

June 3, 2021

The Honorable Thomas J. Vilsack
 Secretary of Agriculture
 U.S. Department of Agriculture

The Honorable Phyllis K. Fong
 Inspector General
 U.S. Department of Agriculture

PEOPLE FOR
 THE ETHICAL
 TREATMENT
 OF ANIMALS
 FOUNDATION

Dear Mr. Secretary and Ms. Fong:

I am writing on behalf of PETA to request an investigation into newly uncovered evidence that Animal Care officials unlawfully destroyed agency records, issued fraudulent Animal Welfare Act (AWA) inspection reports, and attempted to hide evidence of their malfeasance by improperly invoking Freedom of Information Act (FOIA) exemptions and withholding portions of records.

In late 2020, PETA received over 200 pages of USDA records related to the Monterey Zoological Society ("Monterey Zoo") in response to a FOIA request. The agency improperly withheld portions of the records that pertained to a September 25, 2017, inspection as "nonadjudicated statements made pertaining to a licensee that did not reflect the Agency's actual results of an inspection performed of the licensee's facility."¹ PETA appealed, and on March 29, the USDA released the records.²

Evidently, the purpose of withholding the records was to conceal the USDA's misconduct. The unredacted documents include an exit interview memo showing that Animal Care issued [a "clean" report](#) identifying no non-compliant items during the September 2017 inspection, even though inspectors actually identified [two dozen potential AWA violations](#), many of which related to veterinary care.³ For example:

- The Monterey Zoo's records showed that a cavy died "after several days of decline without very [sic] receiving veterinary care." Owner Charlie Sammut claimed the records were poor and a veterinarian had seen the animal.
- Inspectors observed an elderly kangaroo experiencing tremors and vision loss, and directed Sammut to document whether a veterinarian had evaluated the animal.
- Two elephants had hyperkeratosis, which Sammut claimed had been evaluated by a veterinarian. No records of the evaluation were available during the inspection.

The exit memo also states, "photos and videos from the day of inspection will be discarded." PETA did not receive any photos or videos from the inspection in response to its FOIA request, and on April 7, an Animal and Plant Health Inspection Service (APHIS) employee confirmed that officials had not located any.⁴

Additional records indicate that the inspectors and then-Deputy Administrator of Animal Care, Bernadette Juarez, were primarily concerned with appeasing Sammut, rather than with carrying out Animal Care's duty to ensure that animals used in exhibition "are provided humane care and treatment." 7 U.S.C. § 2131. [Emails show](#) that in November 2017, Ms. Juarez questioned Animal Care's Director of Animal Welfare Operations, Dr. Bob Gibbens, after Sammut complained that inspectors had threatened to cite him for not allowing an inspection on a day when—he claimed—a windstorm had blown down fences, resulting in escaped animals.⁵ The two inspectors involved denied this story, claiming no knowledge of a windstorm or animal escapes.

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They said that when they arrived on June 5, 2017, Sammut would not allow them to inspect because he was supervising contractors on site (one inspector believed they were tree trimmers, and Sammut would "lose a lot of money" if he sent them away; the other inspector believed the contractors were "enhancing the entrance" of the facility).⁶ According to USDA guidance, inspection refusals are *critical* non-compliances.⁷ But "[i]n a spirit of cooperation and to establish a good working relationship," the inspectors did not issue any report at all, even though they considered citing the exhibitor for a refused or attempted inspection.⁸ They also evidently assisted Sammut with renewing the Monterey Zoo's AWA license, which had expired.⁹

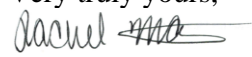
When officials finally returned and were allowed to inspect on September 25, 2017, they identified and discussed the "many problem areas"¹⁰ mentioned above, but issued a fraudulent inspection report stating that they had not identified any non-compliances.¹¹ A year later, in November 2018, Ms. Juarez informed Dr. Gibbens and several other Animal Care employees that she had met with Sammut and he "indicated his relationship is improving with his inspectors following the incident with the storm."¹²

Around the same time, Animal Care bungled the investigation of a dangerous incident that occurred at the Monterey Zoo on [June 20, 2018](#), in which an elephant used for public contact thrashed and stepped on a handler who had been "aggressive" with her.¹³ [A second worker](#) beat the animal with a cane to get her to stop.¹⁴ The injured employee was hospitalized, and sustained a broken back and ankle.¹⁵ On June 25, 2018, Animal Care received an [anonymous complaint](#) from a guest who witnessed the attack and claimed, "the owner asked us to delete the video we took," and felt they had been made to "destroy evidence."¹⁶ The agency did not immediately investigate. It [lost track of the complaint](#) for several months.¹⁷ In December 2018, inspectors conducted a cursory review of the incident and issued a ["clean" inspection report](#),¹⁸ even though guidance makes clear that it is a *critical* non-compliance to handle an animal in a manner that results in an attack and where "the circumstances or practices that caused the incident posed a high risk to the animal and/or the human and could have led to serious injury or death to the animal and/or the human."¹⁹ A California worker safety investigation found that the zoo failed to establish, implement, and maintain an effective program to prevent worker injury.²⁰

As detailed in the enclosed appendix, strong evidence indicates that Animal Care officials violated federal law by destroying government records, issuing a fraudulent inspection report, and concealing material facts in a matter before an executive agency. *See* 18 U.S.C. §§ 2071, 1001. These were not the isolated actions of rogue employees. Animal Care leadership was directly involved, and the actions are consistent with policies set by those leaders whose goals were to protect licensees from disparagement and artificially inflate AWA compliance statistics. Because Animal Care has hidden much of its activity from the public through its abuse of FOIA exemptions in recent years, the true scope of misconduct is unknown. PETA expects a competent investigation may reveal that similar fraud, concealment, and destruction of records have been widespread.

