

UNITED STATES DEPARTMENT OF AGRICULTURE *2012 AUG - 1 PM 4:17*

BEFORE THE SECRETARY OF AGRICULTURE

RECEIVED

Docket No. 11-0222

In re:

TRI-STATE ZOOLOGICAL PARK of
WESTERN MARYLAND, INC., a
Maryland corporation; and ROBERT L.
CANDY, an individual,

Respondents.

DECISION AND ORDER

I. INTRODUCTION

The above captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Complainant”), against Tri-State Zoological Park of Western Maryland and Robert Candy (“Respondents”; “the Zoo”; “Tri-State”). Complainant alleges that Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; “the Act”), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; “Regulations and Standards”).

In a complaint filed on May 11, 2011, (“the Complaint”) Complainant alleged that Respondents willfully violated the Act and the Regulations on multiple occasions between 2006 and 2010. Generally, the Complaint alleged that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records; failed to maintain an adequate plan of veterinary care, or employ an attending veterinarian; failed to adequately maintain facilities in a variety of circumstances, including one leading to the death of a macaque.

Respondents timely filed an Answer on June 2, 2011, and thereafter filed supplementary narrative discussions. By Order issued August 17, 2011, a hearing was scheduled to commence on February 8, 2012 in Hagerstown, Maryland. At the hearing, Complainant was represented by Colleen A. Carroll, Esq. and Buren Kidd, Esq. of the Office of the General Counsel, Washington D.C. Respondents were represented by the Zoo's owner, Robert Candy, who appeared without assistance of counsel on his own behalf and on behalf of the corporate entity.

At the hearing, I admitted to the record Complainant's exhibits identified as CX-1 through CX-16, with the exception of CX-3 page 4 and CX-10, pages 9-12, which Complainant withdrew. Tr. at 21; 23. I also excluded portions of CX-16. Tr. at 434-435. I admitted to the record Respondents' exhibits RX-1 through RX-23, with the exception of RX-12 and RX-14, which Respondents withdrew, and RX-13, which I excluded. Tr. at 743-746. In addition, the parties entered into stipulations regarding the admissibility and authenticity of much of the documentary evidence, which I admitted to the record as ALJX-1. Tr. at 9. .

I directed the parties to file written closing argument by not later than May 18, 2012¹. By telephone on May 17, 2012, Respondents requested permission to file his argument by facsimile. I instructed my staff to advise Respondents that I would not accept filing by facsimile, but would allow a brief extension of time for mailed submissions. Respondents filed closing argument on May 21, 2012. Complainant filed partial written closing arguments on May 18, 2012, and requested a brief extension of time to file additions to its brief. Complainant filed its supplemental closing argument on May 22, 2012. Accordingly, the record is hereby closed.

¹May 18, 2012 fell on a Friday.

The instant decision² is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

II. ISSUES

1. Did Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
2. Is Mr. Candy personally liable for acts of the corporate entity?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

Respondents admit that Tri-State Zoological park of Western Maryland, Inc. ("Tri-State"; "the zoo") is a Maryland corporation whose registered agent for service of process is Respondent Robert L. Candy, whose mailing address is in Cumberland, Maryland.

Robert L. Candy is the Chief Executive Officer, principal and registered agent for Tri-State at all times pertinent to this proceeding.

Respondents further admit that Tri-State operates as an exhibitor within the meaning of the Act and prevailing regulations, and held Animal Welfare Act license Number 51-C-0064 at all times relevant to the instant adjudication.

B. Summary of Factual History

During the period encompassed by the instant cause of action, Respondents were in the business of exhibiting animals. Robert Candy started Tri-State in 2002 as a way to provide his children and other members of the community in Cumberland, Maryland with an entertaining and educational activity. Tr. at 694-697. Before starting the zoo, Mr. Candy spent thirty years as

²In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]. Complainant's evidence shall be denoted as "CX-[exhibit #]" and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record sua sponte shall be denoted as "ALJX-[exhibit number]".

a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services. Tr. at 693. Mr. Candy wrote housekeeping and maintenance manuals and provided training in those disciplines, and is experienced in construction. Tr. at 694-695. He also has experience in operating businesses, and he managed a large horse farm in Pennsylvania at one time. Tr. at 761-762.

During his years working for corporations and as a consultant, Mr. Candy traveled extensively and visited zoos wherever he went. Tr. at 695. He started gathering information on owning and operating a zoo in the 1980s. Id. The Zoo is located on a defunct campsite, which Mr. Candy modified to house and exhibit Tri-State's animals. Tr. at 695-696. The site included a large building that was lost in a fire in March, 2006. Tr. at 763. Most of the Zoo's post-fire structures were constructed by volunteers from recycled materials. Tr. at 697. Tri-State has no employees, but approximately 20 volunteers perform specific duties at the Zoo commensurate with their experience and abilities. Tr. at 696.

The Zoo is still being developed, and approximately five acres of the sixteen acre site are used for zoo related purposes. Tr. at 698. Mr. Candy estimated that when construction is completed, the Zoo will occupy eight acres of the property. Id. Mr. Candy explained that the Zoo operates as an animal rescue facility as much as it does a zoo. Tr. at 699. He estimated that 3,000 visitors come to the Zoo each year to visit approximately 50 animals. Tr. at 721. Although Tri-State rescues animals, all of its big cats are hand-raised from infancy, and three were born at the facility. Tr. at 699-700. Tri-State does not solicit for animals, but is contacted by both large and small zoos when those facilities cannot accommodate a particular animal. Tr. at 700.

Dr. Gloria McFadden has been employed by the Animal Care Division of APHIS as a Veterinary Medical Officer for approximately eight (8) years. Tr. at 31. Her primary duties are

to enforce the AWA and prevailing regulations at facilities that she is assigned to inspect. Tr. at 33. Among her assigned facilities is Respondents', with which Dr. McFadden first became familiar in 2004. Tr. at 34. During the period from May 17, 2006 through September 29, 2010, Dr. McFadden conducted eleven (11) inspections of Tri-State's facility and cited Respondents with violations of the Act and regulations. CX-3 through CX-14.

Mr. Candy testified that he does his best to comply with prevailing rules and regulations regarding the operation of his facility, but has been told by AWA personnel that they cannot give him specific guidance when he has asked for assistance. Tr. at 701. This has posed problems for him, as he has been found non-compliant with some of his fences and cages, despite his requests to consult with an AWA expert about standards for those structures. Tr. at 701-702. Although Tri-State solicits Dr. McFadden's advice before undertaking any project, Mr. Candy has been told that APHIS cannot give specific advice on how to achieve compliance. Tr. at 702.

Mr. Candy was frustrated to be cited for violations of the AWA on occasions when weather or other unusual circumstances caused a temporary non-compliance. Tr. at 702. As an example, he was cited for muddy conditions after five consecutive days of rain. Id. Tri-State has been responsive to criticism from APHIS and has immediately corrected any problems pointed out by APHIS. Tr. at 702-703. Mr. Candy asserted that the Inspector General for the United States Department of Agriculture concluded that APHIS had no clear regulatory guidelines for many of the issues under its jurisdiction. Tr. at 748; RX-3. According to Dr. McFadden, inspectors were expected to be enforcement officers who had little authority to assist exhibitors on reaching compliance with the AWA and its regulations. Tr. at 749. Mr. Candy was not familiar with APHIS' website, which has reference materials on the Act and regulations. Tr. at

Mr. Candy speculated that the biggest problem with his facility is “aesthetics”. Tr. at 703-704. The Zoo doesn’t always look “pretty”, especially in winter. Tr. at 704. Mr. Candy opens at 10:00 a.m. in the morning and closes in the winter at dusk. Tr. at 705. Volunteers follow a written schedule of tasks throughout the day. Tr. at 704. He alone feeds and handles the large cats. Tr. at 705.

Mr. Candy admitted that he does not keep paperwork related to the zoo’s operations on site, stating that he has no permanent structure to store records, save a small gift shop. Tr. at 706. He does not believe it is appropriate to keep records at the gift shop or in the kitchen area of the reptile house, where he keeps staff daily check lists. Mr. Candy argued that he always provides the requested records and documents on the second day of inspection. Tr. at 836-837; 706-707. His records include an enrichment plan for primates, acquisition and disposition records, and information regarding the Zoo’s attending veterinarian, as well as dietary instructions. Tr. at 707-713; 728-729.

Volunteers are required to complete a daily log on which they check off tasks and make observations about conditions of animals and facilities. Tr. at 724-725. The kitchen area where he stores these logs is small, and Mr. Candy did not believe it would be a good place to store official records, which he keeps at home. Tr. at 730-731.

Mr. Candy also keeps information regarding training sessions he or his volunteers attended, and the Zoo’s rules and regulations. Tr. at 714-718. His rules include instructions on cleaning areas occupied by the animals and rules for feeding the animals. Tr. at 718-720. He provides ongoing instruction to his volunteers during their tours of duty. Tr. at 719. Some volunteers live on the premise, which provides added security. Tr. at 727. Other than a “Big Cat Symposium” that he and volunteers attended in 2004 (Tr. at 714-715; RX-5), Mr. Candy and the

Zoo volunteers have had no formal training in the care and keeping of exotic animals. Tr. at 710-712.

Mr. Candy doubted that the facility would appear "perfect" at any time, but he asserted that he was conscientious about correcting problems that he and his volunteers find, or that are pointed out by APHIS. Tr. at 720. He believed that he made every effort to correct violations. Tr. at 834-835. He considered himself compliant with recordkeeping requirements because he always provided all requested records to APHIS inspectors before they concluded the inspection. Tr. at 835-845.

The Zoo gives educational tours to school and other groups, which Mr. Candy conducts on a daily basis. Tr. at 722. Mr. Candy encourages interaction with the animals, but does not allow direct contact with them. Tr. at 854-855. He explained that he conducts tours of the Zoo because the facility does not have a lot of signs, and he is aware that it looks "different" from traditional zoos. Tr. at 790. Many of the Zoo's animals are rescued, and Mr. Candy wants visitors to understand the Zoo's mission and layout. Id.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals by 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§ 2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a).

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a \$2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was \$3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation had been increased to \$10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: “the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person.” 7 U.S.C. §2139.

Implementing regulations provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications and standards for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size of and environmental requirements of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id..

D. Cited Violations

APHIS cited Respondents with violations of the Act and regulations that generally pertain to the state of the zoo's physical facilities; the existence of proper veterinary care; the proper retention and storage of records; and handling of animals, as follows:

1. Handling of Animals 9 C.F.R. § 2.131 (c)(1)

Respondents were cited with several violations of this regulation, which provides:

During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and or barriers between the animal and the general viewing public so as to assure the safety of animals and the public

9 C.F.R. § 2.131(c)(1)

Cougar

During an inspection conducted on May 17, 2005, Dr. McFadden determined that the barrier fence separating the public from the cougar's enclosure was approximately 3 feet from the enclosure and too low, and would permit potential contact between the public and the animal in violation of 9 C.F.R. § 2.131 (c)(1). Tr. at 36; CX-3. Dr. McFadden acknowledged that the AWA regulations do not specify how high a barrier fence must be to be considered "adequate". Tr. at 165; 163. However, since there were areas where she could reach over the fence and touch the enclosure containing the cougar, she concluded that the barrier fence was inadequate to prevent people from leaning over and reaching in to touch the cougar. Tr. at 166-168. Upon cross examination by Mr. Candy, Dr. McFadden acknowledged that the cougar is declawed. Tr. at 168.

Mr. Francis Keyser is an investigator for APHIS who investigated Respondents' facility in May, 2006. Tr. at 414-416. Mr. Keyser noted Dr. McFadden's concern that the cougar cage

did not have an adequate perimeter fence, and he took photographs of the cougar cage area. Tr. at 418; CX-3. He also followed up on Dr. McFadden's concerns about the structural strength of the lion enclosure and took pictures of it. Tr. at 421-422; CX-3. Mr. Keyser met with Mr. Candy and prepared an affidavit which he asked Mr. Candy to sign. Tr. at 428-431; CX-16.

Respondents maintained that the fence around the cougar's enclosure was of sufficient distance within the regulations. Tr. at 752. The cougar is no longer housed in this enclosure. Tr. at 815. Although Respondents were cited for other violations involving the cougar's housing in subsequent investigations, this violation was not cited as a repeated violation. Dr. McFadden testified that repeated violations should be cited. Tr. at 225-226. She typically did not cite violations that had been corrected. Tr. at 62-63.

There is no evidence that the fence around the cougar enclosure was changed. Mr. Candy contended that the fence was adequate within the regulations, which suggests that it remained unchanged. Since the cougar no longer occupies that space, whether the fence was moved or height added is moot. Nevertheless, I accord substantial weight to Dr. McFadden's testimony and opinion and find that the barrier between the public and the cougar was not sufficient. It is not material that the cougar was declawed; the regulations are meant to protect the animal from the public, as well as the public from animals.

