

**BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE**

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THE ANIMAL LEGAL DEFENSE FUND

PETITIONER

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**PETITION FOR RULEMAKING TO ESTABLISH ANIMAL CONFISCATION  
PROCEDURE PENDING ANIMAL WELFARE ACT LICENSE REVOCATION AND  
TERMINATION**

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## **I. NOTICE OF PETITION**

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

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

### **PETITIONER:**

Animal Legal Defense Fund  
170 East Cotati Avenue  
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Dear Secretary Vilsack and Administrator Shea,

Pursuant to the Administrative Procedure Act, 9 U.S.C. § 551 *et seq.*, and the United States Department of Agriculture's ("USDA") implementing regulations, 7 C.F.R. § 1.28, the Animal Legal Defense Fund ("ALDF") hereby petitions the Secretary of Agriculture, through the Animal and Plant Health Inspection Service ("APHIS"), to promulgate a regulation under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, ("AWA") that would ensure the protection of affected animals in the event that an AWA license is revoked or a licensee goes out of business.

As this petition will explain, the rules, in their current state, allow for APHIS to routinely leave animals in substandard conditions pending and subsequent to license revocation or termination, which contradicts the AWA's purpose of providing humane animal care and treatment.

This petition seeks to incorporate a confiscation process as part of the license revocation and termination processes, and proposes a comprehensive new rule to ensure that those processes do not leave animals in substandard conditions during or following those proceedings. The proposed rule would first expand the current AWA confiscation provisions so that they apply whenever APHIS initiates an AWA license revocation or a licensee relinquishes or otherwise terminates its license. Second, the rule would create a general forfeiture procedure for those licensees who violate the AWA and offer a clear process for immediately seizing and treating covered animals. Finally, the proposed rule includes conditions to impose on licenses and means by which interested persons may intervene in the administrative license revocation process, on behalf of the animals, if the USDA begins the process without seizing the animals.

## **A. PETITIONERS**

Petitioner, ALDF, is a non-profit organization dedicated to protecting the lives and advancing the interests of animals through the legal system. Each year, ALDF spends substantial resources advocating on behalf of animals whose treatment is governed by the AWA, including animals used for exhibition, entertainment, research, breeding and other commercial purposes. Through investigations and public records requests, ALDF monitors the care provided to covered animals, disseminating any pertinent information to ALDF members and other interested persons. Upon discovering AWA violations, ALDF advocates for the revocation of the offender's license as well as for the confiscation of the animals so that they may be sent to sanctuaries. The inadequacy of APHIS's current procedures for confiscating animals during the license revocation and termination processes necessitates additional expenditure of resources by ALDF, when those resources could instead be directed toward ALDF's other advocacy efforts, including its farmed animal and wildlife protection campaigns.

## **B. STATUTORY AUTHORITY**

Given the USDA's broad authority to effectuate the plain animal welfare purpose of the Act, as well as its specific statutory confiscation authority, the USDA has ample power to issue ALDF's requested rule. Moreover, the comprehensive general forfeiture procedures laid out in the Lacey Act and the Endangered Species Act serve as helpful guidance and precedent for said rule.

The Secretary of Agriculture has authority under the AWA to "promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate...any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder."<sup>1</sup> Additionally, the Secretary has broad authority under the AWA to "promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter,"<sup>2</sup> among which are to "insure that animals intended for...exhibition purposes or for use as pets are provided humane care and treatment."<sup>3</sup> Leaving animals to languish at facilities in substandard conditions pending and subsequent to revocation or termination of the AWA license necessarily contravenes the plain animal welfare purpose of the Act. Accordingly, it is well within the agency's statutory authority to specifically provide for confiscation as part of the license revocation and termination procedures, and to do so without a finding of animal suffering (particularly in light of the costly delays that have historically preceded such findings).

Indeed, the USDA has already issued forfeiture rules similar to those requested here, as applied to property seized under the Endangered Species Act ("ESA") and the Lacey Act."<sup>4</sup> Under both the ESA and the Lacey Act, forfeiture is triggered via statutory or regulatory violation and no finding that the animals are "suffering" is required. An appropriate regulation in the context of the AWA, pursuant to the agency's general authority to effectuate the purpose of the AWA, would

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<sup>1</sup> 7 U.S.C. § 2146(a) (2014).

<sup>2</sup> *Id.* § 2151.

<sup>3</sup> *Id.* § 2131.

<sup>4</sup> *See* 7 C.F.R. § § 356.1-356.9 (2014).

similarly allow APHIS to immediately seize an animal held in violation of the AWA *absent* any finding that the animals are “suffering.” Moreover, following the examples set under the ESA and the Lacey Act, the regulation would require that the seized animals “remain in the custody of the Deputy Administrator pending disposition,” 7 C.F.R. § 356.6, as well as ensure that the seized animals are held in qualified facilities during the forfeiture proceeding.

The AWA also provides that the Secretary of Agriculture shall issue licenses “in such form and manner as he may prescribe.”<sup>5</sup> Accordingly, in conjunction with the USDA’s general authority to promulgate regulations necessary to effectuate the purpose of the AWA, the AWA also gives the USDA authority to impose conditions on AWA licenses.

