

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00212-BO**

COLONEL HOSEA M. RAY, et al.,)
)
Plaintiffs,)
)
v.)
)
THOMAS VILSACK, et al.,)
)
Defendants.)
_____)

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY OF THE NATURE OF THE CASE

In this Administrative Procedure Act (APA), 5 U.S.C. §§ 701 - 706, case, Plaintiffs challenge Defendants' decisions to renew the Animal Welfare Act (AWA) license of roadside menagerie and animal dealer Jambbas Ranch (Jambbas) in contravention of the AWA's statutory mandate that "no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to [the AWA]," 7 U.S.C. § 2133 (emphasis added), as well as Defendants' admitted pattern, practice, and policy of rubberstamping AWA license renewal applications without requiring a demonstration of compliance.

Not only have Defendants acted in violation of the statutory requirement that Jambbas demonstrate compliance with the AWA standards before any license may be issued, but they have also admittedly rubberstamped Jambbas' license renewal applications while fully aware of chronic violations by the facility. Indeed, Defendants have repeatedly renewed Jambbas' AWA license knowing that Jambbas was actively under investigation by its own Investigative and Enforcement Services division for numerous serious, chronic violations of the AWA standards, and have also renewed Jambbas' license within mere weeks of citing Jambbas for violating those standards.

For example, most recently, in May 2013, the USDA renewed Jambbas' license just weeks after citing the facility for failing to provide veterinary care to a rabbit who was "thin" and so dehydrated that "skin tenting" had been observed by the USDA inspector. The USDA inspector further reported that this animal was "reluctant to move," "was too weak to reach" his water can, had an abrasion on his foot, had overgrown nails, and suffered from "inflammation/ear mites" that Jambbas had treated only with Vaseline. Jambbas had not even

noticed that this rabbit was dehydrated or that he had an abrasion. Despite this citation—and its similarity to myriad prior violations of the AWA standards by Jambbas—the USDA renewed Jambbas’ license.

The USDA also renewed Jambbas’ license in 2013—and in 2012 and 2011—despite the fact that the agency had an investigation open into the facility for “several direct and repeat noncompliant issues.” AR 436. Those noncompliances included Jambbas’ repeated failure to provide veterinary care to animals, including to multiple goats found dead by USDA inspectors on separate occasions, other goats suffering illness, wounded bison, a dog with an untreated eye condition, and numerous other animals, as well as a host of other violations related to the conditions of confinement at Jambbas, such as filthy, unsanitary enclosures, inadequate water, and inadequate shelter. The USDA ultimately charged Jambbas for these violations shortly after renewing its license in 2013.

Defendants’ decision to renew Jambbas’ license notwithstanding the facility’s failure to demonstrate that it was in compliance with the AWA standards and despite the abundant evidence before them demonstrating that Jambbas was in fact not in compliance with the AWA standards contravened the plain language of the AWA and therefore must be set aside under the APA. See 5 U.S.C. § 706(2). Similarly, Defendants’ pattern, practice, and policy of rubberstamping AWA license renewal applications contravenes the statutory mandate that an applicant first demonstrate compliance with the AWA and thus must also be set aside under the APA.

BACKGROUND

I. The Animal Welfare Act

The Animal Welfare Act (AWA), 7 U.S.C. §§ 2131-2159, is intended to ensure “humane care and treatment” of animals, *id.* § 2131. In order to effectuate this purpose, the AWA prohibits anyone from exhibiting or dealing in animals “unless and until such dealer or exhibitor shall have obtained a license.” *id.* § 2134, and sets forth the precise terms under which a license may be issued:

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: Provided, That no such license shall be issued until the dealer or exhibitor shall have **demonstrated** that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title.

Id. § 2133 (second and third emphases added).¹

Thus, the AWA unequivocally prohibits issuance of a license absent an affirmative demonstration of compliance with the Act’s regulatory standards. As this Court already held in denying Defendants’ motion to dismiss, “7 U.S.C. § 2133 . . . circumvents the agency’s discretion to issue renewal licenses to exhibitor/dealers not demonstrating compliance. . . . [T]he express language of the statutory mandate . . . requires a demonstration of compliance before such issuance is proper.” DE 29, Mem. Op at 5 (Jan. 22, 2013) (emphasis added); see also id. at

¹ The AWA regulations also reflect this demonstration requirement—in addition to self-certifying compliance with the standards, 9 C.F.R. § 2.2(b), “[e]ach applicant must demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply with the regulations and standards set forth in parts 2 and 3 of this subchapter,” *id.* § 2.3 (a) (emphasis added). See id. § 2.1(c) (requiring compliance with both section 2.2 and section 2.3); see also Revision of Definitions, Regulations, and Standards for the Humane Handling, Care, Treatment, and Transportation of Dogs, Cats, and Certain Other Warmblooded Animals, 44 Fed. Reg. 63488, 63489 (Nov. 2, 1979) (“The Animal Welfare Act requires, in addition to a written application and payment of reasonable fees, that dealers and exhibitors demonstrate that their facilities comply with the standards promulgated by the Secretary.” (emphasis added)).

6 (“[T]he decision to deny a renewal license is not a discretionary enforcement action, but rather an agency action carried out according to statutory mandates issued by Congress . . .”).

The standards with which an applicant must demonstrate compliance before the USDA may lawfully issue a license “govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors,” including “minimum requirements . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, [and] adequate veterinary care.” 7 U.S.C. § 2143(a).

