Dr. Phillips' opinion, the unauthorized photographs, videotaped images and documents which had been released to the public were the result of several penetrations of the SEMA facility carried out between June 1986, and December 1986.
- *180** 6. Special Agent Alan B. Carroll, of the Federal Bureau of Investigation, Silver Spring, Maryland, who participated in the investigation of the December 6, 1986, incident, testified that in the opinion of the Bureau, a SEMA employee assisted in the theft and was probably recruited and placed at SEMA specifically for that purpose.
7. The SEMA employee suspected of complicity in the theft was no longer employed at SEMA at the time of the hearing. However, neither SEMA officials nor the law enforcement personnel involved in the investigations of the December 6, 1986, incident had been able to rule out the possibility that other infiltrators or "moles" continue to work at SEMA. These lingering suspicions have contributed to an organizational climate characterized by tension and a

strong distrust of outsiders.

****4 8.** After the incident of December 6, 1986, NIH security personnel and law enforcement agencies were consulted and recommendations were solicited. As a result of these discussions, SEMA took steps to improve security at the facility. These included hiring Mr. Toby Ceslar as Security Director, installing video surveillance and alarm systems, implementing a program of physical security for individual offices and documents, and prohibiting photography on the premises. At the request of NIH project officers, a coding system for necropsy reports was developed and implemented.

9. On July 29, 1987, at approximately 8:30 a.m., APHIS inspectors Janet B. Payeur, D.V.M., and Ceelia Sanz, D.V.M., arrived at respondent's facility to perform a routine inspection to ascertain compliance with the Act and pertinent regulations. They met briefly with Dr. Jere Phillips, Vice President and Institutional Veterinarian of SEMA, Inc., and Mr. James Edwards, Primate Supervisor.

10. Drs. Payeur and Sanz then began their inspection. Dr. Phillips and Mr. Edwards accompanied them. Upon entering the second room containing laboratory animals, the inspectors found a strong odor of ammonia and a large quantity of fecal matter on the floor and animal cages. Dr. Payeur took a photograph of the area. Dr. Phillips then voiced strenuous objections to the taking of photographs within the SEMA facility. While making these objections, Dr. Phillips stood in front of Dr. Payeur so as to obstruct her view and prevent her from taking additional photographs. Dr. Phillips told the inspectors he was concerned that their photographs would compromise ongoing investigations of the December 6, 1986, theft and could eventually come into the hands of PETA and similar organizations. In response, the inspectors stated that photography is a standard method of documentation ***181** during inspections, that inspectors have the right to use this method and that Dr. Phillips was interfering with the inspection.

11. As Drs. Payeur and Sanz proceeded through the facility, Dr. Phillips and Mr. Edwards continued to object to the taking of photographs. At times, Dr. Phillips and Mr. Edwards prevented the inspectors from taking photographs by placing themselves between the inspectors and the areas of interest. At other times, Drs. Payeur and Sanz refrained from taking photographs solely to avoid or terminate a confrontation.

12. In the course of the inspection, Drs. Payeur and Sanz asked to review selected **veterinary records**, including records of necropsies performed on animals which had died. The necropsy reports provided to the inspectors contained only coded references to causes of death. The inspectors were denied direct access to the code key. Therefore, they were required to ask Dr. Phillips for the diagnosis which corresponded to each particular code which they encountered. Dr. Payeur testified that the inability to examine more than one record at a time, combined with the lack of access to the code key, hampered the inspectors' analysis of the records.

****5 13.** On the day of the inspection, Dr. John Landon, the President of SEMA, was away from the facility. When he happened to call his office that morning and spoke to Ms. Nancy Piech, he was told that USDA inspectors were in the building and were taking photographs. Dr. Landon thereupon instructed Ms. Piech to summon Mr. Toby Ceslar, SEMA's Security Director, to the facility. He further instructed Ms. Piech to tell Mr. Ceslar that the inspectors were not to leave the building with the film. Dr. Landon then placed a call to Dr. James Glosser, the Administrator of APHIS, to discuss the situation. Dr. Glosser stated that inspectors have the discretionary authority to take photographs which they believe to be necessary during an inspection. Dr. Glosser further stated that he would not substitute his judgment as to the necessity of photographs in a given situation for that of an inspector on the scene. Dr. Landon placed several more calls to Ms. Piech in the course of the morning and was kept apprised of events occurring at SEMA.

14. At approximately 2:00 p.m. on July 29, 1987, Drs. Payeur and Sanz decided to break for lunch. It was their intention to return to the facility after lunch to complete their review of records, write an exit report and discuss their findings with SEMA personnel.