PETA respectfully requests a thorough investigation into these matters. The USDA must fully rescind the policies that enabled this unlawful activity, and must hold accountable the individuals who directed it, including through termination of employment. Please also comply with your obligations under the Federal Records Act to notify the Archivist and the Attorney General of the unlawful destruction of records. Thank you for your attention to this important matter. I look forward to your prompt response.

Very truly yours,



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Appendix

False Statements and Unlawful Destruction of Agency Records

In any matter within the jurisdiction of the executive branch, it is unlawful to make or use "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."

18 U.S.C. § 1001(a)(3). It is also unlawful to falsify, conceal, or cover up by any trick, scheme, or device a material fact. *Id.* § 1001(a)(1). PETA believes that Animal Care officials have committed the following violations of this law:

- The September 25, 2017, inspection report states, "No non-compliant items identified during this inspection," even though inspectors identified *two dozen* potential AWA violations. The report is a false writing that Animal Care officials made or used in a matter within the jurisdiction of the executive branch, knowing that it contained a false, fictitious, and fraudulent statement.
- APHIS and Animal Care employees falsified, concealed, and covered up the true findings of the September 25, 2017, inspection by issuing the fraudulent inspection report, destroying the photos and videos taken during the inspection, and unlawfully withholding the evidence of these apparent crimes from PETA in response to its FOIA request.
- Animal Care officials also concealed or covered up the June 5, 2017, inspection that Sammut refused to allow by choosing to issue no inspection report documenting the attempted inspection.

Additionally, the destruction of records—except in accordance with records disposal schedules set by the National Archives and Records Administration (NARA)—violates the Federal Records Act. 44 U.S.C. §§ 3314, 3303a(d); 36 C.F.R. § 1230.3(b). Unlawful destruction of records is a federal crime, punishable by a fine, imprisonment, and/or removal and disqualification from holding public office. 18 U.S.C. § 2071.

The Secretary of Agriculture has a nondiscretionary duty to notify NARA of the actual unlawful deletion of federal records, and, with NARA's assistance, "shall initiate action through the Attorney General for the recovery of records[.]" 44 U.S.C. § 3106; *see Jud. Watch, Inc. v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016). APHIS's NARA-approved records retention schedules require the agency to preserve inspection-related materials for at least three years, if not more. *See USDA APHIS Records Management Handbook, Program Investigations and Violations*, <https://www.aphis.usda.gov/library/records/downloads/PIV.pdf> (general material to be destroyed after three years; humane treatment case files disclosing insufficient evidence of a violation to be destroyed one year after case closed; humane treatment case files disclosing a violation to be destroyed 7 years after case closed); *USDA APHIS Records Management Handbook, Animal Care*, <https://www.aphis.usda.gov/library/records/downloads/ANC.pdf> (general material to be destroyed after three years).

PETA believes Animal Care officials violated the Federal Records Act when they destroyed photos and videos from the September 25, 2017, inspection mere days after deciding to issue a fraudulent "clean" report. There is no record that this unlawful destruction of records has been referred to NARA. *See NARA, Unauthorized Disposition of Public Records*, <https://www.archives.gov/records-mgmt/resources/unauthorizeddispositionoffederalrecords> (last visited June 3, 2021).

Moreover, it appears that Animal Care's erasure of photos and videos immediately following an inspection is a common practice. At a meeting with animal welfare stakeholders on May 14, 2021, PETA asked Animal Care about the deletion of inspection report photos and videos. Dr. Gibbens stated that inspectors routinely discard photographs that, in their view, "do not accurately or adequately document" a non-compliance, and "only those photographs that are needed to document the non-compliance are kept." He then referred to Chapter 2 of the *Animal Welfare Inspection Guide* for the agency's guidance to inspectors on photography during inspections.

Section 2.5 of the *Guide* provides a list of situations where photos or videos "**must** be taken to document photographable noncompliant item(s)" and admonishes these are the "**only**" circumstances under which inspectors should make such recordings. USDA, *Animal Welfare Inspection Guide* 2-14 – 2-15 (2021) (emphasis original). Specifically, inspectors must photograph direct, critical, or repeat non-compliances; veterinary care citations; non-compliances cited at a facility that is under investigation; and non-compliances that the licensee disagrees with or is likely to appeal. *Id.* There is no directive about erasure of photos and videos. *Id.* This guidance provides further support that the clean inspection report issued on September 25, 2017, was fraudulent, because it directs inspectors *only* to photograph specific non-compliances—which suggests that such non-compliances are what the Monterey Zoo's inspectors believed they were documenting.

Ethics in Government Act

Regulations implementing the Ethics in Government Act include the following "basic obligation of public service":

Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct . . .

