



Animal and Plant
Health Inspection
Service

4700 River Road
Riverdale, MD 20737

To: Animal Defense Legal Fund

The Animal and Plant Health Inspection Service (APHIS) has completed its review of your petition dated July 19, 2016, requesting that APHIS promulgate regulations under the Animal Welfare Act (AWA), 7 U.S.C. §§ 2131 *et seq.*, relating to confiscation during the license revocation, suspension, relinquishment, and termination process. This petition requests several revisions to 9 C.F.R. § 2.12, including:

- An additional provision permitting APHIS confiscation of covered animals 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,” with the costs of the animal care to be covered by the licensee;
- An additional provision allowing interested persons to intervene on behalf of the animals in a license revocation action where APHIS has not already seized mistreated animals; and
- An additional provision conditioning license renewal on license applicants agreeing to comply with all the provisions set forth in 9 C.F.R. § 2.12.

The petition asserts that these provisions are needed because current license termination or revocation processes may leave animals in substandard conditions during and after license revocation or termination.

After careful consideration, APHIS has decided to deny your petition. While APHIS recognizes its authority under the Animal Welfare Act, including its specific authority to issue rules concerning confiscation, *see* 7 U.S.C. § 2146(a), it has decided not to amend its regulations to include the petition’s proposed changes for the reasons discussed in detail below. Although APHIS is aware of the 2010 Report by the Office of Inspector General and other instances of abuse identified in your petition, APHIS believes that its existing regulations provide adequate authority to address such concerns. APHIS is committed to preventing animal suffering, and will continue to monitor the issues addressed in the petition to determine whether rulemaking would be warranted in the future.

I. Provision permitting APHIS confiscation of covered animals following the initiation of an enforcement action that could result in license revocation, suspension, or termination

The petition advocates for a change in regulation 9 C.F.R. § 2.12 to allow APHIS to confiscate covered animals, following the initiation of an enforcement action that could result in license revocation or suspension, or upon relinquishment, suspension, or termination of a license “for any reason.” The proposed provision also requires that the licensee cover the cost of caring for the animal.

Section 2146(a) of the AWA gives APHIS specific confiscation authority: APHIS may issue regulations that provide for confiscation of “any animal found to be suffering as a result of a failure to comply with any provision” of the AWA or the regulations issued pursuant to the AWA. 7 U.S.C. § 2146(a). APHIS has promulgated confiscation regulations tied to the

specific standard set forth in that section: that the animal is “found to be suffering.” *See* 9 C.F.R. § 2.38 (with respect to registered research facilities) and § 2.129 (for dealers, exhibitors, intermediate handlers, and carriers subject to the AWA).¹ For example, with respect to research facilities, APHIS has promulgated a regulation providing that if an animal is “not being used to carry out research, testing or experimentation” and it is “found by an APHIS official to be suffering,” the APHIS official can take steps to correct these conditions and ensure “adequate care be given” to the animals. 9 C.F.R. § 2.38(e)(1). Then, if the facility “refuses to comply with this request, the APHIS official may confiscate the animal(s) for care, treatment, or disposal,” if the “circumstances indicate the animal’s health is in danger.” *Id.* The regulations also state that, “[i]f, in the opinion of the Administrator, the condition of the animal(s) cannot be corrected by this temporary care, the APHIS official shall confiscate the animal(s).” *Id.* § 238(e)(2). Similar regulations apply to dealers, exhibitors, intermediate handlers and carriers. *Id.* § 2.129(a)-(b).

The regulatory amendment you suggest is divorced from this statutory authority. Indeed, the amendment provides that APHIS may confiscate an animal upon the initiation of any enforcement proceeding that could result in license revocation or suspension, or upon the relinquishment, suspension, or termination of a license “for any reason.” Petition at 6. But license proceedings can implicate any number of issues, including issues that may be unrelated to the welfare of animals. For example, the AWA states that the Secretary “may suspend or revoke such license” if the Secretary has reason to believe that the licensee has violated “*any provision* of this chapter,” or any of its rules or regulations. 7 U.S.C. § 2149. Many requirements in the regulations do not directly address harm to animals. For instance, 9 C.F.R. § 2.35 specifies the recordkeeping requirements that research facilities must abide by, and § 2.50 lays out the ways in which owners must tag and identify all animals. *See also id.* § 2.4 (requiring that licensee “shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.”); *id.* § 2.126 (requiring that licensee permit APHIS officials to enter place of business and examine records). Section 2149 gives the Secretary the authority to initiate an enforcement proceeding for violations of any of these regulations, including those that do not concern animal suffering.