For example, before the USDA can issue a license, the applicant must demonstrate compliance with the requirement that it provide adequate veterinary care, to include:

- “[t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;”
- “[d]aily observation of all animals to assess their health and well-being;” and
- “[a]dequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia.”

9 C.F.R. § 2.40(b).

Other examples of the standards with which applicants must demonstrate compliance before the USDA may issue a license include, inter alia:

- providing “[s]helter from inclement weather,” id. § 3.127(b);
- providing food that is “wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health,” id. § 3.219(a);
- providing water “as often as necessary for the health and comfort of the animal” in water receptacles that are “clean and sanitary,” id. § 3.130;
- removing “[e]xcreta . . . from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors,” id. § 3.131(a); and

- utilizing “[a] sufficient number of adequately trained employees . . . to maintain the professionally acceptable level of husbandry practices, id. § 3.132.

II. Statement of Facts

A. The USDA’s Admitted Pattern, Practice, and Policy of Automatically Rubberstamping AWA Renewal Applications

Dr. Elizabeth Goldentyer, Eastern Regional Director for USDA-APHIS’s Animal Care division, is “responsible for enforcement” of the AWA in the Eastern Region and responsible for “overseeing the renewal of existing AWA licenses held by licensees in the Eastern Region.” DE 43-1, Goldentyer Second Decl. ¶¶ 1, 2 (Apr. 19, 2013).² In this capacity Dr. Goldentyer has unequivocally declared that “the renewal of an existing license is a wholly administrative function [T]here is no demonstration of compliance required to renew an existing license.” Id. ¶ 7 (emphasis added); see also AR 43 and DE 36-1, Goldentyer Decl. ¶ 5 (Mar. 29, 2013) (“License renewal is not contingent on a determination that the licensee has met the standards for animal handling, care and treatment, or is or has been in compliance with regulations other than the regulations governing license renewal.”). According to Dr. Goldentyer, the USDA’s automatic and “wholly administrative” AWA license renewal procedure is as follows:

- (1) The USDA sends licensees who are due for renewal a “renewal kit” that includes a license renewal application.
- (2) The renewal applicant submits the completed renewal application and application fee.
- (3) The renewal application is reviewed for completeness and entered into a database.
- (4) The renewal license is issued.

See AR 43 and DE 36-1, Goldentyer Decl. ¶ 6.

² The USDA’s Animal Care division implements the AWA through two regional offices, one in the Western Region and one in the Eastern Region. See USDA, APHIS, Animal Care Regional Map and Addresses, http://www.aphis.usda.gov/animal_welfare/downloads/acorg.html. There is no reason to believe the two regions handle license renewals any differently.

As stated by Dr. Goldentyer, then, the agency makes no assessment whatsoever as to whether the applicant has, as the AWA requires, “demonstrated that his facilities comply with the standards promulgated by the Secretary.” 7 U.S.C. § 2133. To the contrary, Dr. Goldentyer makes clear, evidence indicative of a failure to comply with the requisite standards is actively disregarded: She explains that in renewing an AWA license, the USDA does not consider whether there is an active investigation for violations of the AWA into the applicant or even whether there are formal charges for such violations pending against an applicant. See DE 43-1, Goldentyer Second Decl. ¶ 9(b) (explaining that the sole factor considered is whether such investigation or charges have already resulted in a final order revoking, suspending, or terminating the license, and so long as no such order has issued, “the renewal process is continued”); see also AR 40, Goldentyer Supp. Decl. ¶ 2 (Apr. 10, 2013) (where there is an enforcement action, “[i]f the license has not been revoked or terminated, the ILA [Inspection and Licensing Assistant] is notified to renew the license”). Dr. Goldentyer further explains that “information that is not used . . . during the renewal process”—i.e., information that is “not reviewed or considered in any way” and that is affirmatively disregarded—includes, inter alia, “inspection reports,” which would indicate violations of the AWA by the applicant, formal “Complaints” (formal charges of violations) filed against the applicant, as well complaints submitted to the agency by the public. Id. ¶¶ 10, 11; see also AR 43 and DE 36-1, Goldentyer Decl. ¶ 5 (“The renewal process for AWA licenses does not include a review of public complaints.”).

B. The USDA’s Repeated Renewal of Jambbas’ AWA License Despite Evidence of Egregious Violations of the AWA Standards

The Administrative Record (Record or AR) makes abundantly clear that Defendants have not only rubberstamped Jambbas’ license renewal applications without requiring a demonstration

of compliance with the AWA standards as mandated by statute, but, in fact, have repeatedly and affirmatively disregarded compelling evidence of violations of those standards.³

1. Defendants renewed Jambbas' AWA license in May 2013 despite extensive evidence of violations of the AWA standards

Most recently, in May 2013, the USDA renewed Jambbas' license just weeks after citing the facility for a direct violation⁴ of the AWA for its failure to provide veterinary care to a rabbit who was “thin,” so dehydrated that “skin tenting [was] observed” by the USDA inspector, and “reluctant to move.” AR 162. The USDA inspector further reported that this animal “was too weak to reach” his water can, had an abrasion on his foot, had overgrown nails, and suffered from “inflammation/ear mites” that Jambbas had treated only with Vaseline. Id. Jambbas had not even noticed that this rabbit was dehydrated or that he had an abrasion. Id.