5 C.F.R. § 2635.101(a).

Additional general principles governing federal employee conduct include requirements that employees:

- Place loyalty to law and ethics "above private gain," and not use public office for private gain. *Id.* § 2635.101(b)(1), (b)(7).
- Put forth "honest effort" in the performance of their duties. *Id.* § 2635.101(b)(5).
- Act impartially and not give preferential treatment to any private organization or individual. *Id.* § 2635.101(b)(8).
- Protect and conserve federal property. *Id.* § 2635.101(b)(9).
- Disclose waste, fraud, abuse, and corruption to appropriate authorities. *Id.* § 2635.101(b)(11)
- Endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards. *Id.* § 2635.101(b)(14)

Animal Care employees appear to have violated these principles by falsifying the September 25, 2017, Monterey Zoo inspection report, destroying records of the report, and failing to document an attempted inspection on June 5, 2017, in order to maintain a good relationship with the licensee. By intentionally concealing AWA non-compliances, these employees appear to have given preferential treatment to a private organization, thereby failing to place loyalty to the law above the licensee's private gain. In this case, the "private gain" is that of a misleadingly spotless inspection record for the Monterey Zoo. Endorsement of a private enterprise is considered an impermissible use of public office for private gain, although "documentation of compliance with agency requirements" is permitted. *Id.* § 2635.702. In this case, though, the federal employees' "documentation of compliance" was false.

As stated in the cover letter, these were not the isolated actions of rogue employees. Animal Care leadership was directly involved, and the actions are consistent with the broad policies set by those leaders, whose goals were to protect licensees from disparagement and artificially inflate AWA compliance statistics. These policies, which are discussed in the next section, also appear to violate the basic obligation of public service because they elevate the interests of private entities—AWA licensees, which the agency now calls "customers"—above loyalty to the AWA itself.

Fraudulent Behavior Enshrined and Encouraged Through Animal Care Policy

In 2019, Animal Care released an "Impact Report" that proclaimed, "we expect and require complete honesty and integrity in all we do."²¹ It attributed "[q]uality inspections and guidance" with helping regulants in "gaining an accurate picture of their compliance status, and working through compliance issues to ensure humane animal care."²² Above all, the report emphasized "customer service," referring to regulants as "customers" 19 times in five pages.²³ The program's single-page strategic plan, highlighted in the report, includes a section called "What we Expect From Ourselves" that lists six qualities, including honesty, integrity, and accountability.²⁴

In reality, Animal Care has adopted policies that systematically erode honesty, integrity, and accountability in AWA enforcement. Between FY2015 and FY2020, enforcement actions brought against AWA licensees plummeted by 90 percent, settlement agreements dropped by 86 percent, and warnings plunged by 100 percent.²⁵ Over a similar period, the number of regulants deemed to be in "substantial compliance" with the AWA grew from 95 percent to 99 percent. Senior USDA officials reportedly even prevented the seizure of suffering animals,²⁶ and to PETA's knowledge, APHIS failed to carry out a single animal confiscation between 2017 and 2020. By comparison, the agency "either confiscated or facilitated the voluntary surrender of over 11,000 animals" between 2010 and 2015.²⁷ At the May 14, 2021, meeting with stakeholders mentioned above, PETA asked whether Animal Care intends to use confiscations as an enforcement tool in the future. Deputy Administrator Dr. Betty Goldentyer said it's possible, but "we're hoping we won't need to do it again," and explained that complicated legal requirements make confiscation challenging. Yet as far back as 2010, APHIS declined to implement the Office of Inspector General (OIG) suggestion to revise its rules to remove barriers to immediate confiscation of dying or seriously suffering animals.²⁸

Table 1. Animal Care Enforcement Statistics²⁹

	FY2015	FY2016	FY2017	FY2018	FY2019	FY2020
Cases Initiated	290	239	205	19	17	30
Warnings	181	192	157	44	2	0
Settlement Agreements	28	32	13	7	4	4
Administrative Complaints	36	23	2	1	Unknown	5 ³⁰
Administrative Decisions	Unknown	39	35	10	10	24
Number of "customers"	7,378	8,354	8,470	8,676	8,954	8,751
Number of facilities	10,399	10,730	12,179	12,338	12,851	Unknown
Number of inspections	10,505	9,226	11,072	10,342	9,326 ³¹	5,620 ³²
Customers in "substantial compliance"	95%	96%	96%	98%	96 - 99% ³³	97%

These changes come even though the number of licensees, registrants, and facilities has steadily grown by 18 to 19 percent. They do not appear to correlate with the number of inspections conducted, which has wavered between 9,000 and 11,000 per year. For example, in FY2016, Animal Care conducted 9,226 inspections and initiated 239 enforcement cases; in FY2019, it conducted 9,326 inspections and initiated only 17 cases. Nor does the enforcement drop correlate with any substantive change to animal welfare standards.

The turning point in enforcement—based on Animal Care's numbers—appears to have occurred between FY2016 and FY2017 (Oct. 1, 2015 - Sept. 30, 2017), when the program officially turned away from its regulatory duties and began to enshrine policies that prioritize the welfare of animal-based businesses over the welfare of animals. In 2015, APHIS unilaterally re-envisioned its role from that of a regulatory agency to one of a customer service center. (Of course, the words "customer" or "customer service" appear nowhere in the AWA.) A strategic plan issued under APHIS administrator Kevin Shea in January 2015 announced, "While we will still have a regulatory role, it won't be the only or in some cases even the primary way we contribute

to . . . animal welfare."³⁴ It also emphasized, "APHIS will work closely with its stakeholders and partners to explore alternatives to rulemaking."³⁵ PETA requested a meeting with Secretary Vilsack at the time, pointing out that the agency's assertion that "collaborating with regulated entities is the best way to ensure compliance," directly contradicted OIG findings that such collaboration was not effective at achieving AWA compliance.³⁶ The Secretary declined to meet with PETA.