15. The inspectors then walked across SEMA's parking lot to their car. They placed their equipment, including their cameras, into the car's trunk and proceeded to the Marriott Hotel across the street. They discovered that the *182 hotel's restaurant was closed. They then placed a call to the APHIS Animal Care Staff and decided to drive to another restaurant.

16. Upon returning to the SEMA parking lot, Drs. Payeur and Sanz found that their car was blocked by a pickup truck parked directly behind and perpendicular to it. As the inspectors approached the car, Mr. Ceslar, respondent's Security Director, emerged from the SEMA building. In response to a question from Dr. Payeur, Mr. Ceslar indicated that the truck belonged to him. Dr. Payeur then asked Mr. Ceslar to move the truck so that she and Dr. Sanz could go to lunch. Mr. Ceslar refused and demanded the inspectors' cameras and film. Alternatively, Mr. Ceslar suggested that the inspectors return to the building to discuss the situation with Dr. Phillips. The inspectors refused to surrender the cameras and film. Mr. Ceslar then threatened to call the local police and have the inspectors arrested. Mr. Ceslar told them that they could go to lunch without the car by walking to Harvey's, a restaurant located within a few hundred yards of SEMA.

17. Drs. Payeur and Sanz did go to Harvey's, but instead of having lunch, Dr. Payeur placed a second call to the Animal Care Staff. Upon reporting Mr. Ceslar's actions and his threat to call the police, Dr. Payeur was instructed to call Mr. Donald Tracy, an attorney with the Department's Office of General Counsel. Mr. Tracy advised Dr. Payeur not to surrender the cameras and film and instructed her to initiate police assistance in the matter.

**6 18. Dr. Payeur then called the Montgomery County Police Department. A few minutes later, the inspectors saw a Montgomery County Police car on its way to SEMA. They then started walking toward the SEMA parking lot to meet the officer. As they walked, they saw Mr. Ceslar move his truck from its original position behind their car. Mr. Ceslar did so because Officer John W. McKone, of the Montgomery County Police Department, had informed him that he had no legal right to block the inspectors' vehicle and that his truck would be towed upon request. Police records show that the officer had responded to a telephone call placed by Mr. Ceslar.

19. The inspectors proceeded to their car and drove out of the SEMA parking lot. They returned to Harvey's Restaurant, where Dr. Payeur placed a third call to the Animal Care Staff. She then reported the situation to Mr. Tracy, and he advised her to return to her office as soon as possible. Based upon Mr. Tracy's advice and their own perceptions of the hazards of further contact with SEMA personnel, the inspectors decided to leave the area without completing their inspection activities, i.e., further review of records, completion of an exit report and discussion of the report with SEMA personnel.

*183 20. Though the inspectors, as noted in their reports, observed some deficiencies in sanitary conditions at SEMA suggestive of violations of APHIS regulations, they concluded that, on balance, those conditions did not violate the Act or the regulations.

Conclusion

Respondent violated section 16(a) of the Act, 7 U.S.C. s 2146(a), and section 2.126 of the regulations, 9 C.F.R. s 2.126, by threatening, intimidating, and otherwise interfering with APHIS inspectors during the inspection of July 29, 1987, and thereby effectively denying the inspectors access to respondent's facilities.

Discussion

The Animal Welfare Act seeks to ensure the humane treatment of various species of animals used for research or experimental purposes. See H.R. Rep. No. 1651, 91st Cong., 2d Sess. 9 (1970); 7 U.S.C. s 2131; Haviland v. Butz, 545 F.2d 169, 172 (D.C. Cir. 1976). The Act and the pertinent regulations set forth detailed standards of care for such

animals and provide for inspections to monitor compliance.

However, the issue in this case is not whether the respondent failed to meet the applicable standards for the care of the animals in its custody, but whether the actions of its employees on June 29, 1987, constituted a denial of access for the purpose of inspection within the meaning of 7 U.S.C. s 2146(a). Upon consideration of the evidence and the arguments of counsel, it is my conclusion that Drs. Payeur and Sanz were in effect denied such access to the SEMA facility.

The success of the Animal Welfare Act regulatory program is critically dependent upon the ability of APHIS inspectors to conduct thorough inspections and produce detailed records of their inspections. See Donald Stumbo, 43 Agric. Dec. 1079, 1092 (1984) [aff'd, 779 F.2d 35 (2d Cir. 1985) (not to be cited as precedent)]. Inspectors have considerable discretion in selecting their methods of inspection and the way in which they document their observations. JoEtta L. Anesi, 44 Agric. Dec. 1840, 1846-1847 [(1985), appeal dismissed, 786 F.2d 1168 (8th Cir. 1986) (unpublished)]; Donald Stumbo, 43 Agric. Dec. at 1092.