However, I am not persuaded that this lapse represents a violation of handling animals. Nothing of record demonstrates that the public had breached the perimeter barrier or that the cougar was near the public. Any non-compliance with the regulations involving the cougar enclosure would more aptly constitute a facilities violations. The height and distance of the perimeter fence from the cougar alone does not constitute a violation of 9 C.F.R. § 2.131 (c)(1), where there is no evidence that the public was seen near the cougar. This charge is dismissed.

Lion and Tigers

During an inspection conducted on June 2, 2008, Dr. McFadden was accompanied by another inspector, Robert Markham. Tr. at 75; CX-8. Volunteers for the Zoo were observed leading a group of people to see lions and tigers in a "behind the scenes tour". CX-8. Dr. McFadden noticed that the barrier between the public and the animals would have allowed people to reach in close to the animals, though she did not observe anyone doing so. Tr. at 76-77. She took pictures of two areas that showed people very close to the cats' enclosures. CX-8; Tr. at 79-80. No pictures show anyone touching the animals. CX-8; Tr. at 249. The lion was situated at a distance from the viewing public, with a wall-like structure between the animal and the tour participants. Tr. at 250.

Robert Markmann has been employed by APHIS since 1986, and has been an animal care inspector since 1988. Tr. at 359. He accompanied Dr. McFadden during her inspection of Tri-State's facility on June 2, 2008. Tr. at 361. He observed members of the public viewing tigers and saw children touching the tigers through their cage. Tr. at 362. Mr. Markmann advised a Zoo volunteer who appeared to be in charge that APHIS did not allow the sort of exhibition that was underway, and asked to speak to the owner. Tr. at 363. Dr. McFadden left to find Mr. Candy and bring him to the exhibition site; when Mr. Markmann told him that he could not allow the public to touch the tigers, Mr. Candy told him that he encouraged contact by the public with the tigers to keep them friendly. Tr. at 365.

Mr. Markmann related several incidents where tigers hurt APHIS inspectors and injured or killed exhibitors. Tr. at 365-369. He explained that APHIS has no pictures of the children touching the tigers because people at the exhibit complained about the inspectors taking pictures of children. Tr. at 370. Mr. Markmann said that some people expressed their unhappiness about

being stopped from touching and photographing the tigers while they waited for Mr. Candy to come to the scene. Tr. at 376.

Mark Deatelhauser works as a corrections officer, but has volunteered at the Zoo since 2004. Tr. at 509. He does a little of everything at the Zoo, helping with exhibitions and tours, and feeding and cleaning up after the animals. Id. Mr. Deatelhauser described how he and volunteers would bring groups to see the large cats in their housing behind the cages that are open to general public viewing. Tr. at 516-517. Usually at least two people from the Zoo are with the public during these special exhibitions. Tr. at 518. People are allowed to get close to the animals to take pictures, but they are instructed not to touch the animals. Tr. at 519.

Mr. Deatelhauser was taking a group on a tour of the back of the tiger area on June 2, 2008, when USDA inspectors were present. Tr. at 510. He did not allow anyone on the tour to touch the tigers or to put their hands in their cages. Tr. at 511. He was not involved with showing the lions to the group that day. Id. Mr. Deatelhauser was the only barrier between the public and the cats in their cages. Tr. at 517. He estimated that between fifteen and twenty people were in the group on June 2, 2008, but he could not recall the exact number. Tr. at 515.

Mr. Deatelhauser had worked at the Zoo for four years on the date the inspectors observed him. Tr. at 514. At that time, he worked at his regular job from 4:00 p.m. to 12:00 a.m., so he helped at the Zoo every morning from Monday through Friday. Id. Mr. Deatlehauser's training for his work at the Zoo was acquired "on the job" from Mr. Candy. Tr. at 514; 520. Mr. Candy taught him how to handle young animals, and he has worked with the tigers since they were born at the zoo. Tr. at 520-521; 524. Mr. Deatelhauser no longer handles the cats, but he does direct them to a "catch area" for feeding or cleaning their cages. Tr. at 521. Mr. Deatelhauser was instructed that if an animal escapes, he should do "whatever you can to

keep the animal from getting away". Tr. at 522. He no longer conducts many tours because he now works at his regular job during the day. Tr. at 523.

Kimberly Nicole Cramer has volunteered at the Zoo for ten years. Tr. at 527. Her primary duties include helping to keep internet records, helping with tours, and working in the gift shop and ticket office. Tr. at 528. She leads school groups on tours, including areas of the Zoo that are otherwise restricted to the public. Tr. at 429-530. She often works with another volunteer to lead the tours, depending on the size of the group. Tr. at 530. The school tours generally include chaperones or parents of the children. Id. Ms. Cramer received all her training about the Zoo's animals while working as a volunteer. Tr. at 538-539.

Ms. Cramer instructs all visitors to keep their hands away from the animals, but she believes that the area where she usually stands with groups is too far from the fence containing the lion to allow people to put their hands near the animal. Tr. at 532. She believes she is a sufficient barrier between the animals and the tour group. Id. She instructs people to keep their backs against the wall opposite to the lion's enclosure and their arms at their sides. Tr. at 544-545. She is particularly vigilant when children are present, having four of her own. Tr. at 542-543. When Ms. Cramer thinks that the lion would not be receptive to a crowd, she won't bring them to the area behind the lion enclosure. Tr. at 533.

Ms. Cramer was one of the volunteers leading a tour group on June 2, 2008 when USDA inspectors were at the Zoo. Tr. at 534. She testified that no one touched the lion or put their hands near the fence, which she estimated was twelve feet in distance from the lion. Tr. at 535-537.

Mr. Candy denied inviting the public to touch the tigers. Tr. at 854. He explained that Mr. Markmann misunderstood his concept of contact with the animals, by which Mr. Candy

meant closer interaction with them. Id. Mr. Candy did not say a lot to Markmann that day³. Tr. at 855. He compared his “behind the scenes tour” to films he had seen of children smacking tigers at a preserve, and observed that “[t]here is actually no regulation that says you can’t do that”. Tr. at 787. He explained that the area where people entered to observe the tigers close up was about twenty feet long, and that the number of people who could enter was controlled by the volunteer at the door, while another volunteer was inside the corridor with the tour. Tr. at 786-789. Mr. Candy likes to compensate for what he believed to be the aesthetic drawbacks of his facility by offering tours and personal tutoring to visitors. Tr. at 790.

Mr. Candy observed that at the time of the inspection at issue, the tigers were young teenagers and had occupied their space for about four months. Tr. at 790. They were housed in that area while their permanent enclosure was being prepared. Tr. at 790-791. Mr. Candy believed that his staff was familiar with the temperaments of his hand-reared tigers. Tr. at 788. No one at the Zoo moves a cat unless he is there, and he has trained his staff to handle an animal escape by using fire extinguishers that are scattered throughout the facility. Tr. at 791-792.

I accord substantial weight to the testimony of Ms. Cramer and Mr. Deatelhauser that they instructed the public not to touch from the animals. Bonnie Kellerhouse also conducted tours at times and her description of instruction to the public was very similar to Ms. Cramer’s. See, Tr. at 585. I accord particular weight to this testimony, as it was elicited solely on my colloquy with the witness. I similarly credit Mr. Candy’s explanation that he wanted to provide tour groups with some special closer viewing of the animals but did not invite them to touch the tigers.

³I infer from discussions about the admission of evidence and Mr. Candy’s concerns about Mr. Markmann’s behavior that there was some unpleasant interaction between the individuals on June 2, 2008.

I accord weight to the testimony of the volunteers, who both described giving strict instructions to visitors to keep their hands down. Mr. Markmann testified that he saw children reach into the spaces in the fencing to touch the tigers, but Dr. McFadden did not observe children touching the animals before she left the area to find Mr. Candy. Tr. at 84. The evidence regarding whether people touched the tigers is in equipoise.

Regardless, I find that Complainant has met its burden of proving that Respondents failed to provide a sufficient barrier between the tigers and the public, thereby mishandling animals. The photographs depict close quarters, with Mr. Deatelhauser in front of the group in a narrow corridor and Ms. Cramer outside of the entrance to the corridor. CX-8. It is unlikely that Ms. Cramer could have seen what people did while they observed the tigers, and she was tasked with crowd control in the area next to the lion enclosure.

The volunteers assigned to conduct tours did not have sufficient control over the participants to prevent them from reaching into the tigers' cage. The quarters were too cramped and the volunteers too far apart to provide an adequate barrier between the crowd and the animals. Neither volunteer had a good view of everyone on the tour once the tour entered the area behind the tiger cages. People were too far from Ms. Cramer once they were behind the tiger cage, and Mr. Deatelhauser did not stand between all of the tour participants and the cage. Mr. Deatelhauser could scarcely have seen, never mind have stopped, an impulsive child from reaching between the fencing and touching the tigers. Mr. Markmann's credible testimony about injuries from tigers illustrates their unpredictability, and emphasizes the need for extra caution.

Further, although I fully credit the volunteers' testimony that their years at the Zoo have made them familiar with the tigers, the record does not establish that they were instructed on specific plans for capture or restraint of tigers, or were prepared to respond to an animal attack.

Ms. Cramer has significant experience in educating and handling crowds, but there is little evidence that she would know how to restrain the lion if it decided to jump the wall that separated it from the viewing public on these special tours. Her reliance on her familiarity with the animals and their moods appears misplaced in these circumstances, given the inherently dangerous nature of lions and tigers.

The evidence demonstrates that the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. The regulations anticipate that individuals trained to handle and control animals would be involved in their exhibition to the public, but the presence of a handler does not eliminate the need for distance or a barrier between the animal and the public. In re: ZooCats, Inc., 68 Agric. Dec. 737 (2009).

Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, risking harm to them, I find that the Zoo's private, behind-the-scenes exhibitions, such as was observed on June 2, 2008, represent failure to adequately handle animals in violation of 9 C.F.R. § 2.131(c)(1).

Porcupine

On June 2, 2008, Dr. McFadden observed that the enclosure containing a porcupine did not have a barrier, although she had seen one in the past. Tr. at 90; CX-8. Dr. McFadden maintained that the lack of any barrier represented a violation even though no people were seen

in the area. Tr. at 257. Dr. McFadden agreed that Respondents had corrected the problem by erecting a concrete wall. Tr. at 100; 278; CX-9.

Mr. Candy credibly testified that on the day of Dr. McFadden's inspection, he had removed a portion of a chain link fence that served as the exterior barrier so that he could exhibit the porcupine more closely to a school tour that was present. Tr. at 793-794. Nevertheless, Respondents built a stone wall as an additional barrier together with the chain link fence. Tr. at 783.

The record establishes that there was an inadequate barrier fence around the porcupine enclosure area, but there is nothing to suggest that a porcupine was being exhibited at the time of the inspection in such a way as to risk contact between it and the public. When Mr. Candy removed the barrier to exhibit the porcupine to the school group, he acted as a barrier within the meaning of the Act and regulations. The evidence fails to demonstrate a violation of a regulation concerning the handling of an animal pursuant to 9 §2.131(c)(1).

Binturong

At the inspection conducted on August 3, 2009, Dr. McFadden observed a child stepping over a missing rung of the perimeter fence around the binturong enclosure⁴. Tr. at 102-103; CX-8. A post had fallen from the fencing and Mr. Candy fixed it as soon as Dr. McFadden pointed it out. Tr. at 806. That problem has not occurred again. Tr. at 807.

The evidence does not establish that this violation involved inadequate handling of an animal. Complainant admitted that the child did not enter the binturong enclosure, and the record fails to establish the location of the binturong when the child stepped over the perimeter fence.

⁴USDA moved to correct the complaint to conform with the evidence that the child stepped over the perimeter fence, and did not enter the binturong enclosure, and I granted the motion. Tr. at 447-448.

There is no evidence in previous or subsequent inspection reports that demonstrates that the fallen fence post was a persistent problem. Although the defective condition could represent a deficiency in facilities, I find the evidence insufficient to establish a violation of 9 C.F.R. § 2.131(c)(1).

Squirrel Monkey

Dr. McFadden conducted an inspection of Tri-State's facility on September 29, 2010, and found openings in the wire mesh entry door of a squirrel monkey's enclosure that permitted contact between the animal and public. Tr. at 132; 134; CX-14. The inspector was concerned that the gauge of the wire mesh was wide enough to allow people to put their fingers through it. Tr. at 136. On cross-examination, the doctor agreed that the squirrel monkey had occupied that enclosure for some time and she had never before issued a citation for the condition of the enclosure. Tr. at 311. Once she pointed it out to Mr. Candy, the door was replaced with a solid door. Tr. at 311-312. Mr. Candy observed that the monkey had been in the same location with the same conditions for five years, and the Zoo was not cited for a problem with the construction before this inspection. Tr. at 820.