In January 2016, Ms. Juarez took over leadership of Animal Care, and under her governance—alongside Mr. Shea, Dr. Gibbens, and Dr. Goldentyer—the program's accountability rapidly declined. The agency stepped away from a regulatory role, and took actions to protect its "customers" from scrutiny by concealing and falsifying public records, eliminating guidance documents, removing inspectors' discretion in interpreting the AWA's standards, and deferring to the regulated industry. For example:

- **Teachable Moments.** In 2016, the agency formalized a practice of not documenting certain non-compliant items on inspection reports, instead putting them on separate, secretive "Teachable Moments" forms.³⁷ As a result, inspection reports did not accurately reflect the actual findings of the inspections. Teachable Moments records were only accessible through FOIA requests, which took months or years to fill, and often arrived heavily redacted, making it impossible to determine which Teachable Moments corresponded to which licensees. Animal Care designed this system to conceal AWA non-compliances from the public: in a March 2019 meeting with PETA's attorneys, Ms. Juarez admitted that the purpose of Teachable Moments was to protect regulated entities from "disparagement." Likewise, at an industry meeting for dog breeders held jointly by the USDA and the Missouri Department of Agriculture, senior APHIS officials reportedly announced that the agency would use Teachable Moments instead of citations "to enable breeders to sell their dogs to pet stores," because citing violations is an "impediment to such sales."³⁸ Animal Care continues to use Teachable Moments to avoid citing licensees, although it finally began posting them on its website in 2020, after Congress directed APHIS to "make publicly available via searchable database, in their entirety without redactions except signatures, . . . all reports or other materials documenting any non-compliances observed by USDA officials."³⁹
- **Deference to veterinarians.** Under the AWA's implementing regulations, Animal Care is responsible for assessing whether the care an animal receives is adequate, whether the methods are appropriate, and whether the attending veterinarian is qualified to be providing care to the species.⁴⁰ Although attending veterinarians are the paid employees or agents of AWA regulants, in August 2018, Animal Care announced that it would treat them as compliance "partners" whose judgment is entitled to near total deference.⁴¹ It revised the *Animal Welfare Inspection Guide* to include complicated instructions to inspectors that encourage "cooperation" with veterinarians and discourage citations. In essence, the instructions indicate that as long as a licensee has consulted with a veterinarian and is complying with her instructions, inspectors should not inquire further into the adequacy or appropriateness of care, even when there are strong indications that the care provided is inadequate or inappropriate. There is no guidance on how inspectors are to assess the qualitative adequacy and appropriateness of care, and inspectors are even instructed: "Do not challenge the attending veterinarian's diagnosis or instructions."⁴² To compound this issue, Animal Care does not appear to verify whether attending veterinarians have the minimum required qualifications, even though an "attending veterinarian," by definition, must have "received training and/or experience in the care and management of the species being attended."⁴³
- **Self-reporting.** In 2018, Animal Care formalized a policy directing inspectors not to cite licensees for certain violations. Specifically, inspectors were not allowed to cite for "non-critical" violations if the licensee identified the issue on their own and took action to correct it. They were also not allowed to cite for "critical" violations meeting certain criteria if the licensee self-reported it.⁴⁴ The policy specifically stated that if the self-reported violations met the enumerated criteria, "Animal Care will not document the non-compliance on an inspection report and will make a note of the voluntary-reporting[.]"⁴⁵ As with Teachable Moments, the effect of this policy was to conceal a licensee's true compliance history and to

inflate compliance statistics artificially. Following a lawsuit brought by animal protection groups challenging the legality of the self-reporting rule, APHIS rescinded the policy in 2021.⁴⁶