The USDA also renewed Jambbas' license in 2013—and in 2012 and 2011 as well—despite the fact that the agency had an investigation open into the facility for “several direct and repeat noncompliant issues.” AR 436.⁵ Based on this investigation, just ten days after renewing

³ This evidence includes formal, detailed nonrenewal requests submitted to the USDA by plaintiff PETA prior to the renewal of Jambbas' license in 2013, 2012, and 2011, each setting forth the reasons why renewal of Jambbas' license would be unlawful and compiling extensive evidence. See AR 488-530 (April 14, 2011, request); AR 595-617 (Apr. 22, 2011, request); AR 473-530 (Apr. 10, 2012, request); AR 455-72 (Apr. 23, 2012, request); Ex. 1 (Apr. 16, 2013, request). (Although this last request does not appear to be in the record produced by defense counsel, it should have been, and Defendants have indicated that they are looking into this. This request clearly fell within the scope of the Court's Order granting Plaintiffs' motion to compel production of the full administrative record, which ordered Defendants to include in the Record all “documents pertaining to Jambbas Ranch Tours, Inc. whether they be complaints, inspection reports, renewal applications or otherwise that the agency had in its possession at the time it made its license renewal decision,” and, as such, is properly before the Court. DE 52 at 3; see also id. at 2-3 (“[T]o exclude information from the AR that the agency clearly had in its possession at the time it made its determination would be too limiting. . . . [T]he Court . . . will need to review everything that was ‘before the secretary’ not only the few documents the agency ‘relied on’ in making its decision.”).

⁴ The USDA defines a “direct violation” as “one that has a high potential for adversely affecting the health of an animal.” USDA Office of Inspector General, Audit Report 33002-4-SF, APHIS Animal Care Program – Inspections of Problematic Dealers 8 (May 2010), available at <http://www.usda.gov/oig/webdocs/33002-4-SF.pdf>.

⁵ Dr. Goldentyer states in a declaration: “When receiving the license renewal application for Jambbas Ranch Tours Inc [sic] in 2011 and 2012, I was aware that the investigation was ongoing.” AR 39. The

Jambbas' license on May 14, 2013, Defendants executed a formal complaint charging Jambbas with numerous violations—all of which it was aware at the time of the license renewal—and seeking to revoke or suspend the very same license it had just issued on the basis that: “There is reason to believe that the respondent named herein [Jambbas Ranch Tours, Inc.] willfully violated the Animal Welfare Act . . . , and the regulations and standards . . . issued pursuant to the Act” AR 1372-78, USDA Compl.

The violations for which Jambbas was under investigation at the time of its license renewal (and for which it was charged shortly thereafter) included its repeated failure to provide veterinary care to animals, including to multiple goats found dead by USDA inspectors on separate occasions. See AR 1372-78. Specifically, as described by a USDA inspector: “One dead goat was found in the shelter in the hill pasture. Carcass was cold, semi-stiff and very thin. Another live goat appeared thin and had dried feces accumulated under the tail. Neither goat was under any treatment and had not been identified as having any health problem.” AR 1532 (underlying inspection report and citation dated Jan. 21, 2011);⁶ see also AR 1548, James Bass Aff. (Feb. 23, 2011) (“I don’t know how long the goat was dead. . . . I was not aware that the goat was sick prior to its death.”).

investigation to which she refers was launched June 2010, shortly after the May 2010 renewal of Jambbas' license. See AR 143.

⁶ Because the Complaint generally does not provide details about the violations charged beyond the date of violation and specific regulation violated, the original inspection reports and citations that form the basis for the charges and provide more detail are referenced throughout herein.



AR 1533 (Inspection photograph, “Dead goat in shelter” (Jan. 21, 2011)).



AR 1534 (Inspection photograph, “Dead goat in shelter” (Jan. 21, 2011)); see also AR 1535-36

(additional inspection photographs).⁷

In a chillingly similar incident just several months prior, the USDA found:

One young goat . . . dead in the pasture. The rump of the dead goat was covered in feces. About 12 other young goats were in this pasture and also had severe diarrhea, with liquid and dried feces on their rumps. They were also thin and unthrifty. . . . Owner states he had not noticed recent problem and they were not on any treatment

AR 175 (underlying inspection report and citations dated May 20, 2010); see also AR at 149-54 (inspector’s May 20, 2010, photographs of dead and live goats with diarrhea); see also AR 1546, Bass Aff. (“I don’t understand the definition of poor health At the time of the inspection, I was not aware that we had one dead goat and I was not [aware] that the other goats were in poor health.”). In addressing this incident in an affidavit to the USDA, Jambbas manager James Bass revealed that these goats were babies—acquired by Jambbas at just four days old—and that in fact approximately two thirds of these baby goats had died. Id. A necropsy of two of the goats found that they “were killed by [] pneumonia and starvation.” AR 1422 (emphasis added). According to the necropsy, the pneumonia likely resulted from the stress of starvation and transport and was “severe” in one of the goats. Id. at 1420. The goats’ starvation had resulted in “breakdown of the last available fat in the bone marrow.” Id. at 1422. The necropsy also revealed giardia—transmissible to humans—in one of the goats. Id.