Similarly, the regulations provide that the Secretary may terminate a license for “any reason that a license application may be denied pursuant to 9 C.F.R. § 2.11.” 9 C.F.R. § 2.12. Section 2.11 provides reasons a license may not be issued, including if the licensee has “made any false or fraudulent statements” or who operates in violation of “any Federal, State, or local laws.” *Id.* § 2.11(a)(5), (6). Therefore, the statute and regulations contemplate proceedings for license terminations that do not involve any risk of harm to animals.

The only time that your proposed amendment references the “health or safety of the animal” is in proposed subsection (b)(1), which provides that when APHIS seizes an animal based on a “reasonable belief that prompt action is required to protect the health or safety of the animal,” APHIS shall provide

¹ The petition cites to the AWA’s general grant of authority, empowering the Secretary of Agriculture to “promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.” 7 U.S.C. § 2151. But as explained, the AWA also contains a specific grant of authority pertaining expressly to confiscation of animals. *See id.* § 2146(a). The more specific part of the statute, which ties confiscation to the health and safety of animals by requiring them to be “suffering,” governs APHIS’ legal authority to confiscate.

the licensee with a postseizure hearing. Petition at 6. The language in (b)(1), however, suggests that a hearing shall be provided *only in circumstances implicating the health or safety of the animals*, which raises significant questions about when a hearing would be provided in situations that do not implicate health or safety.

This conclusion does not mean that APHIS is unconcerned about the welfare of animals that are affected by license proceedings. To the contrary, while the outcome of a license revocation, suspension, or termination action is pending, APHIS officials can and do continue to inspect the animals after that action has been initiated. If the officials determine animals are suffering, they are instructed to confiscate those animals. *See* 9 C.F.R. § 2.38(e)(1); *id.* § 2.129(a)-(b). Moreover, pursuant to the statutory authority provided by 7 U.S.C. § 2159(a), if the officials deem the animals' health to be in serious danger, then APHIS will refer the case to Department of Justice to consider seeking an injunction against the licensee. But when APHIS initiates a license revocation, suspension or termination action against an owner, that does not necessarily mean that the animals' health or safety is in danger. If the animals are receiving appropriate care, then it would not be in the animals' best interest to move them, as the petition's new regulation may require. As the Petition recognizes, expanding APHIS' legal authority in that manner involves unsettled legal questions. *See* Petition at 14-16.

The petition also relies heavily on outdated data and APHIS practices that are no longer utilized since the petition was filed. Specifically, the petition cites incidents in 2006, 2007, 2009, 2010, 2011, and 2013 that do not reflect current practices. The Cricket Hollow Zoo has not held a license since 2017. Further, each of these incidents mentioned involve animal suffering, and in those circumstances, APHIS already has the statutory and regulatory authority to confiscate the animals at issue. Thus, what you have identified is not the need for additional statutory authority, but questions concerning the circumstances in which APHIS should exercise its existing authority. Towards that end, APHIS constantly strives to improve its oversight of its licensees and to enforce its regulations when it is warranted.

Since the incidents identified in your Petition, the Agency has taken important steps in this area. For example, since you filed your petition in 2016, APHIS has implemented extensive changes to the regulations governing the licensing process that allow it to successfully fulfill the purpose of the AWA. For instance, in 2019, APHIS revised its licensing requirements to reflect more stringent standards. *See* 84 Fed. Reg. 10,721-35. Those revisions included changing its license renewal process to a requirement that applicants demonstrate to APHIS that they are complying with the AWA from the prior practice of self-certification of compliance. *See id.* at 10,722; 9 C.F.R. § 2.3. Additionally, the updated regulations have strengthened licensing requirements to prevent the issuance of licenses to those who do not operate as bona fide exhibitors but apply for an AWA license to circumvent State laws regarding animal ownership. Under the prior regulations, anyone "*intending* to operate as a dealer, exhibitor, or operator of an auction sale" could apply for a license, 9 C.F.R. § 2.1(a)(1) (2018), while the new regulations no longer include those who only intend to operate as such, *see id.* § 2.1(a)(1) (2020).

II. Provision allowing interested persons to intervene on behalf of the animals in a license revocation action

Next, the petition proposes a general condition that allows any interested persons to intervene in an administrative action initiated to revoke an AWA license in cases where APHIS has not already confiscated the affected animals.

Permitting any party to intervene in an administrative enforcement proceeding is overly broad and could add significantly to the number of parties in a given enforcement proceeding. This would increase the complexity and cost of such proceedings, diverting more agency resources toward cases that may not even concern animal suffering. The increased filings and protracted litigation that could result would dramatically increase the burden on the agency.