I credit Dr. McFadden's testimony that the public could have reached through the door to touch the squirrel monkey. I find that the inspector's failure to cite this particular condition on previous inspections suggests that the violation was not significant. I note that the condition was corrected. Nevertheless, I find that the violation is supported by the record.

2. Facilities and Operating Standards

The majority of the cited violations involved in the instant adjudication fall within the general penumbra of "facilities", and shall be addressed categorically.

Structural Strength

The pertinent regulation states that

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

9 C.F.R. § 3.125(a).

Lion Enclosure

Respondents were repeatedly cited for failure to provide a structurally sound lion enclosure. CX-3; CX-7; CX-10; CX-11; CX-12; CX-13; CX-14. Dr. McFadden testified that at her inspection on May 17, 2006, she observed that “. . . the lion cage, the home panels at the bottom of the enclosure, they were not attached to the bottom in any way, and side posts weren’t securely attached at that time and there were some gaps as well that the animal could reach under or dig under”. Tr. at 40. Dr. McFadden pointed to photographs that she took, which depicted hog panels and different kinds of fencing held together by clips. In her opinion, the failure of one kind of fencing could cause a break in a section of fencing and the potential escape of the Zoo’s lion. Tr. at 49. Dr. McFadden testified that the gauge of the fence would not have prevented the lion from escaping if it attempted to get out. Tr. at 69.⁵ She also believed that the use of railroad ties at the bottom of the hog panel fence created “the potential for it to detach over time or [be] bothered or tampered with, I guess”. Tr. at 104; CX-11.

On September 26, 2007, the inspector found that the entrance door of the lion enclosure, constructed of treated wood and small gauge wire, would not contain the lion. CX-7; Tr. at 67.

⁵The testimony is confusing at this juncture, because it has been acknowledged that the Zoo had only one lion, but the inspector refers to young lions. I believe she meant to discuss the young tigers’ enclosure. See, Tr. at 233.

Reptile House

A large crack in the back of the reptile house posed a potential structural problem, according to Dr. McFadden, who cited Respondents with this defect on her inspection report from May, 2006. Tr. at 40. Dr. McFadden agreed that the problem was repaired, and it was not the topic of any other citation mentioned in later inspections. Tr. at 192. Complainant has established this violation.

Bobcat Enclosure

At her inspection on September 30, 2009, Dr. McFadden noticed that the bobcat's resting platform and ramp, which were made of wood, were damaged and need to be replaced. CX-11; Tr. at 114. She was concerned that the platform and ramp would not bear the weight of the bobcat. Id. Mr. Candy replaced the ramp that day with new wood, but he believed that the wood presented no structural problems that risked harm to the animal. Tr. at 815-816.

The evidence is in equipoise. Dr. McFadden observed an obvious defect in a ramp, but did not explain how the ramp would fail to bear the weight of the bobcat. Mr. Candy's explanation was reasonable and credible, and his willingness to make changes to accommodate Dr. McFadden's concerns merits consideration. This count is dismissed.

Arctic fox

At her inspection on November 29, 2006, Dr. McFadden observed a hole in the roof of the structure housing an arctic fox. CX-5; Tr. at 57. Respondents corrected the defect on the date of the inspection. Tr. at 219. On September 29, 2010, the inspector saw detached planks on a wooden spool that the arctic fox used as a resting place. Tr. at 151; CX-14. Mr. Candy removed the resting platform that day. Tr. at 340. These charges are supported by the evidence.

Storage of Food and Bedding

"Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food". 9 C.F.R. § 3.125(c).

Dr. McFadden's inspection conducted on September 3, 2008, disclosed chemicals stored with feed hay storage building, and she concluded that this could potentially contaminate the hay. Tr. at 97. Respondents were cited with failing to store food supplies in facilities that would protect them from deterioration and contamination. CX-9.

Mr. Squires described a red building as the binturong house, which the Zoo had used for storage; at the time of the hearing, the building contained a separate enclosure that housed an alligator. Tr. at 655-656; RX-15. The items depicted at CX-8 had not been stored at this location for about two years. Tr. at 657. The barn is used to store hay, dog food, and feed for the field animals; a separate room inside the barn is used to store equipment and tools. Tr. at 658-660; RX-16. Within the barn is a platform where the Zoo stores garden tools and shovels. Tr. at 661.

Dr. McFadden's explanation for this citation is based upon conjecture. There is no evidence that chemicals were in open containers mixed among food stores. Her concerns about the potential of storing foodstuffs and other items in the same area represent a general apprehension about this practice, but not a clear indication of what risk the condition posed. It is clear that the inspector's advice about maintaining order was well placed and. Respondents have made significant strides to separate feed from supplies and tools. However, overall, the record fails to establish anything beyond the fact that Respondents' storage procedures were slovenly.

This charge is dismissed.

Waste Disposal

Respondents were cited with a variety of violations of regulations pertaining to this obligation. The regulations require that:

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

9 C.F.R. § 3.125(d).

Accumulation of bedding and rodent feces in fennec fox and agouti enclosures

On May 17, 2006, Dr. McFadden observed an excessive amount of waste and bedding in an enclosure housing an agouti and a fennec fox. CX-3; Tr. at 41. The doctor described a two-tiered enclosure occupied by the fox on the top and the agouti on the bottom. Tr. at 41-43. Mr. Candy testified that the agouti was not housed directly beneath the fox, but rather that the area described by Dr. McFadden allows for air ventilation, heat distribution and drainage. Tr. at 756. He agreed that excess bedding could have been cleaned out, but disagreed that feces had accumulated in the area that actually was next to the agouti enclosure. Id.

This charge is sustained. Mr. Candy admitted that there was an excess of feces in areas near animal habitats. It is immaterial that the agouti was not directly in contact with the waste.

Excessive waste and excreta in pools

On June 2, 2008, Dr. McFadden's inspection disclosed an excessive amount of excreta in a small pool where two adult tigers defecated and urinated. CX-8; Tr. at 91. The water was murky, and Dr. McFadden believed that the pool needed to be cleaned more often. Tr. at 90-91. Dr. McFadden cited Respondents with a repeated violation of this standard on August 3, 2009

(CX-10; Tr. at 105) and again on September 30, 2009 (CX-11; Tr. at 114-115); and November 20, 2009 (CX-12; Tr. at 122).

Mr. Candy explained that the pool referenced in the inspection reports served solely as the “tiger toilet”. Tr. at 794. Dr. McFadden generally conducts inspections on Wednesdays, and is present when the enclosures are being cleaned. Tr. at 726. The pool was cleaned on Wednesdays and on Sundays. Tr. at 794-795. Mr. Candy speculated that Dr. McFadden observed what she considered excess waste in the “tiger toilet” because the pool had not yet been cleaned that day. Tr. at 794. Respondents’ schedule was interrupted when Dr. McFadden arrived, and the area was cleaned after she concluded her inspection. Tr. at 795. The tigers no longer occupy that space, but are in a new exhibit. Tr. at 830. Mr. Candy believed that it was somewhat arbitrary to be cited for conditions that were temporary and were scheduled to be corrected. Tr. at 771.

Dr. McFadden criticized the condition of several pools, including the swimming pool in the area housing the large Siberian tiger and the area where the tiger cubs were housed. Tr. at 810. That pool is made of dark green concrete and Mr. Candy believed that it looked murkier to Dr. McFadden than it really was, because of the color of the paint on the pool. Tr. at 811. He observed that Dr. McFadden was 100 feet away from the pool, and the distance was far enough to make the water appear dark. Tr. at 831. Respondents have resolved the problem with mulch in the tiger pool by removing it; the pool is now surrounded only by concrete. Tr. at 831-832.

Complainant cited Respondents for violations of how the pools that animals used for waste elimination and recreation were cleaned, but did not explain in other than vague terms how the condition of these pools represented a risk to the animals. There is no evidence that describes what constitutes an excess of excreta in the pools in violation of the regulatory standards Dr.

McFadden's proximity to the pools was not close. If she measured or tested the pool water to determine the amount of excreta within, the results of such measurements are not of record.

I fully credit Mr. Candy's testimony that the areas in question were cleaned twice a week, on Wednesdays and Sundays. However, the fact that Dr. McFadden repeatedly cited Respondents with violations of this standard establishes is supported by Mr. Candy's cleaning schedule. Although Mr. Candy testified that he was aware of the aesthetic challenges that his facility presented to the public, my colloquy with him regarding his failure to adjust his practices to mollify Dr. McFadden's perceptions suggests that Mr. Candy did not consider Dr. McFadden's concerns as seriously as he may have. Despite the relative paucity of evidence demonstrating exactly how much excreta is too much⁷, I conclude that Mr. Candy is mistakenly convinced that his methods are sound. He could have avoided Dr. McFadden's scrutiny by a simple adjustment in the cleaning schedule to accommodate her usual arrival for inspection on Wednesday. Respondents' adherence to the existing cleaning schedule, combined with the fact that Respondents have no paid employees to help lighten Mr. Candy's workload, supports a finding of this violation.

However, the evidence regarding the murky pool that is impinged by mulch and painted a color that enhances the murk is vague. I credit the testimony that the Zoo changed its sanitation methods regarding this water source in an effort to avoid future citations, but I also find that nothing of record establishes that this pool was excessively unclean or posed a risk to the health and welfare of the animals. I credit the testimony that the distance between the pool and observer

⁷I find it appropriate in this instance to apply to excessive excreta the observation made by Justice Potter regarding obscenity: "I know it when I see it". Jacobellis v. Ohio, 378 U.S. 184 (1964).

Dr. McFadden believed that the lion was kept in the enclosure depicted in her photograph at the time of the inspection, but she noted that the lions and tigers were moved around. Tr. at 67-68.

The older lion has occupied the same enclosure for some time. Tr. at 68.

Dr. McFadden took pictures of the various kinds of fencing used to build the lion enclosure, and included them with her inspection report from September 30, 2009. CX-11. She shared with Mr. Candy her concerns that the fencing was not "traditional" and did not "necessarily meet the industry standards that [she] generally would see. So it was making an assessment of whether it was appropriate difficult". Tr. at 110.

Dr. McFadden referred to photographs showing corner metal poles connected to corner wooden poles with clamps, and other sections of fencing connected with wire clips. CX-11. She found the construction methods and materials "questionable", as she doubted their durability and strength. Tr. at 111-113. Dr. McFadden's inspection report of her September 30, 2009 inspection detailed her concerns about the use of multiple kinds of materials fixed together with clamps and plastic ties. CX-11; Tr. at 111-112.

At her inspections on November 20, 2009 and May 19, 2010, Dr. McFadden again cited Tri-State with violations related to the soundness of the lion's enclosure because nothing had changed and the materials were the same. Tr. at 121; 127; CX-12; CX-13. At her inspection on September 29, 2010, Dr. McFadden observed that an overhang made of wood planks and high tensile wire had been added to the lion enclosure, but she still had concerns about the structure. Tr. at 138-141 ; CX-14.

In response to questioning by Mr. Candy, Dr. McFadden admitted that she could not specifically state the exact nature of the defects in the lion enclosure, other than that she believed it potentially would be unable to contain the lion. Tr. at 171-172. Dr. McFadden testified that

industry standards are considered when determining whether an exhibitor is in compliance with the Animal Welfare Act. Tr. at 172. In addition, APHIS' big cat expert was unfamiliar with the hog wire panels used by Respondents. Tr. at 173. She acknowledged that the Zoo's lion has occupied the enclosure space for six years without an escape. 172.

Dr. McFadden testified that the lion enclosure was "not the most pleasing exhibit" and one of her reasons for citing non-compliance was to :"minimize complaints", presumably from the public⁶. Tr. at 175. She admitted that she had offered no alternative solution to Respondents, and further admitted that over the years, Respondents have added to the enclosure to increase its strength. Tr. at 172; 176. She had not observed breaks in the high tensile fence erected by Respondents. Tr. at 177. The fence is built with metal poles buried in the ground, and is attached to horizontal metal poles as well as vertical poles 11 feet high. Tr. at 178. The hog panels were added by Respondents after discussions with Dr. McFadden regarding how to improve the fence. Id. Dr. McFadden was concerned that the

Dr. McFadden reiterated her opinion that when a fence is constructed of different materials, the potential for a break in one kind of material could decrease the overall strength of the fence. Tr. at 179. She recalled being able to move one of the panels, which she concluded showed that the fence was not structurally sound. Tr. at 180. The inspector referred to pictures that showed that the fence was not consistently constructed. CX-11. Sometimes poles were erected between fencing; sometimes poles were inside the fence; and sometimes poles were outside the fence. The support posts appeared rusty and there were gaps in the fencing, as well as between the fencing and the ground. Tr. at 180.