The violations under investigation by the USDA at the time it renewed Jambbas’ license in May 2013 (and for which the facility was charged shortly thereafter) also included several violations cited by the agency on November 16, 2012, including a direct violation for failing to provide veterinary care to three animals. AR 164. Specifically, the inspector found that a dog at Jambbas suffered from “ocular discharge and crusting around both eyes” and needed to be

⁷ With regard to all of the inspection photographs herein taken on or before Feb. 14, 2011, Jambbas manager James Bass attested that they “are an accurate and fair representation of what was observed at Jambbas on the inspection dates” in a February 23, 2011, affidavit to the USDA. AR 1549.

evaluated and treated by a veterinarian. Id.; see also AR 197 (inspector’s memo regarding inspection, further noting that eyelids were swollen and “there could be entropion”—a very painful condition in which the eyelid turns inward, causing eyelashes to rub against the eye surface); AR 1142 (inspector’s photograph of dog).⁸ The inspector further observed two bison with “skin abrasions,” some of which were “open and red.” AR 164; see also AR 1404-06, 1408-09 (inspection photographs of wounds on bison (Nov. 16, 2012)).⁹ The inspector noted that these bison had been treated for lice approximately four months prior, but needed to be treated more frequently to prevent the animals “from causing wounds to their skin from licking/scratching.” AR 164. The inspector further observed that one of these bison was underweight and that Jambbas had failed to conduct a fecal exam in the last year as required by its veterinary care program. Id.; see also AR 1405-06, 1408 (inspection photographs of thin bison). On this same day the USDA also cited Jambbas for:

⁸ See generally NC State Univ. Coll. of Vet. Med., Ophthalmology - Special Services, Technology, & Information, Entropion, http://www.cvm.ncsu.edu/vhc/tc/clinical_services/ophthal/entropion.html (describing entropion in dogs and noting that it “result[s] in contact of the eyelashes with the corneal surface. The irritation is very painful and may lead to a corneal ulcer.”) (last visited Jan. 28, 2014).

⁹ As demonstrated by this and a similar incident with which Jambbas was charged, see infra p. 13, the bison at Jambbas have suffered persistent serious untreated skin conditions. As explained in an August 23, 2010, letter that is part of the Record, a leading bison expert reviewed photos of these animals and opined that at least one of the bison was “extremely emaciated”; that the bison likely had not been treated with insect repellent, given the “abundance of flies on the animals”; and that two of the sores on one of the bison “appear[ed] to be infected” yet there was “no evidence of topical treatment.” AR 137-38. The bison expert concluded that “these animals are in need of immediate veterinary care and proper nutrition.” Id. at 138. Yet, years later the bison at Jambbas continue to be documented in similar conditions: On October 3, PETA filed complaint with the agency, providing photographs taken on September 14 by a concerned visitor to Jambbas showing numerous bison suffering from bloody, open, and, in some cases, cases fly-infested wounds. AR 1251-63. As further noted in this complaint, a veterinarian with more than 40 years of experience working with wild animals had reviewed numerous photographs of the bison at Jambbas and concluded, “based on the scarring” on the animals, that they have “been suffering from this condition for years” and “must be miserably uncomfortable.” AR 1251-52 (emphasis added). There is no indication in the record that any action was taken to address these well-documented complaints. See also, e.g., AR 598, 608-10 (Apr. 22, 2011, letter from PETA to USDA describing and attaching photos of “[m]ultiple bison with hair loss and open, bleeding sores” and “[m]ultiple bison who appeared bony and underweight”); AR 414 (Feb. 2007 USDA citation for failure to provide veterinary care to a “noticeably thin” bison).

- confining rabbits in cages containing rust, hair, and “old excreta,” “indicating that they had not been sanitized recently,” AR 164-65; see also AR 1416 (inspection photograph);
- using rusty metal cans that cannot be properly sanitized as waterers for rabbits, AR 164; see also AR 1414-15 (inspection photographs)¹⁰;
- keeping sheep in an enclosure containing broken boards and boards with protruding nails, AR 165; see also AR 1417-18 (inspection photographs); and
- confining a potbellied pig without potable water and with a metal pan with “a jagged metal edge that could cause injury,” AR 165; see also AR 1407, 1411-12 (inspection photographs).

Additional violations for which Jambbas was actively under investigation by the USDA at the time of its license renewal (and for which it was charged shortly after its license renewal), included:

- Failure to provide adequate veterinary care to other animals on numerous additional occasions, including to:
 - o A “thin” llama with a “large area of what appeared to be dried diarrhea on its back legs” and a “thick creamy discharge from its right eye socket” who was not receiving any treatment. AR 168 (underlying inspection report and citations dated Jan. 4, 2012); see also AR 1375; AR at 1572-1574 (USDA inspector’s photographs);
 - o A goat with “excessive hair loss over spine, hindquarters, and some other areas,” and “[e]xposed skin [that] was thick and scaly.” AR 171 (underlying inspection report and citations dated Feb. 14, 2011); see also AR 1375. The USDA inspector observed the goat scratching on his feeder, and reported that Jambbas had not provided the goat with any treatment for his skin condition “because employees had not noticed it.” AR at 171. James Bass, manager of Jambbas, subsequently stated in a sworn affidavit to the USDA, “I may have noticed the skin problems and just forgot to treat it. . . . I wasn’t worried about it.” AR 1549, Bass Aff.

¹⁰ Notably, PETA had apprised the USDA of these issues and provided documentation of them more than a year and a half prior to this citation. AR 598 (April 22, 2011, PETA correspondence to USDA reporting that Jambbas was holding “rabbits in rusty, unsanitary wire cages . . . and with rusty water and food receptacles” and attaching photographs (AR 611-612)). Moreover, these are remarkably similar to prior repeat violations of the standards by Jambbas. See, e.g., AR 418 (2005 inspection report citing Jambbas for repeated failure to maintain wire rabbit cages in good repair, noting that wire was rusted out in parts of the cages, that two feeders were excessively rusty, and that approximately nine rabbit cages “had a build up of dried feces and hair on the wire mesh and had not been thoroughly sanitized”).