- **Letter of the law.** The policies discussed above exist nowhere within the AWA or its implementing regulations, so it's ironic that in 2018, Animal Care instructed inspectors to follow the exact "letter of the law"⁴⁷ in applying animal welfare standards. The AWA's implementing regulations are intentionally vague to allow flexibility of interpretation, given the hundreds of varied species to which they apply. This instruction severely curbed inspectors' ability to use their professional judgment to interpret the AWA's standards to help animals. For example, dust baths are an essential aspect of chinchilla health and husbandry. In the March 2019 meeting mentioned above, Ms. Juarez said she had prevented an inspector from citing a licensee for failing to provide chinchillas with dust baths because no regulation expressly requires them. Likewise, in 2018, the USDA quietly discarded its *Animal Care Policy Manual*, which formerly provided guidance and clarity on how the regulations should be applied under specific circumstances. In a May 7, 2020, meeting with stakeholders—which Animal Care did not record and asked listeners not to record—Animal Care's leadership explained that the AWA's implementing regulations are the only legal standards it follows, so its *Policy Manual* was "no longer necessary." By denying inspectors the discretion to interpret the AWA's intentionally vague standards, Animal Care has constricted their ability to cite for animal welfare problems, thereby artificially inflating compliance statistics while preventing inspectors from using their authority to help animals.
- **Records blackout.** On February 3, 2017, APHIS abruptly removed all inspection reports, regulatory correspondence, research facility annual reports and enforcement records from its website.⁴⁸ As a result, the public could only access these records by submitting FOIA requests, which took months or years for the agency to fill. When records were released, they were often so heavily redacted that it was nearly impossible to discern the contents. Following multiple successful lawsuits filed by PETA and other animal protection organizations, as well as action from Congress, the agency was forced to restore nearly all of the records that were previously available on the website.⁴⁹ This blackout protected licensees and Animal Care from scrutiny by preventing the public from easily accessing public records in a meaningful and timely manner.
- **Delegation to industry.** In January 2018, APHIS sought feedback on whether to expand the use of inspections and certifications by industry-based, third-party accrediting bodies in determining how often to inspect each AWA facility.⁵⁰ Ms. Juarez explained, "We are always looking for ways to serve our regulated community and direct our resources more effectively,"⁵¹ and the public notice signed by Mr. Shea suggested that the USDA was considering whether reducing its own inspections would "incentiv[ize] the use of private accrediting programs and create a "well-functioning market" for such programs."⁵² In May 2018, after receiving more than 35,000 comments overwhelmingly opposing the proposal—including comments from PETA arguing in part that it would constitute an unlawful delegation of federal authority to private parties—APHIS announced that it would not "establish new criteria for recognizing third-party inspection and certification programs when determining the Agency's own inspection frequency."⁵³ Evidently, this statement was false. According to Harvard Law School's Animal Law & Policy Clinic, new internal agency records show that APHIS secretly made it "mandatory" for inspectors not to conduct full investigations of labs accredited by the Association for the Assessment and Accreditation of Laboratory Animal Care International (AAALAC), and that the agency even denied inspectors' requests to conduct full inspections because it would not be "fair" to the labs.⁵⁴ It is not clear whether this policy extends to accreditation in other sectors.

Another apparent consequence of the agency's turn away from its regulatory role was identified in an OIG audit report released in March 2021. In 2010, APHIS agreed to implement regulations and guidance to require exhibitors to report attacks and escapes of dangerous animals, and to establish public barrier requirements for these animals. It developed a work plan and completed an economic analysis in January 2014. "For the next 5

years, APHIS took no action," and was "unable to provide an explanation" for it.⁵⁵ In March 2019, "APHIS senior officials" canceled the regulations via a single email "without any support or analysis regarding the continued need of the regulatory change."⁵⁶ The timing of the work stoppage—just a year before APHIS released its 2015 strategic plan that would "explore alternatives to rulemaking"—suggests that the rule was a casualty of this strategic vision. Had APHIS adopted rules requiring effective barriers and animal attack reporting, it's possible that the June 2018 elephant attack at the Monterey Zoo would have been prevented, or at least would have been reported to the USDA by the licensee and investigated in a timely manner.

The result of these policies has been a decline in citations and the near halting of enforcement actions. The *Washington Post* reported that the number of AWA citations dropped substantially between 2017 and 2018:

In 2017, inspectors recorded more than 4,000 citations, including 331 marked as critical or direct, according to the Animal Welfare Institute, an advocacy group that tallied the figures using inspection reports published on a USDA website. In 2018, the number of citations fell below 1,800, of which 128 were critical or direct.⁵⁷

This has allowed Animal Care to claim that an astonishingly high number of licensees are in "substantial compliance" with the law. Even the term "substantial compliance" is problematic. In the May 2020 meeting with stakeholders mentioned above, Dr. Gibbens explained that "substantial compliance" includes facilities that have not been cited for critical, direct, or repeat non-compliances, or that had three or fewer total non-compliances. Teachable Moments are not factored in to the "substantial compliance" metric. Even more concerning is that the failure to cite licensees for violations hinders more substantive enforcement measures. In 2020, APHIS adopted new licensing rules that it claimed will "prevent individuals and businesses with a history of noncompliance from obtaining a license or doing any regulated activities with regulated animals."⁵⁸ Yet how can Animal Care meaningfully evaluate a licensee's history of non-compliance if its own records are not accurate? (At the May 2021 meeting with stakeholders, APHIS walked back its claim that it will consider regulants' compliance histories in licensing decisions.)

These policies have made it impossible for consumers and regulators to glean accurate information about AWA licensees and AWA enforcement. By reducing how and when inspectors are able to cite licensees, Animal Care has created the false impression that some of its licensees are providing animals with adequate or even "good" welfare because they're not being cited for violations. For example, Animal Care has issued the Monterey Zoo *zero* citations since 2014;⁵⁹ yet in 2017 alone, officials failed to document a refused inspection, and issued a clean inspection after observing 24 potential non-compliances that impacted animals' health and welfare.

The Monterey Zoo example reveals for the first time that the USDA has gone further than previously known to protect licensees, conceal the truth from the public, and inflate compliance numbers. A refused inspection was never documented; a fraudulent clean inspection report was issued; evidence of noncompliance was destroyed; and Animal Care attempted to cover it all up by initially preventing PETA from accessing the records (claiming through agency doublespeak that the records didn't reflect the actual results of the inspection). This fraudulent behavior was encouraged and enshrined through Animal Care's policy, directed or approved by those at the highest levels of APHIS, and warrants a full investigation.

Action Requested

PETA respectfully requests a thorough investigation into these matters. The individuals who directed the unlawful activity must be held fully accountable (including through termination of employment), and Animal Care must fully rescind the policies that enabled this unlawful activity.