Further, this proposed provision would apply to all license revocation proceedings, regardless of whether those proceedings involve animal confiscation. As described in Part I., APHIS may initiate a license revocation action against a licensee for reasons other than mistreatment of animals. Therefore, permitting broad-scale intervention in license revocation proceedings would not even address whether animals at risk of harm are confiscated.

Rather than permitting intervention in any circumstance, USDA administrative law judges consider intervention on a case-by-case basis, subject to the standards set forth in the Administrative Procedure Act (APA). 5 U.S.C. § 554(c)(1) (permitting intervention in formal adjudications when “time, the nature of the proceeding, and the public interest permit”); 5 U.S.C. § 555(b) (permitting intervention when “the orderly conduct of public business permits”). As the D.C. Circuit has held, “[w]e do not believe that the affirmative grant of a right to appear is blindly absolute, without regard to time of appearance, the status of the proceedings, the administrative avenues established by other statutes and agency rules for participation, or, most importantly, as ‘the orderly conduct of public business permits.’” *Easton Utilities Comm’n v. Atomic Energy Comm’n*, 424 F.2d 847, 852 (D.C. Cir. 1970).

Moreover, APHIS has additional avenues through which parties can communicate with it on a particular subject. That conclusion does not mean that APHIS is unwilling to listen to the views of interested parties on issues before the agency. Parties who wish to communicate with APHIS about a given licensing proceeding can do so through several other avenues. For example, parties are welcome to write letters to APHIS voicing their positions. They can also file an online complaint on the USDA website regarding animals covered under the AWA. *Animal Welfare Complaint*, USDA-APHIS, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/complaint-form> (last visited Mar. 28, 2022).

III. Provision conditioning license renewal on applicants agreeing to comply with the other provisions in 9 C.F.R. § 2.12

Finally, the petition proposes adding a subsection stating that the “provisions of this section shall serve as a condition to the granting of any new AWA license.” Petition at 7.

This provision is unnecessary because licensees are already obligated to comply with the requirements of the AWA and its regulations. *See, e.g.*, 9 C.F.R. § 2.1(e) (“The failure of any person to comply with any provision of the Act, or any of the provisions of the regulations or standards in this subchapter, shall constitute grounds for denial of a license; or for its suspension or revocation by the Secretary, as provided in the Act.”); *id.* § 2.2(a) (“The [license] applicant shall acknowledge receipt

of the regulations and standards and agree to comply with them by signing the application form before a license will be issued.”). And to the extent the petition seeks to condition licenses on the other proposed amendments, for the reasons stated above, those amendments are unwarranted at this time.

IV. APHIS’ limited resources and focus on animal welfare

Even if these regulations were warranted, we do not believe adopting them now would be the best use of APHIS’ limited resources. As explained in Part I., the current regulations focus on animal “suffering,” *see* 9 C.F.R. § 2.38(e)(1); *id.* § 2.129(a)-(b), meaning that APHIS concentrates its confiscation authority on animals that are directly at risk of harm. The petition’s suggested amendments would encompass any license proceeding, potentially expanding the agency’s efforts beyond animals whose health or safety is at risk. The amendments could accordingly lead to a dramatic expansion in administrative proceedings, which would quickly exhaust APHIS resources and personnel. As your petition notes, the expansion of the agency’s authority could also lead to additional litigation about APHIS’s ability to confiscate animals even when those animals are not suffering, and whether it can do so without prior notice and a hearing for licensees. APHIS believes it is a better use of its time and resources to focus its confiscation efforts on the animals most in need.

APHIS is also currently focused on a number of time-consuming projects relating to animal welfare. For example, APHIS is working to promulgate regulations establishing new criteria for the humane handling, care treatment, and transportation of certain birds. *See* 87 Fed. Reg. 9,880; *USDA Seeks Public Comment on Proposal to Establish Animal Welfare Regulations for Birds*, USDA-APHIS, https://www.aphis.usda.gov/aphis/newsroom/news/sa_by_date/sa-2022/awa-birds (Last visited Mar. 28, 2022). Additionally, APHIS is in the process of updating regulatory standards under the Horse Protection Act that would better safeguard the health and safety of horses. *See* 86 Fed. Reg. 70,755; *USDA Withdraws Proposed Horse Protection Rule, Plans to Issue Strengthened Regulations*, USDA-APHIS, https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2021/sa-12/horse-protection-regulations (Last visited Mar. 28, 2022).

APHIS will continue to monitor the health and safety of animals, including during the license revocation, suspension, relinquishment, suspension, and termination processes.

For the reasons stated above we believe that conducting rulemaking as requested in this petition would not advance animal welfare and would divert resources from the agency’s central mission. We are, therefore, denying your petition.

Sincerely,

Dr. Betty Goldentyer
Deputy Administrator
Animal Care