****7** Photographic documentation, obtained during normal business hours, in a reasonable manner that does not disrupt ongoing research, must be ***184** construed as within the boundaries of such discretion. See 7 U.S.C. ss 2146(a), 2143[(a)](6)(A)(iii); Donald Stumbo, 43 Agric. Dec. at 1092. Interference with inspectors' efforts to take reasonable photographs in a reasonable manner to enhance an inspection is "an unwarranted interference with responsible officials in the conduct of their authorized activities" and constitutes a violation of 7 U.S.C. s 2146(a). Donald Stumbo, 43 Agric. Dec. at 109

2. The evidence adduced in this proceeding indicates that Drs. Payeur and Sanz were substantially impeded in their efforts to take photographs in a reasonable manner. Although they did succeed in obtaining photographs of several areas of investigative interest, their ability to photograph various other areas was thwarted by SEMA personnel. I have found Dr. Payeur's account of Dr. Phillips' conduct to be more credible than Dr. Phillips' account. His manner of objecting to photography was not only distracting but intimidating. The level of intimidation necessary to cause an experienced inspector such as Dr. Payeur to refrain from using a method which she deems necessary is undoubtedly very high. Intimidation of such magnitude is as surely as much a denial of access as would be a locked door or an obstruction to an inspector's line of sight.

The evidence also shows that the inspectors were denied effective access to needed necropsy records because they were denied the code key and could not examine more than one record at a time. Although SEMA, understandably had legitimate concerns about security and the need to comply with wishes of NIH, which help explain its actions, nonetheless the ability of APHIS inspectors to examine records as they deem necessary to ascertain whether there has been compliance with the Act cannot be made to yield to such considerations. Accordingly, it is my conclusion that respondent's failure to afford the inspectors direct and unrestricted access to the **veterinary records** constituted a denial of access within the meaning of 7 U.S.C. s 2146(a).

The most serious acts of interference with the inspection occurred after Dr. Landon ordered Mr. Ceslar to keep the inspectors' film from leaving the SEMA facility. Although Dr. Landon did not state precisely how he wished his instructions to be carried out, his strongly worded instructions understandably led Mr. Ceslar to take extreme measures. Mr. Ceslar blocked the inspectors' car with his truck, demanded the film and threatened to have the inspectors arrested. The inspectors became so alarmed and intimidated, that they declined to re-enter the SEMA facility to complete their inspection. Dr. Landon's instructions and Mr. Ceslar's actions clearly constituted a denial of the kind of access required under 7 U.S.C. s 2146(a).

***185** In its defense, respondent has argued that the December 6, 1986, theft, the ongoing investigations and the perception of a continuing threat of infiltration and harassment by animal rights activists created a climate of extreme tension and vigilance at SEMA. The testimony by SEMA personnel about those conditions has been accepted. However, SEMA's public relations and security problems cannot justify its intimidation and interference with the

APHIS inspectors. Dr. Landon's instructions to his staff and the actions taken by Mr. Ceslar to carry out those instructions are most disturbing and indefensible. During the June 29 telephone conversation between Dr. Landon and Dr. Glosser, the ranking official at APHIS, Dr. Glosser clearly stated that he would not substitute his own judgment as to the propriety or necessity of a given inspection technique for that of an inspector on the scene. Dr. Glosser further stated that Dr. Landon could raise his objections through other channels. Dr. Glosser's statements were sufficient to place Dr. Landon on notice that Drs. Payeur and Sanz were within the boundaries of their discretionary authority, that they enjoyed the full confidence and support of their agency, and that interfering with their inspection procedures was improper. Dr. Landon's persistence in attempting to stop the inspectors from removing their film from the premises, even after his conversations with Dr. Glosser, was a principal cause of most of the hostile conduct the inspectors experienced.

****8** Complainant has requested the issuance of a cease and desist order to prevent future interference with APHIS inspectors. This request is appropriate and an appropriate order is being issued.

Additionally, complainant urges that the actions of SEMA employees on the day of the inspection constitute a violation of 7 U.S.C. s 2146(a), and that a \$5,000 penalty should be assessed under 7 U.S.C. s 2146(b). Inasmuch as 7 U.S.C. s 2146(b) provides for imprisonment and fines, I have no jurisdiction to take action under it and that part of the complaint which alleges a violation of 7 U.S.C. s 2146(b) is dismissed.