Specifically, PETA requests answers to the following questions:

1. Who instructed inspectors to issue a fraudulent "clean" inspection report for the September 25, 2017, inspection, even though they documented 24 potential AWA violations?
2. Who directed inspectors to destroy photos and videos of the September 25, 2017, inspection?
3. Who directed inspectors not to document the attempted inspection in June 2017?
4. Who directed FOIA officers to redact the portions of records documenting the USDA's illegal destruction of photos and videos and fraudulent issuance of a "clean" inspection report?
5. What steps is the USDA taking to redress the law violations documented in this complaint?
6. How pervasive was and is the destruction of photos, videos, and other records of government activity under the AWA?
7. How pervasive was and is the practice of issuing AWA inspection reports that do not accurately reflect inspectors' findings?
8. What specific steps will Animal Care take to ensure transparency and meaningful AWA enforcement in the future?

Animal Care must prioritize robust, meaningful AWA enforcement in order to achieve the law's overarching goal of ensuring regulated animals receive humane care and treatment. All non-compliances should be documented on inspection reports; the *Animal Care Policy Manual* should be restored and updated to assist inspectors in implementing the law; inspectors must be given discretion to interpret and apply the standards to protect animals; cases involving serious, chronic, or longstanding violations should be investigated for possible enforcement action; and the agency should take action and seek penalties that meaningfully protect animals and deter recidivism.

Endnotes

- ¹ Ex. 1, Excerpts of Final Response, FOIA Request No. 2020-APHIS-00563-F (Nov. 24, 2020), at 1-3.
- ² Ex. 2, Excerpts of Response to FOIA Appeal, Tracking No. 2021-APHIS-00067-A (2020-APHIS-00563-F) (Mar. 29, 2021).
- ³ Ex. 2 at 9-10 (USDA, Exit Interview Memo Charlie Sammut (Oct. 4, 2017)).
- ⁴ Ex. 3, Email from Christine Jones, APHIS, to Elisabeth Custalow, PETA Foundation (Apr. 7, 2021).
- ⁵ Ex. 2 at 11 (Email from Robert Gibbens, Director of Animal Welfare Operations, to Kathleen Garland, SACS (Nov. 14, 2017)). There are no reports of a windstorm in Salinas on or around June 5, 2017.
- ⁶ *Id.* at 16-17, 19 (Email from Michael Schnell, VMO, to Kathleen Garland, SACS (Nov. 14, 2017 9:54 AM); Email from Pamela Smith, VMO, to Kathleen Garland, SACS, & Michael Schnell, VMO (Nov. 14, 2017 10:04 AM); Email from Michael Schnell, VMO, to Kathleen Garland, SACS (Nov. 14, 2017 10:13 AM)).
- ⁷ USDA, *Animal Welfare Inspection Guide 2-10* (2021), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.
- ⁸ Ex. 2 at 23 (Email from Michael Schnell, VMO, to Pamela Smith, VMO (November 14, 2017 10:22 AM)).
- ⁹ *Id.* at 17, 19 (Email from Pamela Smith, VMO, to Kathleen Garland, SACS, & Michael Schnell, VMO (Nov. 14, 2017 10:04 AM); Email from Michael Schnell, VMO, to Kathleen Garland, SACS (Nov. 14, 2017 10:13 AM)).
- ¹⁰ *Id.* at 17 (Email from Pamela Smith, VMO, to Kathleen Garland, SACS, & Michael Schnell, VMO (Nov. 14, 2017 10:04 AM)).
- ¹¹ *Id.* at 3 (USDA, Inspection Report, Monterey Zoo (93-C-1022) (Sept. 25, 2017)).
- ¹² *Id.* at 31 (Email from Bernadette Juarez, Deputy Administrator, to Michael Schnell, VMO, et al. (Nov. 11, 2018)).
- ¹³ Ex. 4, Excerpts of Cal/OSHA Investigation of June 20, 2018, Elephant Attack at Monterey Zoo at 1 (Cal/OSHA, Investigation Summary No. 109431, Monterey Zoo (June 20, 2018)).
- ¹⁴ *Id.* at 5-6 (Cal/OSHA, Employee/Witness Statement of ██████████ (July 2, 2018)).
- ¹⁵ *Id.* at 3-4 (Cal/OSHA, OIS Accident Report, Monterey Zoo (June 25, 2018); Cal/OSHA, OIS Accident Report, Monterey Zoo (June 21, 2018)).
- ¹⁶ Ex. 2 at 36 (USDA, Animal Welfare Complaint Submission to AC West (June 25, 2018)).
- ¹⁷ Ex. 2 at 37-100 (Emails and records sorting out inspection conducted on Dec. 6, 2018)).
- ¹⁸ Ex. 2 at 88, 91-92 (USDA, Inspection Report, Monterey Zoo (93-C-1022) (Dec. 6, 2018); USDA Animal Welfare Complaint Form AC18-512 (Dec. 6, 2018)).
- ¹⁹ USDA, *Animal Welfare Inspection Guide 2-10 – 2-11* (2021).
- ²⁰ Ex. 4 at 15-21 (Cal/OSHA, Citation and Notification of Penalty, Monterey Zoo (Oct. 26, 2018); Settlement Order, *In re: Monterey Zoological Soc'y, Inc.*, (Cal/OSHA App. Bd. May 15, 2019)).
- ²¹ USDA, *Fiscal Year 2018: Animal Care Impact Report* (2019), https://www.aphis.usda.gov/animal_welfare/downloads/FY2018-Animal-Care-Impact-Report.pdf
- ²² *Id.*
- ²³ *Id.*; Delcianna Winders, *It's Official — The Feds Are Protecting Animal Exploiters*, Daily Caller (Apr. 26, 2019), <https://dailycaller.com/2019/04/26/winders-usda-exploiters/>.
- ²⁴ USDA, *Animal Care's Purpose* (2018), https://www.aphis.usda.gov/animal_welfare/downloads/AC-strategy-purpose-doc.pdf
- ²⁵ See Table 1; see also Karin Brulliard & William Wan, *Caged raccoons drooled in 100-degree heat. But federal enforcement has faded.*, Wash. Post (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html; Karin Brulliard, *USDA's enforcement of animal welfare laws plummeted in 2018, agency figures show*, Wash. Post (Oct. 18, 2018), <https://www.washingtonpost.com/science/2018/10/18/usdas-enforcement-animal-welfare-laws-plummeted-agency-figures-show/>;
- ²⁶ Karin Brulliard & William Wan, *Caged raccoons drooled in 100-degree heat. But federal enforcement has faded.*, Wash. Post (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html.
- ²⁷ USDA, *Risk Based Inspection System*, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_risk_based_inspection_system (last modified Nov. 18, 2020).
- ²⁸ USDA OIG, Audit no. 33002-4-SF, *Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers* 16 (May 14, 2010), <https://www.usda.gov/sites/default/files/33002-4-SF.pdf>.