## II. FACTUAL BACKGROUND

Over the past several years, the widespread mistreatment of animals who fall within the AWA’s protective ambit has captured the country’s attention. The media has revealed several shocking instances of AWA under-enforcement and under-regulation at large-scale dog dealers, commonly known as “puppy mills,” traveling zoos, and scientific research laboratories, all of which failed to provide humane treatment for the animals under their care.<sup>6</sup>

The results of the government’s own investigations mirror these disturbing discoveries. In 2010, the USDA’s Office of the Inspector General (OIG) conducted an audit of APHIS’s Animal Care Unit (“AC”), whose primary responsibility is to enforce the AWA.<sup>7</sup> The audit report concluded that APHIS inspectors routinely failed to bring effective enforcement actions against AWA violators – in some instances, repeated offenders – thus leaving the animals to languish in conditions that fell below even the minimum standards set by the AWA. More specifically, the audit report found that APHIS was “not aggressively pursuing enforcement actions against violators of AWA,” and that “the enforcement process was ineffective against problematic dealers.”<sup>8</sup>

Although the AWA grants APHIS the authority to confiscate any animal found to be suffering as a result of an AWA violation,<sup>9</sup> APHIS itself added a provision requiring that the

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<sup>5</sup> 7 U.S.C. § 2133.

<sup>6</sup> See, e.g., Denys Bucksten, *Proposal Targets Puppy Mills, Highland Park woman seeks municipal ban*, Chicago Tribune, July 5, 2013, available at [http://articles.chicagotribune.com/2013-07-05/news/ct-tl-lk-0704-highland-park-dog-sale-20130705\\_1\\_puppy-mills-rescued-animals-highland-park-city-council](http://articles.chicagotribune.com/2013-07-05/news/ct-tl-lk-0704-highland-park-dog-sale-20130705_1_puppy-mills-rescued-animals-highland-park-city-council) (attached as Exhibit 1); Allen St. John, *Where \*Not\* to Buy a Dog: The Pet Store Connection to the Business of Puppy Mills*, Forbes, Feb. 22, 2012, available at <http://www.forbes.com/sites/allenstjohn/2012/02/22/where-not-to-buy-a-dog-the-pet-store-connection-to-the-business-of-puppy-mills/> (attached as Exhibit 2); Associated Press, *NY Law Protects Big Cats, Bans ‘Tiger Selfies’*, Aug. 12, 2014, available at <http://www.washingtontimes.com/news/2014/aug/12/ny-law-protects-big-cats-bans-tiger-selfies/> (attached as Exhibit 3).

<sup>7</sup> Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL (May 2010) available at <http://www.usda.gov/oig/webdocs/33002-4-SF.pdf> (attached as Exhibit 4).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 9; 9 CFR §2.129(a) (January 1, 2005).

violator be given a final opportunity to take corrective action before confiscation can occur,<sup>10</sup> even in extreme cases where animals are suffering or dying.<sup>11</sup> The OIG, however, found that this delayed confiscation practice constituted an impermissibly lenient approach toward AWA violators.

To support these findings, the OIG report provided gruesome evidence of the devastating consequences that APHIS's deficiencies had for the animals. In one example, at a facility in Oklahoma with 219 adult dogs, APHIS cited the breeder for 29 violations (including nine repeat violations) over three inspections ranging from February 2006 to January 2007.<sup>12</sup> However, before the investigation yielded any kind of enforcement action, a subsequent inspection in November 2007 encountered five dogs dead and others starving and resorting to cannibalism. Despite these conditions, AC did not immediately confiscate the surviving dogs and, as a result, 22 additional dogs died before the breeder's license was revoked.<sup>13</sup> Notably, when asked why they had failed to confiscate the remaining dogs upon discovery of the starving and dead dogs on the property, AC responded that its regulations required that the violator be given an opportunity to correct the condition before any confiscation can occur.<sup>14</sup>

In response to these horrific discoveries, the OIG recommended that APHIS "modify regulations to allow immediate confiscation where animals are dying or seriously suffering."<sup>15</sup> Yet, APHIS contended that the current regulations were "sufficient to allow immediate confiscation," and that "clarifying the confiscation processes" would allow inspectors to accomplish the confiscations with "maximum speed and effectiveness."<sup>16</sup> APHIS subsequently distributed clarifying guidance to employees during AC's National Meeting in April 2010.<sup>17</sup> However, this guidance stipulated only that confiscation should be "considered" in those circumstances "[w]hen an animal is determined to be suffering and relief is not provided by the facility, and there is *no evidence* relief will be provided in the immediate future, confiscation should always be considered."<sup>18</sup> (emphasis added). In other words, so long as an inspector found

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<sup>10</sup> Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, *supra* note 7 at 24.

<sup>11</sup> USDA has defined suffering as "any condition that causes pain or distress . . . Examples [include]: animals with serious medical problems that are not receiving adequate veterinary care; animals without adequate food or water; animals exposed to temperature extremes without adequate shelter or bedding; and animals held in enclosures that are filthy. Animals do not need to be in jeopardy of dying to be in a state of suffering." Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, *supra* note 7 at 9 n.25, citing AC Policy No. 8 (May 8, 2001).

<sup>12</sup> Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, *supra* note 7 at 13.

<sup>13</sup> *Id.*

<sup>14</sup> 9 CFR §2.129(a).

<sup>15</sup> Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, *supra* note 7 at 14.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.*

<sup>18</sup> Animal Welfare Inspection Guide, U.S. DEPARTMENT OF AGRICULTURE p.240 (2013) *available at* [https://www.aphis.usda.gov/animal\\_welfare/downloads/Animal%20Care%20Inspection%20Guide.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/Animal%20Care%20Inspection%20Guide.pdf) (attached as Exhibit 5).

any evidence that relief would be provided in the immediate future, regardless of the reliability of that evidence, confiscation was not even to be considered.