- o Bison with “very poor looking skin and sparse to no fur from behind their shoulders back [and s]warms of flies on them.” AR 184 (underlying inspection report and citation dated Sept. 2, 2010); see also AR 1493-1501 (USDA inspector’s photographs). The USDA inspector reported, “The irritation of the flies is causing the bison to lick their sides and flanks, which is ripping the skin off leaving up to 4’ patches of raw flesh.” AR 184.



AR 1498, (inspection photograph, “Side of bison with flies and lesions” (Sept. 2010)); see also AR 1493-97, 1499-1501 (additional Sept. 2010 inspection photographs of wounds on bison).

- o At least three goats with overgrown hooves. AR 184 (underlying inspection report and citations dated Sept. 2, 2010); see also AR 1492 (inspector’s photograph).

- o A raccoon who the USDA inspector “observed to have complete hair loss on its tail and some of its hindquarters” and who had not been examined by a veterinarian or been prescribed treatment. AR 168 (underlying inspection report and citation dated Jan. 4, 2012); see also AR at 1375 (Compl.).



AR 1575 (Inspection photograph, “Raccoon with hairloss [sic] on tail and right side of hindquarters” (Jan. 4, 2012)).

- Failure to remove excreta from animals’ enclosures “as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors,” *id.* at 1374, and forcing two pot-bellied pigs to live in “shelters that were extremely dirty and had excessive accumulation of feces,” AR at 177 (underlying USDA inspection report and citations dated May 21, 2010). According to the USDA inspector, the pigs’ “bedding was wet and had a strong foul odor. Many flies were present. One pig . . . [had no] clean area to go to.” *Id.*; see also AR 145-46 (inspector’s photographs).
- Confining two goats without “adequate shelter from the cold weather,” with “only a roof with no sides,” despite a temperature of 33° Fahrenheit “with a brisk wind.” AR at 173

(underlying inspection report and citations dated Dec. 14, 2010).

2. Defendants renewed Jambbas' AWA license in 2013 despite the fact that a court had recently found it in violation of animal cruelty laws and Jambbas had admitted to such violations.

At the time it renewed Jambbas' USDA license in May 2013, the USDA was also fully aware that Jambbas had recently formally admitted to, and was formally found to be in violation of, state animal cruelty laws. See, e.g., AR 1298-1310 (internal USDA email dated Aug. 9, 2012, attaching preliminary injunction order in cruelty case against Jambbas); AR 72 (Memo from Dr. Goldentyer to USDA Office of General Counsel attaching preliminary injunction order (Aug. 15, 2012)); AR 424 (internal USDA email dated Aug. 14, 2012, circulating article regarding the temporary injunction); AR 1274-97 (internal USDA email dated Sept. 19, 2012, circulating permanent injunction order in same case).

On August 6, 2012, a North Carolina state judge issued a preliminary injunction pertaining to Jambbas' mistreatment of a bear who was housed in a small, virtually barren concrete and chain link enclosure. AR 1299-1309. The court held that Jambbas was unlawfully causing the bear unjustifiable suffering and physical pain, including, inter alia, by failing to provide him with adequate space, enrichment, and veterinary care. Id. 1305, 1304. On August 27, 2012, the Court entered a permanent injunction by consent reiterating these conclusions. AR 1275-97.

3. Defendants similarly renewed Jambbas' AWA license in 2012 and 2011 despite extensive evidence demonstrating noncompliance with the AWA standards.

a. 2012 License Renewal

In addition to knowing, as noted above, that Jambbas was under investigation for violations of the AWA standards at the time it renewed Jambbas' license in May 2012, the

USDA was also in possession of voluminous additional evidence of violations at this time, including:

- Evidence that Jambbas was in ongoing violation of the requirement that the bear enclosure be surrounded by a perimeter fence sufficient to protect the public and the animals—despite having been cited at least twice for this violation, once in September 2010, AR 400-01, and once in 2006, AR 415, and despite having been denied its 2010 request for a variance from the requirement, AR 127. See AR 473 (letter from PETA to USDA dated Apr. 10, 2012, noting Jambbas’ ongoing failure to comply with this AWA standard—which was put in place in 2000, see 9 C.F.R. § 3.127(d)).
- The professional statement of board-certified zoo veterinarian Dr. Heather Bacon based on her personal observations of the bear at Jambbas (named “Ben”) over a two-day period, AR 457-72, finding that the bear spent more than 75% percent of his time engaged in stereotypical pacing behavior and explaining that this was “likely a response to the inadequate environment and daily behavioural frustration he experiences” and “indicates that for the majority of the time, Ben experiences primarily negative affective states such as frustration or stress,” AR 464. Dr. Bacon also noted that the repetitive pacing behavior, combined with Ben’s limited physical environment, was likely to “place chronic and repetitive stress on his musculoskeletal system” and could result in long-term health effects. AR 465. Dr. Bacon concluded, based on her “observations, communication with caregivers and assessment of his environment,” that the bear’s “welfare state can be evaluated as negative and he is likely to be suffering both physically and mentally.” AR 465.
- The results of a January 14, 2012, inspection, during which the inspector had cited Jambbas with direct noncompliances for failure to provide veterinary care to a “thin” llama with a “large area of what appeared to be dried diarrhea on its back legs” and a “thick creamy discharge from its right eye socket,” and to a raccoon who the USDA inspector “observed to have complete hair loss on its tail and some of its hindquarters.” AR 168; see also *supra* p. 14. As noted above, these violations ultimately formed the basis of some of the USDA’s May 2013 charges against Jambbas. See *supra* p. 11.
- The results of a July 11, 2011, agency inspection, during which the inspector cited Jambbas for an inadequate rabbit cage that had a portion of the wire floor that had rusted entirely through, creating a hole in the cage. AR 169.
- A June 9, 2011, complaint to the USDA from PETA regarding a report of and photographs indicating severe torticollis—a distressing symptom often referred to as “head tilt” that is often coupled with fatal conditions, some of them highly transmissible—in a rabbit. AR 217-22.
- A citation that the USDA issued to Jambbas on May 9, 2011—just five days after it had renewed Jambbas’ license—for a metal trough in the bear’s enclosure that was rusty, could not be adequately sanitized, and could also cause injury to the bear. AR 170.