²⁹ Sourced from Office of Budget & Program Analysis Explanatory Notes for 2017 to 2022, and from the USDA's Enforcement Summaries. USDA Office of Budget & Program Analysis, *Congressional Justifications*, <https://www.usda.gov/obpa/congressional-justifications>; USDA APHIS, *Enforcement Summaries*, https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-panels/enforcement-summaries (last modified Jan. 7, 2021).

³⁰ The USDA has not reported this number—it is a tally of AWA administrative complaints posted on APHIS' website. USDA, *Animal Welfare and Horse Protection Actions*, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/actions> (last visited June 3, 2021).

³¹ During FY2019, APHIS inspectors performed over 2,800 inspections of *exhibitors* in their assigned geographic areas. USDA OIG, Audit no. 33601-0003-23, *Follow-Up to Animal and Plant Health Inspection Service's Controls Over Licensing of Animal Exhibitors* 1 (Mar. 12, 2021), https://www.usda.gov/sites/default/files/audit-reports/33601-0003-23_final_distribution.pdf.

³² APHIS halted most inspections in March 2020 due to the COVID-19 pandemic, and "carefully" resumed routine activities in July. See Bulletin, USDA, Message to AWA Licensees and Registrants: Animal Care Inspections During COVID-19 Pandemic (Mar. 27, 2020), <https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/stakeholder-messages/animal-care-news/ac-inspections-during-covid>; Bulletin, USDA, Message to AWA Licensees and Registrants: Resumption of Animal Care Inspections During COVID-19 Pandemic (Jul. 22, 2020), <https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/stakeholder-messages/animal-care-news/resumption-of-inspections-during-covid>.

³³ See USDA Office of Budget & Program Analysis, *2021 Explanatory Notes: APHIS 22-131*, <https://www.usda.gov/sites/default/files/documents/20aphis2021notes.pdf> (96 percent compliance); cf. APHIS 2019 Impact Report 5, https://www.aphis.usda.gov/publications/aphis_general/rpt-aphis-impact-2019.pdf (99 percent compliance).

³⁴ See Letter from Delcianna Winders, PETA Foundation, to Tom Vilsack, Secretary of Agriculture (Jan. 30, 2015).

³⁵ USDA APHIS, *Safeguarding the Health and Value of American Agriculture Since 1972, Strategic Plan 2015-2019* 4 (2015), available at <http://download.ceris.purdue.edu/file/2609>.

³⁶ *Id.*

³⁷ *USDA Animal Care Revises Its Animal Welfare Inspection Guide* (Jan. 14, 2016), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6>.

³⁸ Mo. All. for Animal Legis., *Input Regarding USDA Animal Care (AC) Strategic Planning Efforts* (2015), <http://files.ctctcdn.com/b8b779f6001/12145547-7088-4ddc-bd90-1f63569f3ca1.pdf>; Delcianna Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 Ohio St. L. J. 451, 478 n.147 (2018).

³⁹ Further Consolidated Appropriations Act, 2020, Pub. L. 116-94 § 788(b), <https://www.congress.gov/bill/116th-congress/house-bill/1865/text>; see Settlement Agreement at 3-4, *Missouri Alliance for Animal Legis., et al. v. USDA*, No. 1:18-cv-2087-DLF (D.D.C. Jan. 19, 2021) (agreement by the USDA to revise Teachable Moments policy and improve access to them via its public search tool).

⁴⁰ 9 C.F.R. § 2.40.

⁴¹ Letter from Bernadette Juarez, Animal Care, to AWA Licensees and Registrants (Aug. 6, 2018), https://www.aphis.usda.gov/animal_welfare/downloads/awa/AV-Letter-Licensees-and-Registrants.pdf.