⁶Mr. Candy made references to complaints about his facility made to various groups.

In Dr. McFadden's opinion, it was generally better to have poles outside the fence, because if an animal would push on the fence, the pole would stop the fence from moving further. Tr. at 185. She conceded that the strength of a fence and placement of poles depended on the type of materials and manner of construction. Tr. at 186. In some places, she agreed that changes made by Respondents increased the strength of the lion enclosure, but overall had doubts about the structural integrity of the fence. Tr. at 186-187.

Dr. McFadden acknowledged that Mr. Candy had requested an opinion about the fence from APHIS' big cat expert, who did not offer one. Tr. at 188. Dr. McFadden would have appreciated a second opinion from the specialist regarding whether the lion enclosure was in compliance with the AWA and regulations. Tr. 307. She had discussed with Mr. Candy that she wanted a resolution on the issue from another source. Id. Dr. McFadden further agreed that the basis for Respondents' non-compliance with respect to the lion's enclosure was that the fence may not be structurally sound rather than an affirmative opinion that is not structurally sound.

Tr. at 190-191.

Dr. Ellen Magid has been a supervisory animal care specialist with APHIS since 1994. Tr. at 389-390. In September, 2009, Dr. Magid accompanied Dr. McFadden on an inspection of Tri-State's facilities. Tr. at 391-392. She recalled inspecting the lion enclosure and finding an area of fencing that she could move back and forth. Tr. at 392. Dr. Magid talked about the "wobbly" fence with Mr. Candy, who advised her that he wanted the loose fence as he believed it would be harder for the lion to get out. Id. She could not recall any specific reason for Mr. Candy's opinion, though she remembered discussing his rationale with him, as well as discussing the merits of different kinds of fencing. Tr. at 394.

Dr. Magid favors chain link fence over a hog panel fence because in her opinion, with hog panel fencing, "the animals can reach out with paws, sometimes up to their shoulders". Tr. at 395. Dr. Magid admitted that hog panel fencing met the regulatory minimum standards. Tr. at 408. She agreed that theories about fence construction varied and that the integrity of a fence sometimes depended on the animal. Tr. at 396.

Dr. Magid had observed a gap in the bottom of the lion enclosure of about two and one half feet in one section. Id. She also did not like the fence "waving", as the movement could cause metal fatigue. Tr. at 399-400. The doctor did not agree with Mr. Candy's theories about the flexibility of a fence adding to its safety, and found that the lion's enclosure was not structurally sound, which violated the Act and regulations. Tr. at 401. Although Dr. Magid was aware that the lion had lived for a long time in that enclosure without escape, she remembered an incident where he almost got out. Tr. at 403-404.

Dr. Magid did not recall a complaint from the public about the lion's enclosure, and she had no concerns about the health of the Zoo's animals. Tr. at 406. Her overall concern with the lion's enclosure was that it was constructed of many different materials that were joined together in different fashions in a manner that made it difficult to assess its structural integrity. Tr. at 409. The various kinds of materials required maintenance to prevent rusting, fatigue and breakage. Tr. at 410. Although APHIS' big cat specialist was not available to personally inspect Respondents' facility, she looked at pictures of the fencing and reached similar conclusions to Dr. Magid's. Tr. at 411. The big cat specialist did not give her opinion in written form. Id.; RX-

11.

Timothy Squires is a police officer who regularly volunteers at the Zoo. Tr. at 590-593. Mr. Squires has also worked as a county code enforcement officer. Tr. at 592. He acquired

construction experience by building his own home and other buildings. Tr. at 646. Mr. Squires does a little of everything at the Zoo, but is primarily involved in building and maintaining enclosures. Tr. at 593. When he first started volunteering at the Zoo, the two tigers were a few months old, and he has watched them grow Tr. at 594-595. He has worked with the Zoo's large cats, and was particularly involved with the Zoo's cougar. Tr. at 596.

Mr. Squires took pictures of the facility and referred to them during his testimony. RX-15 through RX-22. He did not build the lion enclosure but was familiar with its construction, and described it from a photograph (RX-17) as consisting of eight foot by twenty foot panels made of four inch square six gauge fencing on the outside of metal posts, with high tensile wire above the post and chain link fence below the post. Tr. at 663. The wires are attached with hog-rings and clamped to the horizontal poles, but Mr. Squires could not say from the picture how they are attached at corners. Tr. at 664-665. Railroad ties are at the base of the fencing and are attached to the fence. Tr. at 665. Another picture showed that at the corners, fencing is held to the posts by clamps. Tr. at 666. Tension straps further stabilize the fence. Tr. at 666.

Respondents have changed all perimeter or barrier fences and replaced three foot fences with eight foot fences. Tr. at 638-639. Mr. Squires confirmed that Respondents planned to confine all large cats to one area of the Zoo, located near the center of the premises and contained within a barrier fence. Tr. at 640. Mr. Squires described the lion enclosure that was then under construction at the Zoo, using photographs that he took to illustrate his explanations. Tr. at 634; RX-21. He testified that metal poles that hold the fencing are sunk into the ground several inches, and stand about twelve feet high. Tr. at 634-635. Mr. Squires stated that Mr. Candy was debating the relative merits of using chain link fence, compared to wire gauge fence,

which he prefers. Tr. at 640-642. Mr. Squires thinks that chain link is flimsier and does not repair as well as panel fencing. Tr. at 641.

Mr. Squires described how he and Mr. Candy placed wire fencing over a wooden perimeter fence with a wooden platform when Dr. McFadden directed them to do so. Tr. at 643-644. Respondent has attempted to address every concern that Dr. McFadden shared by adding fencing and strengthening existing fencing even in areas that the public didn't generally go. Tr. at 647-651; RX-18; RX-22. Mr. Squires believes that the fences at the Zoo are structurally sound. Tr. at 647. Mr. Squires explained the integrity of the materials and the construction of the fencing by showing samples of the materials used. Tr. at 671-676.

Mr. Squires testified that the presence of rust does not present a threat to the strength of metal unless the rust corrodes the metal. Tr. at 675. He typically sands and paints rusted parts, and replaces parts that have deteriorated. Tr. at 676-677. Mr. Candy believed that rust would not harm an animal that licked it because it contains no lead. Tr. at 754. He pointed out that the fencing was secured to the railroad ties, which were secured to poles. Tr. at 753.

Both Dr. McFadden and Dr. Magid did not like certain aspects of the lion enclosure fencing, and I credit their testimony, particularly regarding gaps in the fence and where the fence joined, and places where the fence appeared slack, which photographs corroborate. Although she did not provide a written opinion, APHIS' big cat specialist, Dr. Laurie Gage, agreed with the inspectors that the lion enclosure. Mr. Candy recalled discussing the fencing with both Dr. McFadden and Dr. Magid and he testified that he did not get an opinion about the fence's integrity from Dr. Gage. Tr. at 741. It appears as though Respondents expected a written opinion from Dr. Gage, but I do not find such corroboration necessary.

Although Dr. Magid conceded that hog wire panels met the regulatory standards, her major concerns were with the construction methods used in the fencing and not the materials. The photographs depict a structure that looks cobbled together. I accord substantial weight to Mr. Squires' testimony regarding the strength of the fencing, the security of the panels and the railroad ties, and the difference between a layer of rust and a corroded fitting. Although Mr. Squires is not a construction expert, he has experience in building and his testimony credibly explained why the structure had integrity. However, I equally credit the testimony of APHIS inspectors, who regularly assess the strength and utility of animal enclosures. The inspectors were concerned about gaps in area where fencing was joined, and at the bottom of the fence. They were concerned about the variety of materials used to join the fencing in corners. The fence was pliable at places, which represented an additional concern. There appeared to be no uniform plan in the construction, which cast suspicion on its fitness for purpose.

Dr. McFadden admitted that she cited Respondents with this violation out of her concerns that the fence "may" not be structurally sound. Although Dr. McFadden provided no specific instructions to Respondents on how to satisfy her concerns about the fence, she did repeatedly point out its flaws, and Dr. Magid shared her opinion. Dr. McFadden testified that the fence did not meet industry standards. The record does not describe those standards, nor is reference made to a professional organization that issues such standards. Despite her allusion to "industry standards", Dr. McFadden's citations addressed specific conditions that Respondent could have remedied to meet her expectation of compliance.

Respondents argue that Dr. McFadden was uncertain about whether this enclosure met regulatory standards, and the record supports that conclusion to a point. Despite the somewhat speculative nature of Dr. McFadden's concerns about the fence, I find that the preponderance of

the evidence establishes that the fence violated standards for structural integrity. Repeated inspections revealed different problems with the fencing that impinged upon its reliability. Although Respondents remedied problems identified by the inspectors, such ad hoc attention to the lion's fence falls short of coming into compliance. As I stated in my colloquy with Mr. Candy at the hearing, Dr. McFadden's uncertainty about the soundness of the fence is rooted in her inability to satisfy herself that it would withstand an escape attempt. Tr. at 867. It is clear that particular elements of the lion's fencing needed repair or bolstering, which supports Complainant's contention that the fencing was not adequate.

I further find that Mr. Candy's response to citations regarding the lion's fence demonstrate his unwillingness to accept APHIS' assessment about the fence. Although he questioned what more he could do to come into compliance and asserted that APHIS failed to give him guidance, I find that the inspection reports specifically identify deficits that should have been corrected. Since Mr. Candy fully believed his fence system was adequate, he ignored Dr. McFadden's repeated citations on this issue, resting upon his firm belief that she was uncertain about the integrity of the fence. I find that Dr. McFadden fully believed that the fence was unsound, but had no real and specific idea on how Respondents could come into compliance with the structure as it existed. I mark Dr. Goldentyer's suggestion that Respondents would know how to come into compliance by comparing the lion's enclosure to structures that were not cited for violations of this standard.

Considering the record as a whole, I find that Complainant has established that the lion's enclosure was not structurally sound within the meaning of the regulations. I note that this matter should soon be moot, since at the time of the hearing, Respondents were in the process of building new enclosures for all of the Zoo's large cats. Mr. Squires described a sound plan for

building a solid enclosure that should address APHIS' concerns about gaps at the bottom of the fence, and the materials used to join fence posts at corners.

Tiger Enclosures

Dr. McFadden had concerns about the enclosure that houses the Zoo's tigers. CX-14; Tr. at 140-145. She stood on the viewing platform looking into the white tiger area and took pictures that she used to illustrate her testimony. Tr. at 143-144; CX-14 at 8 and 12. She was concerned about the fencing dividing the white tiger area from an adjacent area housing other tigers:

because, again, it was not traditional materials or industry standard, and they're using different types of materials to put this enclosure together. There was concern about the divider fence, particularly because up in this photo, he has added the wire hog panel fencing to that divider. Originally, it was just the board fencing and animals could potentially jump over. So the wire in this picture it has been added and I believe there's also electric wire you can see at the top of that. Additionally, there was some concern about the height of the enclosure at different points, because this was sort of an old swimming pool. So there was a sloping. So at the lowest end at one point didn't meet our 14 feet requirement. It was probably like 13 or something. So they did add some wire paneling, hog paneling. There has been high tensile wire added as well.

Tr. at 144-145. Dr. McFadden had concerns that tigers could escape over a 12 foot high fence based upon experience at other facilities. Tr. at 146. However, she conceded that there was no height requirement for fences within enclosures that did not lead to public space. Tr. at 325. She described a wide ledge that she believed was less than 14 feet below the highest part of the fencing. Tr. at 147. She did not know the height of the concrete wall before it ended in a ledge to which Respondents had attached additional fencing, with electric fencing and a kick-in at the top. Tr. at 319. She admitted that height of the fence and the kick-in together was twelve feet. Tr. at 321.

Dr. McFadden pointed out that Respondents had added fencing, and the inspection report citing violations of this condition addressed general concerns about the security of the enclosure. Tr. at 326 She conceded that the regulations do not require a particular height of fence, but policy required a fence of at least twelve feet in height. She had not measured the exact height of the fences, and could not estimate the thickness of the concrete wall that formed part of the enclosure. Tr. at 318.

Dr. McFadden did not like the concrete construction of the tiger enclosure because of the potential for crumbling. Tr. at 320. She cited Respondents with a violation of sanitary standards for that condition. CX-14. She did not know the thickness of the concrete, which Mr. Candy estimated at eight inches to two feet thick. Tr. at 323. She thought the animals could gain footing on the ledge, but could not say how high the fence above the ledge was. Tr. at 322. Dr. McFadden acknowledged that the board fencing that Respondents had erected to separate animals from each other was not in an area open to the public. Tr. at 148-149.