Notably, this was not a violation that suddenly arose following the renewal of Jambbas' license, but rather, a violation that the USDA was aware of before it renewed Jambbas license in May 2011. See AR 604 (photograph of the bear's "rusty basin" provided with PETA request submitted to the USDA on April 22, 2011, AR 595-617).

- A letter to the USDA from the Executive Director of the Living with Wildlife Foundation, who has worked with captive animals professionally for more than two decades, including in bear management and rehabilitation, detailing serious concerns about the conditions of the bear held at Jambbas and urging the agency not to renew Jambbas' license because of these concerns. AR 1207-09.
- A request from Dr. Goldentyer to the USDA's Investigative and Enforcement Services (IES) dated May 19, 2011—just two weeks after she had renewed Jambbas' license—asking IES to open another investigation into Jambbas for AWA violations based specifically on concerns regarding the bear held at the facility and attaching, inter alia, numerous expert statements condemning the bear's conditions and other evidence that was in her possession prior to the 2011 renewal. See AR 122.

b. 2011 License Renewal

In addition to knowing, as noted above, that Jambbas was under investigation for violations of the AWA standards at the time it renewed Jambbas' license in May 2011, the USDA was also in possession of voluminous additional evidence of violations at the time it issued Jambbas' 2011 license, including:

- Letters from bear experts received by the agency just days before it renewed Jambbas' license wherein the experts detailed their qualifications and serious concerns about the welfare of the bear at Jambbas. AR 427-28; 828-829.
- The declaration of a bear behaviorist detailing welfare problems with the conditions of the bear held at Jambbas, AR 613-17, which was submitted to the agency on April 22, 2011, just two weeks before the agency renewed Jambbas' license. See AR 595-96 (This declaration accompanied a request sent via email from Alex Thornton, Captive Wildlife Specialist, to Chester Gipson, Deputy Administrator, USDA, APHIS, AC on April 22, 2011. See id.).
- The results of a September 2, 2010, USDA inspection, during which the agency had cited Jambbas for numerous violations of the AWA standards, including three repeat violations: repeated failure to provide adequate veterinary care to animals such as bison with exposed raw flesh, AR 184; see also supra p. 14 (describing this citation—which was included as a charge against Jambbas in the USDA's Complaint—in more detail), and to goats with overgrown hooves, AR 184; see also supra p. 14; repeated failure to provide animals with potable water, AR 185; see also AR 1507-09 (inspection

photographs of dirty water for animals); and keeping animals in sheds with protruding nails and wires, a repeat violation of the requirement to have “structurally sound housing facilities in good repair to protect the animals from injury and to contain” them, 9 C.F.R. § 3.125(a), AR 184; see also AR 1502-04 (inspection photographs of protruding nails). At this time the USDA also cited Jambbas again for failure to have an appropriate perimeter fence around the bear’s enclosure, AR 184-85, and for housing most of the goats in enclosures with “a layer of feces on the dirt floors,” denying the animals a clean place to rest and putting them at risk of disease, AR 185; see also AR 1510-13 (inspection photographs showing excess accumulations of feces in goat shelters).

- On June 16, 2010, Dr. Goldentyer submitted a request for an investigation into Jambbas for AWA violations attaching, inter alia, the agency’s May 20, 2010, citations, as well as citations issued on five prior occasions, including for, inter alia:
 - o failure to provide veterinary care to a fox with an apparent infected wound that Jambbas had treated ineffectively with penicillin that had expired 2 ½ years prior, AR 183;
 - o failure to provide veterinary care to several goats who had died of unknown causes and four underweight goats, AR 186;
 - o failure to provide veterinary care to goats with overgrown hooves, including a lame goat, AR 187;
 - o failure to provide adequate access to feed to 20 goats who were all fed from a single feeder, some of whom “were pushed out and not able to access feed” and were thin, AR 187; and
 - o failure to provide adequate veterinary care to four rabbits with “severe oozing encrustations in their ears,” some of whom also had nasal discharge, AR 188.

AR 1454.

- On June 7, 2010—barely a month after renewing Jambbas’ license—the USDA inspected and cited the facility for two violations of the AWA, including dirty water bowls for young goats who were recovering from diarrhea. AR 174; see also AR 1488 (inspection photograph).

STANDARD OF REVIEW

Under the APA, the Court “shall . . . set aside” an agency’s action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; “in excess of statutory jurisdiction[or] authority”; or was adopted “without observance of procedure required

by law.” 5 U.S.C. § 706(2)(A), (C), (D). As the Fourth Circuit has explained, although these criteria call for deference, “the arbitrary-and-capricious standard does not reduce judicial review to a rubber stamp of agency action.” Friends of Back Bay v. U.S. Army Corps of Eng’rs, 681 F.3d 581, 587 (4th Cir. 2012) (citation and internal quotation marks omitted); see also U.S. Army Eng’r Ctr. v. Fed. Labor Relations Auth., 762 F.2d 409, 414 (4th Cir. 1985) (“[T]he Supreme Court has cautioned that courts must not ‘rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.’” (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983)); Dickinson v. Zurko, 527 U.S. 150, 162-63 (1999) (“The APA requires meaningful review . . .”).