⁴² USDA, *Animal Welfare Inspection Guide* 6-17 (2021), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

⁴³ 9 C.F.R. § 1.1; see *PETA v. Tri-State Zoological Park of W. Md., Inc.*, 424 F.Supp.3d 404, 412-13 (D. Md. 2019) (explaining that—on the USDA's watch—the two attending veterinarians employed by a roadside zoo had no "formal or informal training, education, or experience working with Big Cats or primates," "utterly failed to implement a satisfactory program of veterinary care" for these animals, "ma[de] a mockery of the simple requirement" that exhibitors document the medical care provided to animals, and ultimately "contributed to long and painful deaths of five endangered species.").

⁴⁴ USDA, Tech Note, *Incentives for Identifying, Reporting, Correcting, and Preventing Noncompliance with the Animal Welfare Act* (May 2018), <https://naldc.nal.usda.gov/download/7219769/PDF>.

⁴⁵ *Id.*

⁴⁶ Settlement Agreement at 3-4, *Missouri Alliance for Animal Legis., et al. v. USDA*, No. 1:18-cv-2087-DLF (D.D.C. Jan. 19, 2021); USDA, *APHIS Removes Guideline on Self-Reporting from Animal Welfare Act Inspection Guide* (Feb. 12, 2021), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/2c0f2c3>.

⁴⁷ Karin Brulliard, *The USDA saw no problems at this zoo. Local authorities found 'a monkey dungeon.'*, Wash. Post (Dec. 19, 2019), <https://www.washingtonpost.com/science/2019/12/19/usda-saw-no-problems-this-zoo-local-authorities-found-monkey-dungeon/>.

⁴⁸ See Bulletin, USDA, Updates to APHIS' Website Involving Animal Welfare Act and Horse Protection Act Compliance Information (Feb. 3, 2017), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/184e0d0>.

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- ⁴⁹ Press Release, PETA, PETA Marks Victory in Third USDA FOIA Lawsuit (Oct. 15, 2020), <https://www.peta.org/media/news-releases/peta-marks-victory-in-third-usda-foia-lawsuit/>; Further Consolidated Appropriations Act, 2020, Pub. L. 116-94 § 788(b), <https://www.congress.gov/bill/116th-congress/house-bill/1865/text>.
- ⁵⁰ Third-Party Inspection Programs Under the Animal Welfare Act; Public Meetings, 83 Fed. Reg. 2959 (Jan, 22, 2018), <https://www.federalregister.gov/documents/2018/01/22/2018-00966/third-party-inspection-programs-under-the-animal-welfare-act-public-meetings>; Bulletin, USDA, USDA Seeks Public Input on Recognizing Third-Party Inspections and Certifications of Animal Welfare Act Facilities (Dec. 19, 2017), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/1cd6c95>. Animal Care uses a "risk-based inspection system" (RBIS) to determine how often to inspect each facility based on what it claims are "objective criteria." Although the agency has stated that third-party accreditation is one such factor, it has refused to release these criteria except in heavily redacted form (and following a PETA lawsuit). *See* Records Responsive to FOIA Request No. 2016-APHIS-00268-F.
- ⁵¹ Bulletin, USDA, USDA Seeks Public Input on Recognizing Third-Party Inspections and Certifications of Animal Welfare Act Facilities (Dec. 19, 2017), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/1cd6c95>.
- ⁵² Third-Party Inspection Programs Under the Animal Welfare Act; Public Meetings, 83 Fed. Reg. 2959 (Jan, 22, 2018), <https://www.federalregister.gov/documents/2018/01/22/2018-00966/third-party-inspection-programs-under-the-animal-welfare-act-public-meetings>.
- ⁵³ Bulletin, USDA, USDA Announces It Will Not Recognize Third-Party Inspections and Certifications (May 25, 2018), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/1f27bfl>.
- ⁵⁴ David Grimm, *USDA now only partially inspects some lab animal facilities, internal documents reveal*, Science, May 5, 2021, <https://www.sciencemag.org/news/2021/05/usda-now-only-partially-inspects-some-lab-animal-facilities-internal-documents-reveal>; Press Release, Harvard Law School Animal Law & Policy Program, Secret Policy Uncovered Under the Freedom of Information Act Shows USDA Does Not Inspect Research Labs as Required by the Animal Welfare Act (May 5, 2021), <https://animal.law.harvard.edu/news-article/secret-policy-uncovered/>.
- ⁵⁵ USDA OIG, Audit no. 33601-0003-23, *Follow-Up to Animal and Plant Health Inspection Service's Controls Over Licensing of Animal Exhibitors* 5 (Mar. 12, 2021), https://www.usda.gov/sites/default/files/audit-reports/33601-0003-23_final_distribution.pdf.
- ⁵⁶ *Id.*
- ⁵⁷ Karin Brulliard, *The USDA is issuing far fewer citations to zoos, labs and breeders for animal welfare violations*, Wash. Post (Feb. 26, 2019), <https://www.washingtonpost.com/science/2019/02/26/usda-is-issuing-far-fewer-citations-zoos-labs-breeders-animal-welfare-violations/>.
- ⁵⁸ Bulletin, USDA, APHIS Announces Changes to Animal Welfare Act Licensing Requirements (May 12, 2020), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/28b2627>.
- ⁵⁹ *See* USDA, *Inspection Reports Search*, <https://aphis-efile.force.com/PublicSearchTool/s/inspection-reports> (last visited June 3, 2020).