Recent legal efforts by ALDF against AWA-licensed exhibitor Cricket Hollow Zoo underscore these concerns cited by the OIG report. In *Kuehl v. Sellner*, ALDF sued an Iowa AWA exhibitor named Cricket Hollow Zoo for providing substandard care to endangered species at that facility.<sup>19</sup> Specifically, ALDF alleged in that case that Cricket Hollow Zoo was providing care to endangered animals that fell short of the level of care required under the AWA, and that in turn constituted a “take” under the Endangered Species Act. ALDF successfully proved these claims at trial, resulting in a federal court order that the endangered animals be removed and placed in AWA-compliant facilities.<sup>20</sup>

Incidentally to ALDF’s lawsuit against Cricket Hollow Zoo, APHIS concurrently suspended Cricket Hollow Zoo’s license from June 16 to July 8, 2015. APHIS suspended Cricket Hollow Zoo’s license in the wake of a series of inspection reports showing repeated violations of the AWA. This suspension forced Cricket Hollow Zoo to shut its doors during this time period. With more robust confiscation policy, APHIS could have confiscated these animals in 2015 rather than allowing them languish pending ALDF’s victory in its litigation. At the time this petition for rulemaking is submitted, the endangered animals subject to ALDF’s victory are still at Cricket Hollow Zoo. Moreover, the animals who are not endangered but are protected by the AWA will continue to languish at the facility without further action by APHIS.

In addition to the Cricket Hollow Zoo example, evidence gathered in a Freedom of Information Act (FOIA) request further underscores that APHIS’s current confiscation policy is still tragically deficient. For example, APHIS cited Jerry Holly, an exhibitor in Upper Marlboro, Maryland, for 46 violations found on 18 separate inspections. These included transporting a lion in March of 2010 in an enclosure with torn sheet metal, which caused the lion to bleed from its head and mouth, and two years later, keeping a kangaroo in an enclosure filled with feces, preventing her from sitting, laying down or standing without coming into contact with the feces. The animals remained in this condition because APHIS only charged this exhibitor with a \$12,143 penalty instead of taking protective measures. Similarly, in May of 2013, USDA filed a complaint against Stephen Kroschel, doing business as Kroschel Films & Wildlife Center in Haines, Alaska. Each time APHIS investigated Kroschel, it found deplorable conditions: Kroschel had failed to provide adequate veterinary care, leading to the death of two wolves in February 2009, one fox in August 2009, and another wolf in March 2011.

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<sup>19</sup> *Kuehl v. Sellner*, Case No. C14-2034, 2016 WL 590468 (N.D. Iowa, Feb. 11, 2016). A copy of the decision and judgement in that case is attached as Exhibit 6.

<sup>20</sup> The court order stated: “IT IS HEREBY ORDERED that Defendants must transfer the lemurs and tigers in their possession to an appropriate facility which is licensed by the USDA and is capable of meeting the needs of the endangered species. This transfer must occur not later than Ninety Days (90) after the filing of this Order. IT IS FURTHER ORDERED that Defendants are enjoined from acquiring any additional animals on the endangered species list, without first demonstrating an ability to care for the animals and receiving Court approval.” Id. at \*35-36.

Countless records collected through FOIA requests reflect that APHIS's lax enforcement of AWA regulations remains the norm. Appropriate intervention in the form of strengthened confiscation procedures will save countless animal lives.

### **III. PROPOSED AMENDMENT TO THE LICENSE TERMINATION REGULATION**

In order to provide humane care and treatment for the animals who fall under the ambit of the Animal Welfare Act, APHIS must promulgate a regulation that allows for confiscation of animals when an AWA license is revoked or a licensee goes out of business.

Petitioners hereby request that the USDA initiate a rulemaking to amend 9 C.F.R. § 2.12, to ensure the protection of animals kept in substandard conditions. In particular, ALDF proposes amending § 2.12 to read as follows:

#### **9 C.F.R. § 2.12 License Termination and Confiscation of Animals**

- (a) A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to §2.11 after a hearing in accordance with the applicable rules of practice.
- (b) Upon initiation of an enforcement proceeding that could result in license revocation or suspension, or upon the relinquishment, suspension, or termination of a license for any reason, an APHIS official may confiscate the animal(s) for care, treatment, or disposal and place the animal(s) with persons or facilities, such as a non-for-profit animal sanctuary, that can offer a level of care equal to or exceeding the regulatory standards, as determined by APHIS, even if the persons or facilities are not licensed by or registered with APHIS.
  - (1) Whenever an officer authorized under this section seizes or impounds an animal based on a reasonable belief that prompt action is required to protect the health or safety of the animal or the health or safety of others, the officer shall provide the owner or keeper of the animal, if known or ascertainable after reasonable investigation, with the opportunity for a postseizure hearing to determine the validity of the seizure or impoundment, or both.
  - (2) Failure of the owner or keeper, or his or her agent, to request or to attend a scheduled hearing shall result in a forfeiture of any right to a pre seizure hearing or right to challenge his or her liability for costs incurred pursuant to this section.

- (3) The hearing officer, after the hearing, may affirm or deny the owner's or keeper's right to custody of the animal and, if reasonable grounds are established, may order the seizure or impoundment of the animal for care and treatment.
  - (4) The full cost of caring for and treating any animal properly seized under this subdivision shall constitute a lien on the animal, and the animal shall not be returned to its owner until the charges are paid if the seizure is upheld pursuant to this section.
  - (5) If the animal requires veterinary care and the impounding agency is not assured, within 14 days of the seizure of the animal, that the owner will provide the necessary care, the animal shall not be returned to its owner and shall be deemed to have been abandoned.
- (c) Interested persons who do not have a possessory or ownership right in the animal may intervene in the administrative license revocation process on behalf of the animals if the USDA begins the revocation process without seizing the mistreated animals.
  - (d) The provisions of this section shall serve as a condition to the granting of any new AWA license.