The Supreme Court has made clear that “courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.” Judulang v. Holder, 132 S.Ct. 476, 483-84 (2011). To fulfill that role, the Court “must assess, among other matters, ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.” Id. at 484 (quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (additional citation and quotation marks omitted).

Under this standard, an agency action is “arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” State Farm, 463 U.S. at 43.

In addition to determining whether an agency has based the challenged action “on a consideration of the relevant factors,” the Court must assure itself that the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Id. (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); accord FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).

ARGUMENT

Defendants’ undisputed pattern, practice, and policy of automatically rubberstamping AWA renewal license applications without regard to the applicant’s compliance or noncompliance with the AWA is contrary to the plain statutory mandate that “no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to [the AWA].” 7 U.S.C. § 2133. As further discussed below, this pattern, practice, and policy thus is not in accordance with law, exceeds Defendants’ statutory authority and jurisdiction, is without observance of procedure required by law, and is arbitrary, capricious, and an abuse of discretion, in violation of the APA. 5 U.S.C. § 706(2)(A), (C), (D). Accordingly, this policy must be set aside.

Defendants’ renewal of Jambbas’ AWA license in particular without a demonstration of compliance with the AWA standards—and, indeed, in the face of extensive evidence of noncompliance—similarly contravenes the statutory prohibition on issuing an AWA license without a demonstration of compliance with the AWA standards and thus also violates the APA and must be set aside.

I. Defendants' Admitted Pattern, Practice, and Policy of Rubberstamping AWA Renewal License Applications Violates the AWA and APA

As discussed above, the AWA sets forth the terms under which the USDA may issue a license:

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: Provided, That no such license shall be issued until the dealer or exhibitor shall have **demonstrated** that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title.

7 U.S.C. § 2133 (second and third emphases added). As the Court has already recognized earlier in this litigation, this provision “circumvents the agency’s discretion to issue renewal licenses to exhibitor/dealers not demonstrating compliance. . . . [T]he express language of the statutory mandate . . . requires a demonstration of compliance before such issuance is proper.” DE 29, Mem. Op. at 5 (Jan. 22, 2013) (emphasis added).

Yet, in direct contravention of this statutory mandate, Defendants have admitted to a pattern, practice, and policy of automatically rubberstamping renewal applications. As discussed above, Dr. Goldentyer, the USDA official responsible for overseeing the AWA license renewal process, maintains that this process is “wholly administrative”—that, in other words, the agency rubberstamps renewal applications. DE 43-1, Goldentyer Decl. ¶ 7 (Apr. 19, 2013); see also DE 52, Order at 2 (“Defendants argue that . . . license renewals . . . are an automatic, ‘rubberstamping’ type transaction.”). Lest there were any questions, Dr. Goldentyer makes the USDA’s pattern, practice, and policy as to the renewal process as clear as it is contrary to the statute, stating: “[T]here is no demonstration of compliance required to renew an existing license.” DE 43-1, Goldentyer Second Decl. ¶ 7 (emphasis added); see also AR 43 and DE 36-1, Goldentyer Decl. ¶ 5 (Mar. 28, 2013) (“License renewal is not contingent on a determination that the licensee has met the standards for animal handling, care and treatment, or is or has been in

compliance with regulations other than the regulations governing license renewal.”); DE 43-1, Goldentyer Second Decl. ¶¶ 10, 11 (explaining that inspection reports, pending charges of violations (“Complaints”), and public complaints are “not reviewed or considered in any way” during the renewal process).

This rubberstamping policy is not in accordance with the AWA mandate, it exceeds the scope of the USDA’s statutory jurisdiction and authority to issue AWA licenses, and it fails to observe procedure required by the AWA. For all of these reasons, it violates the APA and must be set aside. See 5 U.S.C. § 706(2)(C), (D). Defendants’ automatic AWA renewal policy further violates the AWA and must be set aside because it is archetypically arbitrary, capricious, and an abuse of discretion. See id. §702(2)(A).

Rubberstamping AWA license applications is the opposite of the “reasoned decisionmaking” that the APA requires—this is, in other words, a case where the court is confronted with an “absence” of reasons. Judulang, 132 S.Ct. at 483-84. Defendants’ renewal policy, moreover, fails to consider the “relevant factor[.]” set forth by Congress—i.e., whether there has been a demonstration of compliance with the AWA standards. Id.; see also State Farm, 463 U.S. at 43 (action is “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem”); Yousefi v. INS, 260 F.3d 318, 329 (4th Cir. 2001) (finding agency action arbitrary and capricious based on the “complete failure of the decision makers to consider key . . . factors”).

Further, Defendants’ total disregard for the AWA mandate that a license applicant demonstrate compliance with the AWA unlawfully “frustrate[s] the congressional policy” and purpose underlying the statute—to ensure “humane care and treatment” of animals. 7 U.S.C. § 2131; U.S. Army Eng’r Ctr., 762 F.2d at 414 (quoting Bureau of Alcohol, Tobacco & Firearms,

464 U.S. at 97); see also Judulang, 132 S.Ct. at 485, 490 (noting that an agency’s “approach must be tied, even if loosely, to the purposes of the . . . laws” and setting aside as arbitrary and capricious an agency rule that was “unmoored from the purposes and concerns of the [underlying] laws”).