Lisa Ferguson is a Doctor of Zoology whose studies focused on the behavior of large cats. Tr. at 556-558. She has experience raising tigers and has worked at zoos and animal rescues for many years. Tr. at 556-559; 566-567. She has addressed animal rights conferences and has acted as a consultant on a variety of issues dealing with large cats. Tr. at 559. Dr. Ferguson is also a qualified veterinary technician and has worked with veterinarians. Tr. at 559; 567. She has worked at Tri-State as a volunteer since October 2011. Tr. at 560. In her opinion, the Zoo's cats are well-cared for and content. Tr. at 560-561. She has not observed the signs and symptoms of anxiety or illness that are typical in large cats. Tr. at 561-563.

Dr. Ferguson was surprised at how well the tiger's containment area was adapted from a drained swimming pool. Tr. at 564. She observed, "[f]or a private owned zoo, out of the ones

I've been to, I think that is like an amazing tiger cage, actually, to hold them, to see them, view them, they have plenty of room." Tr. at 564. She believed that the enclosure was secure and structurally sound. Id. Dr. Ferguson considered Respondent's enclosures to be superior to many she had seen at other facilities. Tr. at 574-575.

Mr. Squires helped build the tiger enclosure, and he described the construction methods and materials he used, illustrated by photographs that he took. Tr. at 595-600; RX-19; RX-20. Mr. Squires explained how the height of the enclosure varied because it was built around an emptied swimming pool, but the height of the fence was generally fourteen feet to sixteen feet from the lowest points of the enclosure, with kick-ins affixed to the top of the fencing. Tr. at 599-601. Additional fencing was added to concrete walls to heighten the fence. Tr. at 619. In addition, electric wiring runs along the top of the concrete, wood, and wire that comprised the enclosure. Tr. at 601-602. He explained that there was twelve feet of fencing above the ledge that concerned Dr. McFadden. Tr. at 622.

Mr. Squires testified that every structure or wall that abutted the tiger enclosure was at least twelve feet high. Tr. at 628. All cages were designed with catch areas, and no enclosure opens directly onto public areas. Tr. at 629-632. The doors to the tiger enclosure are reinforced with rebar and Mr. Squires believed them to be particularly impervious. Tr. at 630-633. High fences with electric wiring separate the Siberian and white tiger enclosures. Tr. at 635.

Mr. Squires explained that when the tiger enclosure is being cleaned, the tigers are moved to their inside area, and are kept in that area by two "guillotine" drop doors. Tr. at 652-653. The tigers are kept separate from the people who clean their areas. Tr. at 653.

Dr. McFadden's opinion regarding the fencing is speculative and conclusory. She believed that the fencing did not meet recent guidelines for height, but admitted that she was not

good with dimensions, and conceded that the fence was at least twelve feet high. I accord substantial weight to Respondent's evidence regarding the height of the fencing that encloses the tiger display. With the help of Mr. Squires, Mr. Candy took extensive measurements of the fencing, documented by photographs. In addition, Dr. McFadden was unable to explain how Respondents could meet her expectations regarding the materials used to build the enclosure. Dr. McFadden and Dr. Magid were concerned that the re-purposed pool area created an unconventional enclosure, and their objections appear to be based primarily on the look of the containment area, since the preponderance of the evidence demonstrates that the enclosure was at least 12 feet high at all points, and constructed in a manner to discourage animals from escaping.

Dr. McFadden also did not provide a basis for concerns about the fencing that separated the tigers from each other. I credit the testimony that the fence that divided the enclosure did not open to the public in any way. Any animal that escaped its half of the enclosure would end up in another animal's enclosure. The enclosure was surrounded by fencing that was at least twelve feet high at every point, with tensile and electric wires and kick-ins at the top. Nothing of record demonstrates that an escape by tigers into each other's enclosures would pose a risk to the animals. The evidence fails to establish why the fence separating the different kinds of tigers violated the Act or regulations.

In contrast, Dr. Ferguson believed that the enclosure presented opportunity for environmental enrichment and variety for the tigers. Although Dr. Ferguson is not a veterinarian, she has a doctorate in zoology and has worked with big cats at many facilities. I accord weight to her opinion, and also credit Mr. Squires' testimony regarding the construction methods and materials, as his explanations are more concrete than the conclusory and speculative opinions of inspectors McFadden and Magid.

Complainant was unable to affirmatively explain how the tiger enclosure was fundamentally defective within the regulatory scheme. Although it is clear that inspectors found the enclosure unconventional, the regulations measure the structural soundness of an enclosure and not its beauty. Complainant could not explain how Respondents could correct the fence to meet its standards. Dr. McFadden was unable or unwilling to advise Respondents on how to reach compliance regarding the tiger fence. In her opinion, Respondents are responsible for familiarizing themselves with regulatory requirements, presumably even those that could not be specifically explained.

I find that Complainant has failed to establish with any specificity how the Zoo's tiger enclosure fails to meet regulatory standards. I accord substantial weight to the photographic evidence that depicts the height of the fence and the methods and materials used for its construction, including an electrical fence and overhang at the top. I find that even considering the policy change regarding fence height, the evidence establishes that the tiger enclosure fences met that standard. These charges are dismissed.

Young Cat Enclosure

On an inspection on or about September 26, 2007, Dr. McFadden cited the Zoo with failing to construct an enclosure for a large cat, referred to as a lion, in a manner sufficient to contain the animal. CX-7. On cross-examination, Dr. McFadden corrected the citation, acknowledging that the enclosure actually held Respondent's young tiger. Tr. at 233. Dr. McFadden explained that there were "two doors, sort of a space between a keeper area or a lock-out area." Tr. at 235. She believed that the small gauge of the wire door "would not withstand the strength of the animal." Id. She acknowledged that Respondents added hog-wire fence to the area. Tr. at 236. Dr. McFadden again found a problem with the young tiger enclosure upon

inspection conducted on May 19, 2010. CX-13. At that time, she observed that a tree had grown inside the enclosure, which the tiger could potentially climb and escape. Tr. at 128.

Mr. Candy described how he had reinforced the door to this enclosure with another panel of six gauge wire. Tr. at 783. He further explained how trees had been growing out of an old pool back in 2008, two years before he rebuilt the enclosure for the tiger. Tr. at 818-819. He stated that the tree that the inspectors had observed was small and was immediately removed. Tr. at 819; CX-13.

Complainant has established this violation, but Respondents have established that it was corrected.

Cougar Enclosure

Complainant charged Respondents with a violation pertaining to damage and loose boards in the cougar's enclosure on September 26, 2007. CX-7. Mr. Candy explained that the loose boards were decorative trim that did not affect the structure. Tr. at 784. Upon reviewing photographs of the cougar area, Dr. McFadden acknowledged that the loose boards did not affect the structural integrity of the cage, and were decorative. Tr. at 240; CX-7, 7-9. The doctor admitted that the entire platform could be removed without impacting the integrity of the enclosure and agreed that the damaged platform did not give the cougar access to areas beyond its enclosure. Tr. at 9. She explained, "However, this is a citation for housekeeping and things have to be in good repair. If it's there, it needs to be in good repair." Tr. at 240.

On September 30, 2009, Dr. McFadden again cited Respondents with a violation of structural integrity standards with respect to the cougar enclosure. CX-11; Tr. at 114. She testified that the platform remained damaged. Id.

Despite Dr. McFadden's explanation that the condition of the cougar platform represented a housekeeping violation, Respondents were cited for structural failure. The record fails to establish that the loose boards on a decorative cover on the outside of a platform under the cougar enclosure violated the cited regulation pertaining to structural strength of a facility. See, 9 C.F.R. § 3.125(a). This charge is dismissed.

Llama and Goat Enclosure

On inspections conducted on November 29, 2006 and May 23, 2007, Dr. McFadden observed that wire fencing around the llama and goat enclosure was detached from the ground, causing sharp wire to protrude into the enclosure. CX-5. Dr. McFadden was concerned that the protruding wire could injure an animal, or that an animal could escape. Tr. at 56. The inspector was aware that a miniature horse regularly damaged the fence, and she thought a citation could motivate a permanent solution to a recurring problem. Tr. at 57. Dr. McFadden had seen the horse damaging the fence, and Mr. Candy had told her that the horse damaged the fence on a regular basis. Tr. at 59; 222.

The inspector agreed that Respondents fixed the problem whenever she pointed it out, but she was not sure that the problem was ever permanently corrected. Tr. at 218; 222. She had no pictures of the damage because she typically does not retain pictures of inspections for more than three years. Tr. at 217-218. Mr. Candy testified that "that horse is no longer with us". Tr. at 765.

The evidence establishes this continuing violation. Respondents are credited with making repairs, but the record clearly demonstrates that the problem remained so long as the horse was housed in that location.

would make it difficult to determine how clean the water was. I further credit the testimony that the water is filtered and sump pumped routinely. This violation is dismissed.

Failure to remove uneaten food and food waste

On June 2, 2008, Dr. McFadden observed a carcass in the lion enclosure, and Mr. Candy told her it had been there for two days. CX-8; Tr. at 92-93. Dr. McFadden concluded that the carcass should have been taken away sooner to prevent potential contamination. Tr. at 92.

Mr. Candy denied that the carcass represented food, but maintained that it was for the enrichment of the lion, which would play with it. Tr. at 797-798. He did not believe it posed the risk of contamination, as it was dried skin. Tr. at 797. He found nothing in the regulations that addressed giving a large cat a deer carcass. Tr. at 796. Nevertheless, the carcass was removed before the inspectors left the Zoo that day. Tr. at 797.

Complainant did not fully establish how the lion was at risk because of the presence of a carcass. I find that the evidence on this issue is in equipoise and dismiss this allegation.

Outdoor Facilities

Shelter from sunlight and inclement weather

“When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals . . . to protect themselves from direct sunlight.” 9 C.F.R. § 3.127(a). In addition, exhibitors are required to provide “for all animals kept outdoors [appropriate shelter] to afford them protection and to prevent discomfort to such animals . . .” 9 C.F.R. § 3.127(b).

On June 2, 2008, Respondents were charged with failing to provide adequate shelter to ferrets. CX-8. Dr. McFadden observed ferrets in an outdoor enclosure in direct sunlight, with no shade available. CX-8; Tr. at 92. Mr. Candy explained that the ferrets were outside for a short

time, while their enclosures were being cleaned. Tr. at 795. He denied that they were in direct sunlight, noting shade from a structure and a tree in the area. Tr. at 795-796. The ferrets are not exhibit animals, and usually are kept in an area in the back of the reptile house. Tr. at 796. They were not in the exhibition area of the zoo when the inspector saw them. Tr. at 797.

Dr. McFadden could not recall the weather or temperature on the day of her inspection but pictures confirm that the sun was shining. CX-8; Tr. at 262. She acknowledged that there was a pavilion nearby and a tree that provided shade. Tr. at 263. Dr. McFadden was concerned that the ferrets were left in direct sunlight. Tr. at 264.

The evidence fails to establish how long the ferrets were outside. I credit Dr. McFadden's observations, but she did not observe the animals for an extended length of time. I credit Mr. Candy's representations that the animals were left outside temporarily while their enclosure was being cleaned. In addition, if the animals were uncomfortable, the pavilion and tree were close enough for them to obtain shelter from the elements. The record fails to show that they were restrained or otherwise confined to the exact area where they were observed by the inspector.

Complainant has failed to establish that Respondents' conduct involving the ferrets constitute a violation of the Act or regulations. This allegation is dismissed.

Drainage

On an inspection conducted on May 17, 2006, Dr. McFadden observed a mixture of feces and mud in the pot-bellied pig enclosure, and she cited Respondents with failing to provide adequate drainage. CX-3. Respondents are required to provide "a suitable method. . . to rapidly eliminate excess water. 9 C.F.R. § 3.127(c). The doctor testified that the Zoo had previous problems with drainage, and she therefore issued a citation at this inspection. Tr. at 43.

Respondents acknowledged that drainage was a problem at the facility, but maintained that the Zoo has worked regularly to improve drainage. Tr. at 756-757. Mr. Candy observed that despite five consecutive days of rain prior to the day he was cited with this violation, there was only one puddle. Tr. at 757.

I accord substantial weight to Respondents' efforts to find a permanent solution to this problem, as there is no evidence of repeated violations for this purported defect after 2006. I also credit Mr. Candy's explanation about the effects of continuous days of rain. The record is devoid of an explanation of how muddy conditions posed a sanitation or other health problem for the pigs in the area affected by the excess water. This violation is dismissed.

Perimeter fence

The regulations mandate that "all outdoor facilities must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out." 9 C.F.R. § 3.127(d). The fence must be at least 8 feet high for potentially dangerous animals as identified by the regulations and must be constructed so as to protect the animals and "function as a secondary containment system." Id. The perimeter fence must be sufficiently distance from the primary enclosure "to prevent physical contact between animals inside the enclosure and those outside the perimeter fence" and fences less than 3 feet from the primary enclosure must be approved by APHIS. 9 C.F.R. § 3.127(d). The regulations do not mandate the height of such fencing. Tr. at 165.