#### **IV. LEGAL BACKGROUND AND SUPPORT FOR THE PROPOSED RULEMAKING**

In order to serve the purposes of the AWA, APHIS must expand its regulations to explicitly provide for confiscation in its license revocation and termination procedures. This section begins by exploring the inconsistent application of the current enforcement regulations. Second, this section highlights relevant state animal protection laws that provide useful guidance for necessary additions to APHIS's regulations. Third, this section examines how additional provisions drawn from state law will prove integral to a workable confiscation regime, and explains how ALDF's proposed regulations are consistent with due process. Finally, this section proposes mandated conditions to apply to all AWA licenses.

##### **A. APHIS'S HISTORICAL APPROACH TO ANIMAL CONFISCATION REVEALS A NEED FOR INCREASED APPLICATION OF CONFISCATION AUTHORITY**

Under current AWA regulations, if an APHIS official finds that an animal is "suffering as a result of the failure of the dealer, exhibitor, intermediate handler, or carrier to comply with any provision of the regulations or the standards," the official may confiscate the animal.<sup>21</sup> Separately

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<sup>21</sup> 9 C.F.R. § 2.129(a).

from this confiscation provision, the AWA outlines several procedures and requirements for terminating or revoking an AWA license. For example, APHIS may terminate an AWA license if the licensee is “not in compliance with any of the regulations or standards” established under the AWA, and APHIS may temporarily suspend an AWA license if there is “actual or threatened physical harm to animals.”<sup>22</sup>

APHIS’s previous efforts to confiscate animals as a result of AWA violations strongly supports the need to expand the application of APHIS’s confiscation authority. For example, in *In re Lorenza Pearson*, APHIS initiated a consolidated proceeding against a licensed exhibitor, doing business as “L & L Exotic Animal Farm,” who had been charged with willfully violating the AWA in the care of his bears and exotic felines.<sup>23</sup> The defendant had faced various and often repeated noncompliance charges over ten years, ranging from failure to establish and maintain a program of adequate veterinary care to failure to provide potable water in receptacles that were clean and sanitary, as often as necessary for the health and comfort of the animals.<sup>24</sup> APHIS eventually confiscated seven of the respondent’s bears on May 17, 2005, pursuant to section 16(a) of the AWA,<sup>25</sup> and section 2.129 of the Regulations<sup>26</sup> for the respondent’s failure to provide the bears requisite care.<sup>27</sup>

Prior to the confiscation of the seven bears, the defendant’s facility contained in “every sense egregious, obvious violations of the Animal Welfare Act and the Regulations that substantially endangered the health and well-being of the animals [defendant] kept at his facility for exhibition.”<sup>28</sup> The defendant’s “egregious violations,” which were “often uncorrected and persistent,” included what an APHIS Inspector characterized as the presence of maggot-infested food in the enclosure that “could cause parasites.”<sup>29</sup> Among the “appalling conditions” described therein, APHIS employees found dead animals, including a badger left on top of a cage enclosure, which “appeared to have been dead for a significant period of time and should have been removed,”<sup>30</sup> and a dead tiger left in a pen.<sup>31</sup> Animals’ pens contained loose stools, indicating diarrhea, and various animals needed immediate veterinary care.<sup>32</sup> Finally, finding that the defendant had not complied with APHIS’s written warning, the APHIS Inspector confiscated the defendant’s bears, which were examined and dewormed on May 17, 2005.<sup>33</sup> APHIS proceeded to send the bears to various zoos and other facilities throughout the country, given the APHIS

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<sup>22</sup> *Id.* §§ 2.11-2.12; *Id.* § 4.10(b).

<sup>23</sup> No. 02-0020, 2009 WL 8382858, \*1 (U.S.D.A. July 13, 2009).

<sup>24</sup> *Id.* at \*17.

<sup>25</sup> 7 U.S.C. § 2146(a).

<sup>26</sup> 9 C.F.R. § 2.129.

<sup>27</sup> *See* 2009 WL 8382858, *supra* n. 21 at \*4.

<sup>28</sup> *Id.* at \*28.

<sup>29</sup> *Id.* at \*6.

<sup>30</sup> *Id.* at \*6.

<sup>31</sup> *Id.* at \*7.

<sup>32</sup> *Id.* at \*6.

<sup>33</sup> *Id.* at \*13.

veterinarian's finding that it was "in the best interest of these animals to be moved to a facility that could take better care of them."<sup>34</sup>

Unfortunately, this example of delayed confiscation causing prolonged animal suffering is not an isolated incident. In *In re: Hope Knaust*, APHIS's investigation uncovered an "appalling lack of adequate and necessary veterinary care and husbandry practices despite repeated citations, serious overall deterioration in the standard of care of respondents' animals and physical facilities, and repeated deficiencies at [the] [r]espondents' facility."<sup>35</sup> Among other violations, the respondent exhibitors, doing business as The Lucky Monkey, failed to provide sufficient food to their animals, and failed to remove a bloated equine carcass adjacent to a live animal's enclosure.<sup>36</sup>

The Judicial Officer subsequently concluded that the respondents lacked sufficient funding and personnel resources for continued operation of, or correction of the conditions at their facility.<sup>37</sup> The seriousness of the conditions at the facility ultimately resulted in confiscation of some of the animals on March 5, 2010.<sup>38</sup> An evaluation of the confiscated animals reflected "unacceptable neglect in their care, with many animals observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites."<sup>39</sup>

Two years passed between the The Lucky Monkey's first citation for noncompliance and APHIS's eventual confiscation of the exhibitor's animals for immediate veterinary treatment. During the time preceding confiscation, the defendant's animals languished in filthy cages, suffering from malnourishment, parasites, and lack of food and water, while they awaited their eventual confiscation and emergency treatment. Facing dealers, exhibitors and other licensees who in some cases systematically deprive animals of basic needs, APHIS's issuance of a rule allowing for swift confiscation of these animals upon commencement of license revocation and termination procedures would save lives and help effectuate the policies underlying the AWA.