For these reasons, Defendants’ acknowledged pattern, practice, and policy of rubberstamping AWA license renewal applications must be set aside.

II. Defendants Have Also Violated the AWA and the APA in Renewing Jambbas’ License

Defendants’ renewal of Jambbas’ AWA license in particular also violates the AWA and the APA and must be set aside. Like all AWA license renewal applications, Jambbas’ have been rubberstamped by the agency—automatically issued without the statutorily required demonstration of compliance with the AWA standards. Not only have Defendants not required Jambbas to demonstrate compliance with the standards, they have also repeatedly renewed Jambbas’ AWA license despite being aware, as demonstrated by the Record, of numerous egregious chronic violations of the standards by Jambbas and despite their own ongoing formal investigation into AWA violations by Jambbas.

A. Defendants Have Violated the AWA and APA by Rubberstamping Jambbas’ License Renewal Applications

It is undisputed that the USDA has repeatedly renewed Jambbas’ license without a demonstration that it was in compliance with the standards. As discussed above and set forth in Dr. Goldentyer’s affidavit, it is the agency’s admitted policy not to require such a demonstration. Moreover, the agency has made clear that the sole information that Defendants considered in renewing Jambbas’ license was Jambbas’ renewal application and whether Jambbas had paid the \$360 renewal application fee. See DE 43-1, Goldentyer Second Decl. ¶ 9, (the sole documents considered by Defendants in renewing Jambbas’ license were renewal applications and records

related to payment of the renewal application fee). As such, for the same reasons that Defendants' entire rubberstamping renewal policy violates the APA, as described above, so too does its rubberstamping of Jambbas' renewal applications in particular.

B. Defendants Have Violated the AWA and the APA by Renewing Jambbas' AWA License Despite Being Aware of the Facility's Chronic, Egregious Violations of the AWA

In addition to unlawfully rubberstamping Jambbas' AWA renewal applications without the requisite demonstration of compliance with the AWA standards, Defendants further violated the APA by renewing Jambbas' license while being fully aware of extensive evidence of Jambbas' noncompliance with the standards and by offering no adequate explanation—or, indeed, any explanation—for the licensure.

As detailed at length above, the Record in this case leaves no question that Jambbas is a chronic violator of the AWA and that Defendants have been fully aware of this. See supra at pp. 6-18. According to the USDA's own records, Jambbas has repeatedly denied animals veterinary care, leaving animals with wounds, chronic diarrhea, dehydration, infections, and disease unattended to and starving animals, thereby rendering unnecessary suffering and death a routine occurrence at the facility. See, e.g., supra at pp. 7, 11, 12, 16, 19. The Record also reveals that Jambbas has forced animals to live in feces-infested enclosures, sometimes without a single clean spot to occupy, see supra at p. 14; has routinely denied animals access to drinkable water, see supra pp. 13, 18; has denied animals shelter, including in near-freezing weather, see supra at p. 15; has endangered the public for years, see supra at pp. 17, 19; and has repeatedly endangered animals by confining them in enclosures with protruding nails and jagged metal edges, see supra at pp. 13, 19.

Yet, despite this abundant, uncontroverted evidence of Jambbas' noncompliance with the AWA standards, and despite the statutory mandate that license applicants demonstrate compliance with the standards, year after year Defendants have renewed Jambbas' AWA license. These renewals are arbitrary and capricious and amount to agency action "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." State Farm, 463 U.S. at 43. Defendants have not just "failed to consider" whether Jambbas has demonstrated compliance with the AWA, id.—they have actively disregarded evidence of noncompliance. See also id. (agency must "examine the relevant data").

Defendants have also failed to offer a reasonable explanation—or, in fact, any explanation—for their renewal of Jambbas' license, yet another way in which they have violated the APA. See id. (agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (emphasis added) (citation and internal quotation marks omitted)); id. ("an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency"); Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 519 (D.C. Cir. 2009) (the Court must "perform a searching and careful inquiry into the facts underlying the agency's decisions" in an effort to "ensure that the [agency] has examined the relevant data and has articulated an adequate explanation for its action" (citations and quotation marks omitted)).¹¹

Finally, Defendants' renewal of Jambbas AWA license in the face of chronic, egregious violations of the AWA further violates the APA through its total frustration of the congressional

¹¹ Of course, any such explanation by the agency must be contained in the record and cannot be a post hoc rationalization. See N.C. Wildlife Fed'n v. North Carolina, 677 F.3d 596, 604 (4th Cir. 2012) ("[I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.' The 'basis articulated by the agency' is the administrative record, not subsequent litigation rationalizations." (quoting State Farm, 463 U.S. at 50) (additional citations omitted)).

purpose underlying the AWA—“to insure that animals . . . are provided humane care and treatment,” 7 U.S.C. § 2131. See U.S. Army Eng’r Ctr., 762 F.2d at 414; see also Judulang, 132 S.Ct. at 490. Indeed, in renewing Jambbas’ AWA license, which authorizes the facility to exhibit and deal in animals, Defendants have become active facilitators of the inhumane treatment of animals—the very thing they are charged with regulating against.

For all of these reasons, Defendants’ renewal of Jambbas’ AWA license despite being fully aware of Jambbas’ chronic, egregious noncompliance with the AWA standards violates the APA and should be set aside.

CONCLUSION

For these reasons, the Court should grant Plaintiffs’ motion for summary judgment.

Respectfully submitted, this 28th day of January, 2014.

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CERTIFICATE OF SERVICE

This is to certify that on this 28th day of January, 2014, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System which will send notice of such to the following CM/ECF participants:

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