On the other hand, 7 U.S.C. s 2149(b) authorizes the Secretary to assess a penalty of \$2,500 for each violation of the Act. This section of the Act further provides that in determining an appropriate civil penalty, the Secretary shall consider the size of the business, the gravity of the violation, the respondent's good faith and the history of previous violations.

The record contains evidence pertaining to each of these factors. Respondent is a relatively large business which conducts extensive research programs under contract with NIH. SEMA's veterinary care program and its record of compliance with the Animal Welfare Act are satisfactory. Moreover *186 the events which occurred at SEMA on June 29, 1987, were essentially the product of poor judgment and confusion, rather than bad faith, on the part of SEMA personnel. However, the acts of resistance and intimidation committed against responsible officials of APHIS by SEMA employees constitute a very serious violation of the Act. Actions of this nature are an intolerable threat to the integrity of the Animal Welfare Act regulatory program, and normally call for severe sanctions.

In the circumstances of this case, I believe that a moderate civil penalty, in addition to a cease and desist order, is appropriate. Inasmuch as actions of SEMA personnel on the day of the inspection could be construed as either several violations or as one violation of 7 U.S.C. s 2146(a), I will treat the events as constituting a single, serious violation and assess a civil penalty in the amount of \$2,500, the statutory maximum for one violation of the Act as the appropriate penalty.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises a number of issues on appeal that are completely without merit. The decision of the ALJ is correct, based on the evidence in the case, and the civil penalty of \$2,500 is not excessive, considering the serious nature of the violations. No useful purpose would be served by discussing respondent's contentions. I agree fully with the Department's views set forth in Appellee's Response to Appeal, which is attached as an Appendix to this decision (but will not be reproduced in Agriculture Decisions).

Respondent's basic error is the failure to recognize that the Department's inspectors have authority to take whatever photographs they regard as appropriate during the course of an inspection. Respondent may object to the receipt of photographs in evidence at a disciplinary hearing, but respondent is not permitted to interfere with the inspectors when the inspectors believe that a photograph is appropriate, in connection with their inspection activities.

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****9** Respondent complains about the absence of discovery availability, but the record here shows that respondent was furnished with a considerable amount of material relating to complainant's case, well in advance of the hearing. Furthermore, under the Department's Rules of Practice, there is no provision for pre-hearing discovery, and in similar cases it has been held that discovery is not available. Fairbank v. Hardin, 429 F.2d 264, 268 (9th Cir.), cert. denied, 400 U.S. 943 (1970); In re Sterling Colo. Beef Co., 35 Agric. Dec. 1599, 1600 (1976) (ruling on certified questions), final decision, 39 Agric. Dec. 184 (1980), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980); In re Blackfoot *187 Livestock Comm'n Co., 45 Agric. Dec. 590, 616 (1986), aff'd, 810 F.2d 916 (9th Cir. 1987); In re Beef Nebraska, Inc., 44 Agric. Dec. 2786, 2834-35 (1985), aff'd, 807 F.2d 712 (8th Cir. 1986); In re Gilardi Truck & Transp., Inc., 43 Agric. Dec. 118, 143-45 (1984); In re Machado, 42 Agric. Dec. 820, 832-36 (1983) (remand order as to respondent Cozzi), final decision, 42 Agric. Dec. 1454 (1983) (decision as to respondent Cozzi), aff'd, 749 F.2d 36 (9th Cir. 1984) (unpublished).

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

Order

Respondent SEMA, Inc., its agents and employees, directly or through any corporate or other device, shall comply with every provision of the Animal Welfare Act, 7 U.S.C. s 2131 et seq., and the Regulations and Standards promulgated pursuant to the Act, 9 C.F.R. s 1.1 et seq. Specifically, respondent shall cease and desist from (a) preventing or interfering in any manner with the use of photography by APHIS personnel during valid inspections; (b) denying or restricting an inspector's access to any records which the inspector deems necessary to ascertain compliance with the Act and regulations; (c) restricting in any manner an inspector's freedom of movement; (d) threatening or attempting to take possession or control of any property owned or leased by the United States Department of Agriculture, including cameras, photographic film and automobiles; and (e) interfering with, harassing or intimidating in any other manner an APHIS inspector engaged in the performance of the inspector's official duties.

Respondent is assessed a civil penalty in the amount of \$2,500, to be paid no later than 90 days after service of this order, by certified check or money order, made payable to the Treasurer of the United States, and sent to Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014, South Building, Washington, D.C. 20250-1400.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent.

FN1 The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. ss 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

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