On September 7, 2006, Dr. McFadden found that Respondents had failed to enclose facilities for servals with a perimeter fence. CX-4. The servals were in a temporary enclosure that did not have a perimeter fence three feet from the enclosure fence in the back. Tr. at 54. Dr. McFadden explained that although there was a perimeter fence generally around the facility,

there was a break in the wall in this particular area, which represents a failure to create a secondary containment system that would keep an animal from escaping the premises. Tr. at 54-56; 216.

At her inspection on September 26, 2007, the serval was no longer in that enclosure, but the problem persisted. No complete perimeter fence had been erected, and a tiger and coatiundi were housed in the area. CX-7-A; Tr. at 68-69. Dr. McFadden cited Respondents because the back wall of the tiger enclosure was not within a perimeter fence. CX 7A; Tr. at 72-74.

Mr. Candy believed that a solid wall around the coatiundi and young tiger enclosure was sufficient to serve as a perimeter fence but nevertheless put up another fence when Dr. McFadden expressed reservations about the existing wall.. Tr. at 786. Dr. McFadden acknowledged that a solid wall could serve as a perimeter, since the regulations did not demand a particular material of fencing. Tr. at 217. However, there was a break in one area of the wall between two enclosures. Tr. at 216. Dr. McFadden conceded that there was a wall present in the area, but it did not meet the regulatory standard of being three feet from the enclosure. Tr. at 237.

Dr. McFadden acknowledged that the three foot requirement was a policy and not a specific regulatory requirement. Tr. at 238. She was not the original inspector assigned to Respondents' facility, and did not know whether her predecessor provided information to the Zoo. Tr. at 239-240. This violation has been substantiated.

On September 26, 2007 and on August 3, 2009, Dr. McFadden noted that the perimeter fence near the lion's enclosure was leaning inward, and therefore was not structurally providing an adequate barrier. CX-7; CX-10; Tr. at 105. The fence was "slightly, but noticeably" leaning inward. Tr. at 289. The fence was leaning at the top of its eight foot height, and Dr. McFadden could not recall whether it was braced on either side. Tr. at 289. Pictures that she took at both

inspections show the fence leaning, and it appeared to be leaning more in 2009. CX-7; CX-10; Tr. at 292. She and Mr. Candy discussed the issue, and Mr. Candy understood that the fence needed to be made sturdier, and he straightened it out. Tr. at 812.

Complainant's concern about the structural integrity of the leaning perimeter fence is supported by the fact that later inspection revealed further leaning. This violation is established.

3. Animal Health and Husbandry Standards

The regulations require that animals be provided wholesome, palatable food, free from contamination, and appropriate in quantity and nutritive value for the age, species and condition of animals. 9 C.F.R. § 3.129(a). Potable water must be provided as often as necessary if not accessible at all times.

Feed

Respondents were cited with violations of this standard, with respect to a carcass that was observed in the lion enclosure on June 2, 2008. CX-8. At an inspection on September 3, 2008, Dr. McFadden was concerned about how meat and a carcass were stored in a refrigerator. Tr. at 97-99. She found that blood had pooled in the refrigerator, which she believed presented a risk of contaminating the other food. CX-9; Tr. at 99-100.

Respondents have adopted new policies regarding the storage of feed for animals. Tr. at 801. The Zoo no longer keeps large amounts of food on store. Mr. Candy buys meat on a daily basis and keeps enough of other foodstuffs for about a week. Tr. at 802. The Zoo freezes or refrigerates only donated meat, and donated foods are inspected closely before being fed to animals. Tr. at 802-803. Meat is no longer kept in the kitchen area inspected by Dr. McFadden, but fruits and vegetables are stored in the refrigerator. Tr. at 804.

The evidence demonstrates that Respondents' past practices were not the most tidy, but the record fails to establish how the conditions posed sanitation or health risks to animals. There is no record showing that animals were sickened by foodstuffs, and nothing to suggest that the conditions were not corrected. These violations are based upon appearances and not proof of actual and potential risk to animals or visitors. Complainant has failed to substantiate these violations by a preponderance of the evidence.

Watering

The Complaint charged Respondents failing to keep a water receptacle clean for a lion as a result of Dr. McFadden's inspection of November 20, 2009. CX-12. The testimony regarding the lion's water did not explain how the inspector reached her conclusions. She discussed the presence of a heating element in either a tub or a pool, and pointed to a photograph. Tr. at 124; 126. Dr. McFadden thought the water looked green. Tr.. at 126.

Mr. Candy believed that this violation was prompted by a complaint made to PETA about his facility, because the inspection occurred shortly after he received a letter from that organization, and Dr. McFadden had completed an inspection thirty days or so previously. Tr. at 817. He believed that the water was clear.

No testing of the water was conducted, and although the water looked green in color to Dr. McFadden, the record fails to establish her distance from the container, or the color of the container that held the water. There is no evidence that the water contained algae. Cf., In re: Hoctor, 56 Agric. Dec. 416 (1977). The preponderance of the reliable evidence fails to establish that Respondents' animals were not provided adequate and potable water. This charge is dismissed.

Sanitation

Cleaning and Housekeeping

“Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . .” 9 C.F.R. § 3.131(a)(1). On November 29, 2006, Dr. McFadden observed an excessive amount of feces in several enclosures. CX-5; Tr. at 59. Mr. Candy advised that enclosures were cleaned once a week, which the inspector considered to be inadequate to prevent contamination and health hazards. Tr. at 59-60. On her inspection conducted on May 23, 2007, Dr. McFadden observed accumulated excreta, dirt and hair in the tiger enclosure. CX-6; Tr. at 60-61. She cited with a repeated violation for not cleaning enclosures frequently enough, Tr. at 61-62. These charges are upheld.

At her inspection on August 3, 2009, Dr. McFadden found an excessive amount of excreta in the enclosures for cougars, servals, bobcats, pigs and goats. CX-10; Tr. at 106. She believed the problem would be resolved with more frequent cleaning. Id.; CX-10. Mr. Candy had worked in the field of environmental services and has written policies regarding proper cleaning and building maintenance for companies such as Sodexho and Marriott. Tr. at 693-694. He is certified in cleaning and sanitation and feels qualified to determine how to maintain facilities so that they are properly cleaned and sanitized. Tr. at 694. He and his volunteers follow a schedule for cleaning the facility. Tr. at 705. He has developed checklists that volunteers must use to record that they accomplished assigned tasks. Tr. at 714-716. He trains volunteers in the best way to clean the facility, and uses industry-recognized cleaning agents. Tr. at 717. Vinegar is used inside, near the animals, and outside facilities are cleaned with a water and bleach mixture. Id.

Animals' areas are cleaned daily, and power-washed every two weeks. Tr. at 718. Mr. Candy asserted that Dr. McFadden is aware of the schedule and approved of his power-washing schedule. According to Mr. Candy, Dr. McFadden had never suggested a different schedule for removing feces, or doing other routine maintenance. Tr. at 719; 725. Since the Zoo operates on a 16 to 20 hour day, the fact that conditions appear unsanitary in the morning does not mean that they have been neglected, as the facility will be cleaned later in the day. Tr. at 771. He cleans large cat cages, and he cannot be cleaning on inspection days when he is required to tour the premises with the inspector. Id. The areas of fencing that tigers used to rub against and that accumulated hair have been changed, and are no longer attractive to the cats for that purpose. Tr. at 772.

As I have stated herein, supra., Mr. Candy's insistence on adhering to his pre-established cleaning schedule demonstrates that he fails to comprehend Complainant's concerns. He has been repeatedly and frequently cited for deficiencies of cleanliness standards, yet maintains that Dr. McFadden has not suggested adjusting his cleaning practices. I find that Respondents have made little effort to accommodate Dr. McFadden's concerns. Although Mr. Candy deems himself an expert in sanitation, the businesses that he had worked in prior to his current enterprise hardly replicate conditions at a zoo. This violation is substantiated.

Dr. McFadden cited Respondents with violating basic housekeeping standards set forth at 9 C.F.R. § 3.131(c) on June 2, 2008. CX-8. She explained that half of the building that housed the binturong was used to store unused equipment, which was haphazardly placed and presented a potential place to harbor pests. Tr. at 93. The inspector estimated that equipment and material, including propane tanks and possibly chemicals, had accumulated in three-quarters of the space, but did not impinge upon the binturong's living space. Tr. at 94-95.

Inspection of the premises on August 3, 2009 revealed an accumulation of trash and unused equipment in the bird area that could attract pests. Tr. at 107. Dr. McFadden cited Respondents with violating housekeeping standards. CX-10. She found a similar problem on her inspection of September 30, 2009. CX-11; Tr. at 117-118. The bird room is connected to the reptile house, which serves as part of the Zoo's perimeter fence. Tr. at 813. The area that Dr. McFadden described is outside of the Zoo's exhibition space, and part of the area used by another business that Mr. Candy owns. Tr. at 813-814. The area contains bathrooms and a miniature golf course. Tr. at 814.

The description of how housekeeping standards within this area of the Zoo violated the Act is too vague and subjective to fully credit. It does not appear from the record that any harm came to animals, or that the condition posed a risk other than potential increase in pests in an area not devoted to exhibiting animals covered by the Act. These problems have been resolved with permanent solutions, as described by Mr. Squires and Mr. Candy. The preponderance of the evidence fails to establish a violation of the Act and regulations with respect to this condition.

Respondents were cited for having cracks in concrete in the big cat enclosures that would have made it difficult to clean the area. Mr. Candy disagreed that the cracked concrete presented a sanitation problem. Tr. at 822. Mr. Candy uses Borateem or Borax, which is a powder that can sink into crevices that a power washer doesn't reach. Tr. at 822. He believed that although the cracks were not attractive, the effect was no different from having rocks or other irregularly shaped articles in an enclosure. Id. Mr. Candy pointed out that Dr. Gage believed that rough ground was better for cats. Tr. at 823; RX-10; RX-11.

I credit both opinions equally. The record is in equipoise on this issue and Complainant has failed to establish by a preponderance of the evidence that this condition as a violation of the Act.

Pest Control

During the inspection on May 17, 2006, a mouse was seen in the binturong enclosure. CX-3. It was obvious to Dr. McFadden that the mouse was staying in the enclosure, and she opined that the presence of one rodent generally signified additional mice and an inadequate pest control system. Tr. at 46. Exhibitors are required to establish "a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests. . ." 9 C.F.R. § 3.131(d).

On May 23, 2007, Dr. McFadden noted numerous flies in the reptile house, and concluded that Respondents had not taken effective measures to reduce their numbers. CX-6. Tr. at 62-63. She observed a number of fly strips, and knew of no other pest control measure used by Respondents. Tr. at 63. Dr. McFadden admitted that APHIS had not established standards for pest control. Tr. at 227. She further testified that she was not supposed to give guidance on how to come into compliance. Id.

On June 2, 2008, a dead mouse was seen in a trap near the young tiger's enclosure. CX-8; Tr. at 95. Although she could not say whether the picture she viewed depicted the mouse trap inside the enclosure, she nevertheless concluded that Respondents did not have effective pest control measures that included frequent checking of traps to remove dead rodents. Tr. at 95- 96.

Mr. Candy has a written pest control program, but acknowledged that sometimes conditions require adjustments, such as in May, 2007, when an excessive number of flies were on site. Tr. at 773. An individual who used to have an animal exhibition now runs a pest control company and the Zoo uses his services. Id.

I find that the evidence supports that better pest control was necessary at the Zoo. These allegations are supported. However, Respondents have established a written program and instituted more effect pest control methods.

Employees

Exhibitors are required to use “a sufficient number of adequately trained employees . . . to maintain the professionally acceptable level of husbandry practices” required by the regulations. 9 C.F.R. § 3.132. “Such practices shall be under a supervisor who has a background in animal care”. *Id.*

At her inspection on May 17, 2006, the inspector cited Respondents for failure to have adequate numbers of sufficiently trained employees on site. CX-3. It was evident to Dr. McFadden that Respondents did not have enough properly trained staff, due to the number of problems she had observed. Tr. at 46-47. She believed that the Zoo’s volunteers needed guidance from someone with expertise in animal husbandry. Tr. at 47.

In 2004, Mr. Candy and two other Zoo volunteers attended a “Big Cat Symposium”. Tr. at 714-715. He has not provided any other formal training to his volunteers, but he stated that he has established strict rules about maintenance and care of the animals, and closely supervises his volunteers. Tr. at 715. The Zoo’s rules include health and safety policies, and volunteers are required to note and sign a list of tasks that they completed during their tours of duty. Tr. at 716. The checklist requires observations about the condition of the animals and facility, and volunteers are expected to make entries when they arrive for their shifts, and again when they leave. Tr. at 717. Mr. Candy is always available to answer questions. *Id.* He expects volunteers to record weather conditions, any changes they notice in the animals, maintenance issues and any thing else that they consider important. Tr. at 724-725.