## **B. STATE ANIMAL PROTECTION REGULATIONS OFFER SUPPORT AND USEFUL GUIDANCE FOR NECESSARY ADDITIONS TO APHIS'S REGULATIONS**

Various state animal cruelty codes contain useful provisions designed to address the care of animals following seizure or forfeiture that could reasonably be applied in the disposition of animals confiscated from AWA licensees. For example, Missouri's animal cruelty code provides that seized animals shall be placed "in the care or custody of a veterinarian, the appropriate animal control authority, or an animal shelter."<sup>40</sup> "If no appropriate veterinarian, animal control authority, or animal shelter is available, the animal shall not be impounded unless it is diseased or disabled

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<sup>34</sup> *Id.*

<sup>35</sup> No. 12-0552, 2014 WL 4311047, \*10 (U.S.D.A. Apr. 9, 2014). A copy of that decision is attached as Exhibit 7.

<sup>36</sup> *Id.* at \*8.

<sup>37</sup> *Id.* at \*10.

<sup>38</sup> *Id.* at \*9.

<sup>39</sup> *Id.* at \*10.

<sup>40</sup> Mo. Ann. Stat. 578.018 (2014).

beyond recovery for any useful purpose,” in which case the a licensed veterinarian is authorized to “[h]umanely kill any animal.<sup>41</sup>

Similarly, Florida’s anti-cruelty statute provides a means by which a neglected or mistreated animal can be “removed from its present custody, or made the subject of an order to provide care, [...] and given protection and an appropriate and humane disposition.<sup>42</sup> The statute further provides for “[a]ny law enforcement officer or any agent of any county or of any society or association for the prevention of cruelty to animals appointed under the provisions of s. 828.03 [to] [l]awfully take custody of any animal found neglected or cruelly treated by removing the animal from its present location.<sup>43</sup>

Under D.C. law, moreover, if the owner or custodian of an animal or animals fails to respond [to a notice of the animal’s forfeiture] after 20 days, the animal or animals become the property of the Washington Humane Society, who shall have the authority to: (A) place the animal or animals up for adoption in a suitable home; (B) retain the animal or animals, or (C) humanely destroy the animal or animals.<sup>44</sup>

Some states have further expanded the scope of humane officers’ confiscation authority and expressly hold the owner liable for impounding fees. For example, the California animal cruelty statute allows animal control or humane officers to immediately seize and provide for animals at the pound or an animal shelter, “based on a reasonable belief that prompt action is required to protect the health or safety of the animal,” until the owner has a “post seizure hearing to determine the validity of the seizure or impoundment.”<sup>45</sup> The California statute also holds the owner liable “to the impounding officer for all costs of impoundment from the time of seizure to the time of proper disposition.”<sup>46</sup> Notably, the California Court of Appeals held in *People v. Speegle*, that the defendant’s felony animal cruelty conviction properly required her to pay approximately \$265,000 in restitution to the Northwest Society for the Prevention of Cruelty to Animals (NWSPCA) for care of the animals seized on her property.<sup>47</sup> Animal control officers had delivered the animals to the NWSPCA following seizure, and the burden of caring for those animals nearly bankrupted the nonprofit, leaving it virtually unable to take in other animals.<sup>48</sup> The court rejected the plaintiff’s claim that she only owed restitution relative to the eight animals to whom each conviction pertained, not the other 196 who were also seized. The court explained that

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<sup>41</sup> *Id.*; see also *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688 (Mo., 2005) (holding that 578.018 provides sufficient guidance to practitioners so as to avoid arbitrary and discriminatory application, and is thus not unconstitutionally vague in violation of due process, since its terms were defined with reference to basic needs of an animal for food, water, shelter, among other factors and granted courts “the discretion necessary to evaluate the innumerable scenarios under which an animal abuse or neglect case might arise.”). A copy of that decision is attached as Exhibit 8.

<sup>42</sup> Fla. Stat. § 828.073 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> D.C. Code § 22-1004 (2014).

<sup>45</sup> Cal. Penal Code § 597.1(f) (2014).

<sup>46</sup> *Id.* § 597(g)(1).

<sup>47</sup> 53 Cal. App. 4th 1405, 1419 (Cal. Dist. Ct. App. 1997). A copy of that decision is attached as Exhibit 9.

<sup>48</sup> *Id.* at 1410.

the phrase “costs of impoundment” in the California Penal code refer to “all animals lawfully seized and impounded with respect to the violation.”<sup>49</sup> Likewise, the words “with respect to” in the California code focused temporally on the moment of seizure and had general import; the requisite restitution was not contingent on those animals identified in the criminal charge or even those charges resulting in conviction.<sup>50</sup>

Montana’s cruelty code similarly provides for forfeiture “of any animals affected” if the owner is convicted of cruelty to animals.<sup>51</sup> The statute requires “the defendant to pay all reasonable costs incurred in providing necessary veterinary attention and treatment for any animal affected, including reasonable costs of care incurred by a public or private animal control agency or humane animal treatment shelter.”<sup>52</sup> In particular, in *State v. Chilinski*, the Montana Supreme Court found that the plain language of § 45–8–211(2)(b) MCA did not limit the animals that could be forfeited to only those which served as the underlying basis for the substantive charges.<sup>53</sup> The statute specifically provided that “*any* animal affected may be forfeited” (emphasis in original). As a result, the court affirmed the defendant’s forfeiture of all dogs, as part of sentence on 92 counts of animal cruelty,<sup>54</sup> emphasizing “the deplorable conditions that all of the dogs were living in while in [the defendant’s] care” and the lack of “evidence to suggest that returning the animals to [the defendant] would change the circumstances which gave rise to their seizure.”<sup>55</sup> Finally, the fact that the defendant had insufficient funds available to care for the dogs, and that there was no indication he could provide viable treatment for injury and disease if the dogs were returned to him further supported the decision to require forfeiture of all the animals.<sup>56</sup>

Drawing from these examples in state law, APHIS should expand the scope of APHIS officials’ duties to intervene in situations of animal mistreatment by confiscating *all* of a violator’s affected animals, placing the animals in appropriate care, and expressly holding the owner liable for impounding fees.

### **C. ADDITIONAL PROVISIONS DRAWN FROM STATE LAW WILL PROVE INTEGRAL TO A WORKABLE CONFISCATION REGIME**

As currently enforced, APHIS’s rules allow for animals to be left in substandard conditions pending license revocation, termination, or suspension, thus contradicting the purpose of the AWA: to provide humane care and treatment for animals.<sup>57</sup> Consequently, ALDF proposes

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<sup>49</sup> *Id.* at 1417, citing § 597(g)(1).

<sup>50</sup> *Id.*

<sup>51</sup> Mont. Code Ann. § 45-8-211 (2014).

<sup>52</sup> *Id.*

<sup>53</sup> 376 Mont. 122, 133 (Mont. 2014). A copy of that decision is attached as Exhibit 10.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1179.

<sup>56</sup> *Id.* at 1179-80.

<sup>57</sup> *See* 7 U.S.C. § 2131.

amendments to the current rules, designed to expand the application of confiscation authority, as well as flesh out procedures related to the removal of the animals to an appropriate institution.

**1. Confiscation of Animals Receiving Substandard Care and Removal of the Animals to an Appropriate Institution**

In accordance with AWA's overarching animal welfare purpose, APHIS's animal confiscation authority should automatically be triggered as part of the license revocation, termination, or suspension processes. Specifically, ALDF proposes the addition of the following language (excerpted from ALDF's proposed rule included in full in Section III above) to the current text of 9 C.F.R § 2.12:

- (b) Upon initiation of a license revocation or the relinquishment, suspension, or termination of a license for any reason, an APHIS official may confiscate the animal(s) for care, treatment, or disposal, and place the animal(s) with persons or facilities, such as a non-for-profit animal sanctuary, that can offer a level of care equal to or exceeding the regulatory standards, as determined by APHIS, even if the persons or facilities are not licensed by or registered with APHIS."

By explicitly including confiscation in the license termination procedures, USDA would be carrying out its statutory duty to "insure that animals intended for...exhibition purposes or for use as pets are provided humane care and treatment."<sup>58</sup> ALDF counsels APHIS to prioritize the placement of animals in a non-for-profit animal sanctuary that can offer a level of care equal to or exceeding the standards and regulations, as determined by APHIS, even if the persons or facilities are not licensed by or registered with APHIS. This choice best aligns with the purpose of the AWA, providing humane care and treatment for animals,<sup>59</sup> as sanctuaries frequently take on the care of sick or injured animals as their sole undertaking, and would thus be best equipped to ensure the wellbeing of the confiscated animals. By the same token, euthanasia should be used only as a last resort, pursuant to a qualified veterinarian's determination.

As the cases referenced in Section A and B above indicate, APHIS's current confiscation provisions are applied capriciously with devastating consequences. In order to adequately protect the animals governed by the AWA, therefore, APHIS must introduce explicit confiscation authority earlier in the disciplinary process and provide for the animals' removal to an appropriate facility.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

## **2. Responsibility for Cost of Caring for the Seized Animals**

When APHIS seizes animals during an investigation, an impounding facility typically expends significant resources to feed, house, and medically treat those animals. Unfortunately for those impounding facilities, the former owners rarely have the funds to pay for treatment, leaving the facilities uncompensated. In order to avoid this negative externality, ALDF recommends that APHIS's disposition procedures also be amended to include cost of care and bond provisions at 9 C.F.R. § 2.12(b) (excerpted from ALDF's proposed rule included in full in Section III above) to read:

- (4) The full cost of caring for and treating any animal properly seized under this subdivision shall constitute a lien on the animal and the animal shall not be returned to its owner until the charges are paid, if the seizure is upheld pursuant to this section.
- (5) If the animal requires veterinary care and the impounding agency is not assured, within 14 days of the seizure of the animal, that the owner will provide the necessary care, the animal shall not be returned to its owner and shall be deemed to have been abandoned.

Such cost of care provisions would expressly authorize a judge to require offenders to pay for the cost of caring for seized animals; anything less than a clear rule granting judges the express authority to order reimbursement would result in an unjust windfall to the offender by shifting the expense of mitigating the harm—inflicted by the offender—to the impounding agencies. As a result of these provisions, licensees would have further incentive to limit the number and nature of animals they possess to those animals they could afford to maintain, improving the wellbeing of the animals, and allowing animal rescue facilities to better achieve their objectives.