Volunteers are trained on an on-going basis, and the Zoo uses the specific talents and expertise of its volunteers. Tr. at 719. The Zoo does not provide manuals to volunteers, other than the check list and rules. Tr. at 722. Mr. Candy is in charge of whatever goes on at the Zoo and he expects the volunteers to heed his instructions. Id. The checklists are kept in the reptile house. Tr. at 723-725; RX-23. One volunteer is designated as the "main volunteer" daily. Tr. at 726. The main volunteer works the same day each week and is generally responsible for feeding the animals. Tr. at 726-727. In addition, people live on the premises, and provide security on a consistent basis. Tr. at 727.

Mr. Candy testified that Dr. McFadden has told him that four people should be on duty at a time. Tr. at 759. Since the Zoo is not open long hours, and volunteers perform different jobs throughout the day and evening, Mr. Candy believed that he had sufficient workers. Tr. at 759-760. Mr. Candy asserted that he had adequate experience in animal care and expertise in facility maintenance and consequently has knowledge of animal husbandry. Tr. at 761. Mr. Candy had managed a large horse farm in Pennsylvania, and was responsible for cleaning and sanitizing universities, hospitals and veterinarian clinics. Tr. at 761-762. He developed procedures with the consultation of an individual with zoo experience. Tr. at 762. That individual is now working for another zoo, and another individual that Respondents hired as an animal consultant is no longer with Tri-State. Tr. at 762-763.

I credit Mr. Candy's years of experience working with animals and conferring with veterinarians and other animal experts, and conclude that he has adequate experience to operate the Zoo. However, the preponderance of the evidence demonstrates that the Zoo is not adequately staffed. Respondents have been repeatedly cited for violations that could have been avoided if people were tasked to make routine maintenance inspections to correct such problems

as breaches in fencing, pest control, and unsanitary conditions. Although Respondents' use of a check list for volunteers is laudatory, it is inadequate to prevent those types of infractions that were routinely observed by Dr. McFadden on her inspections. The Zoo fails to provide much formal training to volunteers. Despite Mr. Candy's contention that he demands certain skill sets from volunteers, he assumes sole responsibility for many tasks, without a trained individual to replace him in the event of an emergency.

I disagree with Mr. Candy's insinuation that four on-site people, reporting to an individual with experience in animal husbandry, is an arbitrary number. The size of the Zoo, both in area and animals, and the repeated problems observed by inspectors, support Complainant's contention that at least four people should be on site while the Zoo is open for operation. This is most clearly demonstrated by the fact that Mr. Candy must interrupt his scheduled work whenever an inspection takes place. Since he has sole responsibility for cleaning big cat cages, it is axiomatic that tasks are left undone or postponed when his attention is diverted.

Complainant has established this violation by the preponderance of the evidence.

4. Handling, Care and Treatment of Nonhuman Primates

On September 7, 2006, Dr. McFadden noticed that the roof of a dog house that was used as shelter for a Japanese macaque was cracked. CX-5; Tr. at 57. She believed this posed a problem as the crack could potentially injure the animal, and may not provide sufficient shelter from the elements. Respondents were cited with violating regulations pertaining to Structural soundness of housing and Shelter from elements. Housing facilities must be structurally sound and kept in good repair (9 C.F.R. § 3.75 (a)) and must provide protection from weather conditions (9 C.F.R. § 3.77 (d)).

Mr. Candy testified that the macaque in question was a rhesus macaque and not a Japanese macaque. Tr. at 770. He disagreed with this citation, because the dog house was meant as an environmental enhancement for the animal; it was not where the macaque was sheltered, but was meant for the macaque to play in. Tr. at 770. Dr. McFadden admitted that the macaque was housed in a different enclosure. Tr. at 220. In any event, the roof was removed. Id.

Complainant has failed to establish that a cracked toy violated a housing standard for primates.

On her inspection conducted on September 29, 2010, Dr. McFadden noticed rodent holes in the lemur house charged Respondents with violating the standards set forth at 9 C.F.R. § 3.84 (d), Failure to maintain effective pest control program. CX-14; Tr. at 153.

Complainant has established that the Zoo's pest control plan is not consistently effective. This violation is supported.

On May 17, 2006, Dr. McFadden observed a young lemur housed by itself. CX-3; Tr. at 38-39. She charged Respondents with failure to provide enrichment for the psychological well-being of a primate, and with failure to provide environmental enhancement needs in violation of 9 C.F.R. § 3.81(b); (c)(4). Tr. at 39. Dr. McFadden issued a notice of non-compliance with this standard on August 3, 2009 with respect to a capuchin monkey, a squirrel monkey, and the lemur, who were each individually housed without companionship and without any program to enrich their psychological well-being. CX-10; Tr. at 103.

Dr. McFadden testified that the problem regarding the enrichment plan remained in effect at her inspection on September 30, 2009. CX-11; Tr. at 108-109. However, the inspector was uncertain where the primates were housed at this time, speculating that some may have been at a clinic or in foster homes. Tr. at 109.

Respondents denied that the Zoo failed to have an enrichment plan. Tr. at 707. Mr. Candy included every primate at the Zoo in the plan that was originally devised by an individual with experience with primates, and which was approved by the Zoo's veterinarian. Tr. at 708. The enrichment plans from the years 2006 to 2011 were admitted to the record as RX-6. The Zoo's original veterinarian was Dr. Ryan, who practices under the name of "Feathers, Tails and Scales". Tr. at 709. Mr. Candy believed that Dr. Ryan was the only exotic pet expert in his part of the state, and the doctor's veterinarian technicians get some training at the Zoo. Tr. at 709-710.

The plans were again approved by Dr. Adams, who has been the Zoo's primary veterinarian from approximately 2007 or 2008, as he was located closer to the Zoo. Tr. at 710. When Dr. Adams decided to concentrate his practice on large hoofed animals, the Zoo engaged Dr. Fox from Cumberland County. Tr. at 710-711.

Mr. Candy acknowledged that the lemur was alone, but the environmental plan called for an increase in the variety of toys and other ways to stimulate solitary primates. Tr. at 807-808. The lemur is still alone, but his enclosure is near other primates so that they can interact. Tr. at 808. Respondents cannot buy a lemur legally, and must wait for a donation, so the Zoo's lemur is by necessity alone. Id.

The preponderance of the evidence establishes that Respondents had in place a plan for environmental enhancement, and practiced it. I dismiss this charge.

5. Attending veterinarian and adequate veterinary care

Exhibitors are required to employ "an attending veterinarian under formal arrangements. . . which include a written program of veterinarian care and regularly scheduled visits to the premises". 9 C.F.R. § 2.40(a). The program of care must demonstrate "the availability of

appropriate facilities, personnel, equipment, and services. . . ; the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being . . . with a mechanism of direct and frequent communication [with] the attending veterinarian; adequate guidance to personnel involved in the care and use of animals regarding handling; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures". 9 C.F.R. § 2.40(b)(1)-(5).

Dr. Fox remains the Zoo's primary veterinarian. Tr. at 711. Mr. Candy volunteers at the doctor's office to learn as much as he can about animal care. Tr. at 712. Dr. Fox is very responsive to the needs at the Zoo, and his close physical proximity allows him to attend to emergencies. Tr. at 713. In addition to the plans for the care of the primates at the Zoo, the veterinarians that the Zoo has used over the years approved plans for the care of other animals, including the large cats. Tr. at 729; RX-7; RX-8; RX-14 and RX-15. The doctor's signatures are visible on the records. Tr. at 733. Veterinarians have visited the Zoo and signed a letter acknowledging their service. Tr. at 734; RX-9.

The record fully establishes that Respondents have a plan of veterinary care. This charge is dismissed.

Care of Goats

On September 7, 2006, Dr. McFadden noticed that one of Respondents' goats needed to have its hooves trimmed. Tr. at 53-54. The goat has a genetic deformity on its hooves, but they also were overgrown. CX-4; Tr. at 54. On August 3, 2009, Dr. McFadden noticed two limping goats, and documented their gait problem to make sure that they received veterinary attention. CX-10; Tr. at 102. On November 20, 2009, Dr. McFadden again cited Respondents with this

violation. CX-12. She explained that Respondents had failed to provide a record from a veterinarian acknowledging the condition of the goats' hooves and establishing a schedule for trimming them. Tr. at 121. Respondents had no documentation from a veterinarian diagnosing the chronic condition. Id.

Mr. Candy explained that some of the goats at the Zoo had a genetic defect that creates a consistent problem with their hooves, which was known to their veterinarian. Tr. at 757. Mr. Candy does not consider the genetic malformation a medical condition that requires a schedule of care, but he is aware that the condition affects the goats and he tries to tend to their needs. Tr. at 757-758. Some of his goats have since been donated to other facilities. Tr. at 758; 804. Respondents have only six goats, none of which are related, because he was concerned that the goats that limped due to the genetic hoof problem caused visitors to question their care and condition. Tr. at 804-805.

The evidence regarding veterinary care for goats with a genetic condition is substantiated. I accept that the existence of a genetic condition may not warrant a schedule of medical treatment for the condition. However, goats were observed limping due to overgrown hooves that needed medical attention. Respondents did not have a plan for routine hoof treating, and Mr. Candy admitted that the condition needed attention, as he called the Zoo's veterinarian, who treated the goats. Tr. at 281. This constitutes a failure to follow a plan of veterinary care, and a violation of the Act.

Pigtail Macaque

During her inspection of September 26, 2007, Dr. McFadden noted that Respondents' pigtail macaque was not in its usual enclosure. Tr. at 65. She had inquired into its whereabouts, having learned that Respondents did not always document the transfer, acquisition, death, or sale

of their animals. Tr. at 64. Mr. Candy told her that the pigtail macaque had been found dead in its enclosure, and he speculated that it may have chewed on the cord of a heat lamp that was adjacent to its enclosure. Tr. at 65. Dr. McFadden concluded that the Zoo's personnel were not properly trained to care for animals, as a potential hazard had been left near the macaque in violation of 9 C.F.R. § 2.40(b)(1). Tr. at 66. In addition, it was alleged that appropriate methods to prevent, control, diagnose, and treat an injury were not used, in violation of 9 C.F.R. § 2.40(b)(2). Dr. McFadden concluded that these failures led to the macaque's electrocution. CX-7.

Mr. Candy found the animal dead, and discussed alternate theories of the cause of its death with Dr. McFadden, including the possibility that the animal had bitten through an electric cord. Tr. at 778. Mr. Candy rejected electrocution by the lamp as the cause of death because the extension cord was far from the enclosure, and the lamp remained in its place, suggesting that its cord had not been pulled. Tr. at 781. Although the plug on the cord was marked, the cord and plug were old and there was no way to say that the marks were recent. Id. The cord and lamp were arranged so that they would be unplugged if pulled. Tr. at 781. There was no sign of damage to the cord, or signs of burns on the animal. Tr. at 779; 781. He and Dr. McFadden discussed many different causes of death, including old age and heart disease. Tr. at 781. No necropsy was performed, and the animal had been buried. Tr. at 780. Dr. McFadden did not examine the animal because her inspection was conducted the September following the animal's death in December. Tr. at 780-781.

There is insufficient evidence to determine that the animal died of electrocution. Even if Mr. Candy's speculations about the cause of the animal's death were limited to electrocution, Complainant has no corroborative evidence to charge Respondents with such a serious

allegation. The violation is based on conjecture and is not supported by evidence of any sort.

This allegation is dismissed.

6. Failure to retain records

Dr. McFadden charged Respondents with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. §. 2.75(b) during her September 26, 2007 inspection. CX-7; Tr. at 64. Mr. Candy testified that people often leave animals at their facility that they may not keep, and the Zoo did not at first record animals that were not covered by the AWA. Tr. at 775. He believed that he now kept records of animals, though were reconstructed after originals were destroyed in a fire. Id.

I find no evidence of record credibly disputes Complainant's contention that the Zoo fails to keep complete records relating to the acquisition and disposal of animals. This charge is sustained.

On June 2, 2008, Respondents failed to provide a copy of a written veterinarian plan. CX-8; Tr. at 75-76. As a result, Dr. McFadden was unable to determine whether Respondents had a veterinarian on call, or had developed a plan for care. Tr. at 75. Mr. Candy testified that he has no place to keep his records on site since the Zoo lost a building in a fire. Tr. at 706. He is reluctant to keep records in the gift shop or any other building that gives access to the public. Tr. at 707. However, he is aware that Dr. McFadden generally spends two days inspecting his facility and he consistently provides her with all the records, including plans of veterinary care and enrichment for non-human primates, on the morning of the second day of her inspection. Tr. at 707.