## **3. Affording the Licensee an Opportunity to be Heard**

Finally, in order to relieve animal suffering while respecting the due process rights of the present or former licensee, ALDF proposes including the following language in 9 C.F.R. § 2.12(b) (excerpted from ALDF's proposed rule included in full in Section III above):

- (1) Whenever an officer authorized under this section seizes or impounds an animal based on a reasonable belief that prompt action is required to protect the health or safety of the animal or the health or safety of others, the officer shall provide the owner or keeper of the animal, if known or ascertainable after reasonable investigation, with the opportunity for a

postseizure hearing to determine the validity of the seizure or impoundment, or both.

- (2) Failure of the owner or keeper, or his or her agent, to request or to attend a scheduled hearing shall result in a forfeiture of any right to a preseizure hearing or right to challenge his or her liability for costs incurred pursuant to this section.
- (3) The hearing officer, after the hearing, may affirm or deny the owner's or keeper's right to custody of the animal and, if reasonable grounds are established, may order the seizure or impoundment of the animal for care and treatment.

By affording a current or former licensee the occasion to dispute an APHIS officer's characterization of his or her compliance with the AWA or the animal's wellbeing, these measures guard against mistaken or unjustified deprivation of life, liberty, or property, while continuing to protect any affected animals' wellbeing. Furthermore, these measures would help respond to OIG's stated concerns that delayed confiscation evidenced an impermissibly lenient approach in enforcing AWA.

#### **D. ALDF'S PROPOSED REGULATIONS ARE CONSISTENT WITH DUE PROCESS**

These proposed provisions, including the expansion of confiscation procedures under the AWA to expressly include pre-hearing confiscation have proven entirely consistent with due process. Due process requires that a citizen receive notice and an opportunity to be heard prior to forfeiture of his property.<sup>60</sup> To protect the animals' immediate best interests, and in recognition of the law's treatment of animals as distinct from generic property,<sup>61</sup> designating procedures that provide for a contested hearing would place APHIS's actions squarely within the bounds of constitutional due process.

For example, in *Daul v. Meckus*, an animal dealer found to have violated the Animal Welfare Act brought a *Bivens* action against the USDA alleging that the agency violated his due process rights in the course of his prosecution.<sup>62</sup> The dealer, however, failed to provide any specific facts supporting his contention that government agents' actions had deviated from agency procedures or purposely skewed the outcome to his detriment.<sup>63</sup> As a result, the dealer's

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<sup>60</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") citing *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965).

<sup>61</sup> See Adam P. Karp, *Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction Restitution Under Animal Cruelty Statutes*, 70 A.L.R. 6th 329 (2011) (explaining that the nature of "property" seized in animal cruelty forfeiture scenarios is distinct from other types of civil and criminal forfeiture because in the animal cruelty context, the forfeited "property" embodies qualities "volition, sentience, and the ability to suffer" "to the fullest extent."). A copy of that article is attached as Exhibit 11.

<sup>62</sup> 897 F. Supp. 606, 601 (D.D.C. 1995), summarily aff'd, 107 F.3d 922 (D.C. Cir. 1996).

<sup>63</sup> *Id.* at 610.

“conclusory allegations” that his due process rights were violated lacked merit, and the court dismissed the case, finding that the dealer had been given proper notice at each stage and an opportunity to present his defenses and arguments.<sup>64</sup>

Case law examining the states’ approaches to the confiscation, holding, and disposal of animals under state animal cruelty codes provides further guidance on appropriate general forfeiture regulations and due process considerations in the context of the AWA. State courts have consistently condoned seizure of animals in perilous conditions, with varying degrees of notice requirements.

For example, in *Daskalea v. Washington Humane Society*, pet owners, whose dogs had been seized by the Washington Humane Society (WHS), brought suit against the District of Columbia, WHS, and its employees, challenging the constitutionality of the seizure of their animals.<sup>65</sup> The plaintiffs alleged that DC’s Freedom from Cruelty to Animal Protection Act<sup>66</sup> was unconstitutional for failing to provide owners with a meaningful right to contest the seizure, detention, and terms of release of their pets, prior to final action.<sup>67</sup>

At the time the suit was initiated, D.C. code provided WHS employees with the plenary discretion to determine whether a plaintiff had neglected an animal and to seize the animal without either a pre- or post- seizure hearing, and maintain a lien on the seized animal for “care and provisions.”<sup>68</sup> During the course of the suit, however, D.C. passed a municipal regulation establishing a notice and hearing process for the owner of an animal seized pursuant to D.C. Code § 22–1004(b)(1) to “contest the seizure, detention, and terms of release; the treatment of the animal; any allegation of cruelty, abandonment, or neglect; and the imposition of any lien and costs assessed for caring and providing for the animal.”<sup>69</sup> Because the amended statute indisputably provided pet owners with due process through notice and postseizure hearings, the court dismissed the plaintiffs’ claims as moot.<sup>70</sup>

In *Brinkley v. County of Flagler*, Florida animal control officers seized 358 dogs and puppies and one bird without a warrant pursuant to Fla. Stat. Ann. § 828.073, a statute designed to “provide a means by which a neglected or mistreated animal can be removed from its resent custody,” among other protective measures.<sup>71</sup> The court found that the Fourth Amendment applied to civil forfeiture actions generally, and to Fla. Stat. Ann. § 828.073 actions, specifically, due to the statute’s arrangement of the eventual transfer of custody to the humane society upon a finding of owner unfitness.<sup>72</sup> However, because a person whose animals had been seized had access to

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<sup>64</sup> *Id.*

<sup>65</sup> 710 F.Supp.2d 32, 34 (D.D.C., 2010).

<sup>66</sup> D.C. Code § 22-1004 (2014).

<sup>67</sup> 710 F.Supp.2d at 34.

<sup>68</sup> D.C. Code § 22-1004 (2008).

<sup>69</sup> D.C. Mun. Reg. tit. 24, § 1500.1.

<sup>70</sup> 710 F.Supp.2d at 45.

<sup>71</sup> 769 So. 2d 468, 470 (Fla. Dist. Ct. App. 2000).

<sup>72</sup> *Id.* at 471.

counsel and the opportunity to examine witnesses and offer evidence, the court found no due-process infirmity in the postseizure hearing and that a pre-seizure hearing was not necessary.<sup>73</sup>

As these cases demonstrate, by specifically providing for pre-hearing confiscation, APHIS would not risk infringing on the constitutional rights of current or past AWA licensees by immediately seizing an animal held in violation of the AWA.

## **E. PROPOSED MANDATED CONDITIONS FOR ALL AWA LICENSES**

While explicit authority to confiscate violators' animals constitutes a critical element of an effective regime for AWA license termination or revocation, APHIS's comprehensive system of regulating licensees must naturally extend beyond those events to work successfully. Therefore, ALDF suggests that the APHIS amend the current rules to provide for interested person intervention on behalf of the animals in any administrative revocation action initiated by the USDA, and other general conditions on the issuance of AWA licenses.

### **1. Interested Person Intervention on Behalf of the Animals**

ALDF proposes a provision, consistent with the USDA's authority to impose general conditions on all AWA licenses,<sup>74</sup> that interested persons may intervene in the administrative action initiated by the USDA to revoke an AWA license should USDA fail to confiscate the affected animals prior to initiation of the revocation procedures. This provision at 9 C.F.R. § 2.12 (excerpted from ALDF's proposed rule included in full in Section III above) would read:

- (c) Interested persons who do not have a possessory or ownership right in the animal may intervene in the administrative license revocation process on behalf of the animals if the USDA begins the revocation process without seizing the mistreated animals.

This proposed provision is modeled after a similar provision in North Carolina's state animal cruelty statute, N.C.G.S. § 19A-1, whereby any person in North Carolina may file suit in district court for permanent or preliminary injunction if an animal needs "to be removed from its owner" as a result of animal cruelty and/or neglect.<sup>75</sup> This statute has previously been invoked to permit animal protection organizations to provide care for animals suffering at the hands of licensees.

For example, in *Animal Legal Def. Fund v. Woodley*, the plaintiffs, the Animal Legal Defense Fund, invoked §19A-1 to request an injunction demanding that the defendants, who had

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<sup>73</sup> *Id.* at 472.

<sup>74</sup> 7 U.S.C. § 2133.

<sup>75</sup> N.C. Gen. Stat. Ann. §§ 19A-2-19A-4 (2014).

abused a large number of dogs and birds in their possession, forfeit all rights in those animals.<sup>76</sup> The court allowed for the removal of the animals from defendants' control and granted temporary custody of the animals to the plaintiff for proper care.<sup>77</sup>

## 2. General Conditions on the Issuance of Licenses

The AWA provides that the Secretary of Agriculture shall issue licenses “in such form and manner as he may prescribe.”<sup>78</sup> Thus, in conjunction with the USDA’s general authority to promulgate regulations necessary to effectuate the purpose of the AWA, the AWA also gives the USDA authority to impose conditions on AWA licenses.

ALDF proposes adding a general condition to the AWA licensing regulations, obliging the licensee to agree to disposition requirements for animals in its possession should its license be revoked, the licensee go out of business, or the license become defunct under any other circumstances. This regulation would be amended at 9 C.F.R. 2.12 (excerpted from ALDF’s proposed rule included in full in Section III above) to read:

- (d) The provisions of this section shall serve as a condition to the granting of any new or renewed AWA license.

In light of the OIG’s findings that APHIS inspectors routinely failed to bring effective enforcement actions against AWA violators, imposing such a condition on licensees upfront would raise awareness of the importance of animal welfare to the licensee regime and allow licensees to expect more rigorous and methodical enforcement.

## V. CONCLUSION

Based on the foregoing, Petitioners respectfully request that APHIS immediately create a regulatory process for confiscating animals when an Animal Welfare Act permit is revoked or a licensee goes out of business. The requested rulemaking will “insure that animals intended for...exhibition purposes or for use as pets are provided humane care and treatment,” as demanded by 7 U.S.C. § 2131.

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<sup>76</sup> 640 S.E.2d 777, 777-78 (2007).

<sup>77</sup> *Id.*; see also *Justice for Animals, Inc. v. Lenoir Cty. SPCA, Inc.*, 607 S.E.2d 317, 321 (2005) (“The trial court has subject matter jurisdiction pursuant to N.C. Gen. Stat. § 19A–2 over plaintiff’s claim to the extent it seeks an injunction against defendant by alleging the cruel treatment of animals, as defined in N.C. Gen. Stat. § 19A–1.”); *Justice for Animals, Inc. v. Robeson County*, 595 S.E.2d 773, 776–77 (2004) (holding that §19A “express[es] the General Assembly’s intent that the broadest category of persons or organizations be deemed ‘[a] real party in interest’ when contesting cruelty to animals.”)

<sup>78</sup> 7 U.S.C. § 2133.

Respectfully submitted,

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**[EXHIBITS  
OMITTED]**