When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records

in that location, which is a kitchen that stores animal feed. Tr. 730. He distinguished those records from the daily logs, which are used daily. Tr. at 731. Despite being cited for repeated violations, he had never failed to provide the records. Tr. at 731-732. He maintains that so long as he "cures" defects, he should be considered compliant with the Act and regulations.

Mr. Candy's attitude with respect to keeping records on-site for inspection demonstrates that he does not understand the need to meet the inspector's expectations of compliance with the Act and regulations. I accept that the records are always made available to Dr. McFadden, but I reject the notion that duplicates cannot be maintained somewhere on the premises. Moreover, APHIS has the right to see records at an unannounced inspection to assure itself that the records have not been changed to conform with regulatory standards. See, In re: S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 489 (1991).

Mr. Candy's recalcitrant resistance to keeping the records on-site despite repeated violations for this failure demonstrates a lack of cooperation and commitment to full compliance with the Act and regulations. This violation is supported by the evidence.

E. Summary

The record establishes that Respondents are clearly in violation of regulatory operating standards regarding sanitation and record keeping. Although Respondents cooperate with USDA when Mr. Candy agrees with Dr. McFadden, where Mr. Candy is comfortable with how he does things, he disregards Dr. McFadden's concerns. For example, he is satisfied with being repeatedly cited for recordkeeping violations rather than finding a place to keep records on site. He would rather be charged with repeated violations of unsanitary conditions than modify his cleaning routine. Although Respondents have resolved some of the government's concerns about food and equipment storage, I cannot conclude that Mr. Candy made those changes entirely to

please APHIS. Mr. Candy has shown himself indisposed to alter his conduct when he disagrees with Dr. McFadden.

In addition, there is no doubt that Respondents lack adequately trained employees.

Despite USDA's expressed concerns about manpower, and the obvious defects that inadequate staffing has caused, Mr. Candy has made no attempt to mollify the inspectors on this point. It is clear that more frequent patrols of the facility would eliminate problems with food storage, pest control, fence maintenance issues, and animal care. There is no trained back-up personnel, should Mr. Candy become unable to clean large cat enclosures or carry out other tasks. He failed to maintain and put into place a schedule for routine care of goats' hooves.

Although I have found certain allegations do not demonstrate failure to handle animals properly, Respondents' policy of taking groups within close proximity to large cats is a serious offense. The volunteers comprise the sole barrier between the cats in their cages and the public, who are within reaching distance to the cats. The volunteers are not positioned directly between the cats and the public, and their training is limited to using fire extinguishers in the event of an emergency. Even without direct evidence that spectators touched the cats, this practice represents a clear danger to both animals and spectators, and must be discontinued.

Respondents have corrected the concerns of APHIS about barrier and perimeter fences. I agree with Mr. Candy that certain of the allegations address concerns about appearances. Complainant has not been able to articulate exactly why the tiger enclosure fails to meet the regulatory standards. Respondents' facility appears to have been judged against "industry standards", which are not in evidence. The record establishes that the fencing meets height requirements and the use of kick ins, tensile wire and electric fencing demonstrates Respondents' concerns about containing the tigers.

In contrast, Complainant's concerns about the integrity of the lion enclosure have merit. Inspectors specifically pointed to questionable materials used to join fencing at corners. Specific deficits were observed in the fencing on different inspections, such as a gap at the bottom of fencing, and a leaning portion of the fence. In instances where inspectors found fault with aspects of the lion enclosure, Respondents addressed the concerns. However, Complainant clearly found the construction of the enclosure inadequate and a risk factor for an escape. I put little weight on an escape attempt in the past, since Respondents have done much to shore up the fencing since that time. However, I credit the inspectors' explanations that the use of several fencing types and different joining materials made the stability of the fence questionable. Since Respondents are in the process of building a new enclosure for the lion, the concerns that gave rise to these allegations shall soon be moot.

F. Personal Liability of Robert Candy

As sole corporate officer, and Director of the zoo, Mr. Candy is personally responsible for the acts of Tri-State. All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Candy. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. §2139. See, In re Coastal Bend Zoological Ass'n, etc. et al, 67 Agric. Dec. 154 (2008). A corporation and the individual who exercised sole control over corporate activities may be jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. Irvin Wilson and Pet Paradise Inc. v. U.S.D.A., 54 Agric. Dec. 111 (1995). I find that Mr. Candy may be held personally liable for acts he performed on behalf of Tri-State.

G. Remedies

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. In re David M. Zimmerman, 56 Agric. Dec. 433 (1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. In re Lee Roach and Pool Laboratories, 51 Agric. Dec. 252 (1992). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. In re: Marilyn Shepherd, 57 Agric. Dec. 242 (1998).

As Eastern Regional Director of the Animal Care Program for APHIS, Dr. Goldentyer is familiar with the licensees within her jurisdiction. Tr. at 858-860. When considering whether sanctions are appropriate, she considers factors such as the size of the business of the licensee, the history of compliance, and the good faith of the enterprise with adhering to the Act and regulations. Tr. at 860-862. Respondents' operation is relatively small in size, and Respondents have consensually paid a previous fine to APHIS. Tr. at 860-861. Dr. Goldentyer could not say that Respondents acted entirely in good faith, because repeated and multiple violations were disclosed at each inspection. Tr. at 862.

Dr. Goldentyer agreed that some of the violations were not "egregious", but she pointed to the accumulation of violations, which she inferentially attributed to poor management. Tr. at 863. She believed that a period of suspension was appropriate to allow the facility to come into compliance. Tr. at 863-864. She also believed that a civil money penalty would send an appropriate deterrent message, though she was cognizant of Respondents' limited resources. Tr. at 870-871.

With respect to the soundness of the tiger and lion structures, Dr. Goldentyer suggested that the best model to judge structural soundness would be those enclosures that were not considered a violation of the regulations. Tr. at 865-866. Inspectors are expected to give guidance to licensees on how to achieve compliance, but are not tasked to dictate standards of construction. Tr. at 883. Inspectors generally rely upon their experience with facilities that have successfully built structures that are reliable when they measure the integrity of fencing. Tr. at 882. Dr. Goldentyer testified that she believed it would be possible for APHIS to work with Respondents during a period of suspension and confirm whether its newly constructed enclosures met regulatory standards. Tr. at 885. She observed that this would only work if both parties were in complete agreement about the outcome. Tr. at 886.

According to APHIS policy, if a deficient condition is corrected, it will not be cited on the following inspection. Tr. at 875-876. However, if a pattern of non-compliance establishes itself with repeated violations that reflect upon overall management of a facility, then inspectors will include all cited violations to show the pattern. Tr. at 877.

Respondents handled animals in a manner that posed risk to them and the public. Respondents do not employ an adequate number of trained personnel to ensure compliance with the Act and regulations, leading to repeated violations pertaining to the maintenance of the facility. Respondents failed to develop and follow a plan for veterinary care of its goats' hooves. Respondents' lion enclosure did not meet standards for structural soundness and at times had no full perimeter fence and no barriers. Respondents repeatedly violated regulations regarding recordkeeping requirements. Although Respondents have put forth good faith efforts to improve the appearance of the facility, and have implemented changes that corrected many of the conditions for which they were cited, conditions remained unaltered when Respondents

disagreed with APHIS' findings. The Zoo's response to repeatedly being cited for certain conditions suggests lack of good faith and demonstrates willful violation of the Act and its implementing regulations.

APHIS has recommended that Respondents' license be suspended for a period of six months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based occurred as long as six years ago, and many have been corrected by Respondents. As Dr. Goldentyer observed, the Zoo constitutes a small business; a suspension will pose a significant financial burden. Considering the remedial nature of the Act, and the fact that there were no violations involving harm to animals or the public, I find that a short suspension represents a sufficient deterrent from violating the Act, and see no need to impose an additional monetary penalty on Respondents as the result of their violations. In particular, I find that the deterrent purpose of sanctions would not be furthered by imposing a civil money penalty for violations that were transitory and have been remedied, regardless of their historical accuracy.

I find it appropriate to suspend Respondents' license for a period of forty-five (45) days. I have found that Respondents' repeated violations are willful, thereby permitting the imposition of a suspension of the Zoo's license. See, In re: Big Bear Farm, Inc., et al., 55 Agric. Dec. 107 (1996).

H. Findings of Fact

1. The Secretary has jurisdiction in this matter.
2. Tri-State Zoological Park of Western Maryland, Inc. is a Maryland corporation whose registered agent for service of process is Robert L. Candy.

3. At all times relevant to this adjudication, Respondents operated a Zoo, and exhibited approximately 65 wild and exotic animals at a facility in Cumberland, Maryland under AWA license 51-C-0064.
4. APHIS conducted inspections of Respondents' facility, records and animals on May 17, September 7, and November 29, 2006; on May 23 and September 26, 2007; on June 2 and September 3, 2008; on August 3, September 30, and November 20, 2009; and on September 29, 2010.
5. At each of the inspections, APHIS inspectors cited Respondents with violations of the Act and regulations, including violations pertaining to handling animals; recordkeeping; housekeeping; animal husbandry; environmental enhancement for primates; inadequate drainage; structural inadequacy of enclosures; insufficient number of and inadequately trained employees; inadequate plan for pest control; poorly maintained fencing and shelter; inadequate shelter from inclement weather for primates and other animals; excessive feces and waste matter; failure to erect perimeter fencing; failure to provide wholesome and palatable food; failure to provide potable water; failure to store foodstuffs properly; and failure to follow plan of veterinary plan for trimming goat hooves.
6. Groups of people, including children, were led on tours to view the rear of lion and tiger enclosures with no additional barrier outside of the cages other than the presence of volunteers, and were allowed close proximity to the animals.
7. Records were not consistently maintained to record acquisition and disposition of animals, and no records regarding a plan for veterinary care, or other required records, were available on the days of inspections.

8. An accumulation of bedding and feces was observed in and near animals' housing on several occasions.
9. Deficits in construction and disrepair was noted in the enclosures of a porcupine, a binturong and a macaque.
10. Primates were housed singly and a plan for their environmental enhancement was not kept on the premises.
11. A veterinarian developed plans for environmental enhancement of primates.
12. Tri-State has an attending veterinarian who treats the Zoo's animals.
13. Puddles were observed after several days of rainfall, indicating problems with drainage.
14. The lion enclosure showed gaps between the ground and the fence, and the fencing was joined with a variety of materials.
15. Volunteers undertook tasks assigned by Mr. Candy, but had no special training in animal husbandry or animal escape and capture.
16. Rodent carcasses and an excess of flies were observed upon inspection.
17. Wire fencing at the llama and goat enclosures was detached and sharp wires protruded; a crack in a permanent shelter was observed; and the door of the lion enclosure needed reinforcement.
18. A cougar was displayed in an enclosure that was not surrounded by a barrier of sufficient height and distance to prevent contact between the animal and the public.
19. Ferrets were left in the sun; a structure used by a macaque was cracked; a spool in the enclosure for an arctic fox was cracked; and a ramp used by a bobcat appeared unstable.
20. Feces was observed repeatedly in the tiger pools and other areas of the facility.
21. Perimeter fencing was not evident in certain areas of the facility.

22. Foodstuffs were stored in locations where chemicals, tools and equipment were also stored.

23. A carcass was kept in a lion's enclosure for two days.

24. Water for a lion appeared greenish in color.

25. A macaque was found dead without obvious cause of death.

26. The hooves of goats needed to be trimmed, and there was no plan of veterinary care for maintenance of the condition.

I. Conclusions of Law

1. In his capacity as corporate officer and director of the Tri-State Zoological Park of Western Maryland, Robert Candy operated as an exhibitor as that term is defined by

the Act and regulations.

2. Pursuant to 7 U.S.C. § 2139, Robert Candy's acts, omissions or failures in his capacity as corporate officer and director are deemed to be his own as well as those of the corporate entity.

3. The following violations brought against Respondents are dismissed for lack of proof by a preponderance of the evidence:

a. Allegations of violations of 9 C.F.R. § 2.131(c)⁸, alleging failure to properly handle a cougar on May 17, 2005; a porcupine on June 2, 2008; and a binturong on August 3, 2009.

⁸ It is clear that Respondents failed to provide proper barrier fences in these instances, but Complainant did not charge them with that offense.

- b. Allegations of violations of 9 C.F.R. §3.125 (a), alleging insufficient structural strength of the tigers' enclosure, including the fencing that separates the different of tigers
- c. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the decorative board surrounding the platform in the cougar enclosure.
- d. Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects in the bobcat ramp.
- e. Allegations of violation of 9 C.F.R. § 3.125(c) alleging improper storage of food on September 3, 2008.
- f. Allegations of violations of 9 C.F.R. § 3.125(d) alleging sanitation violations with respect to the tiger pool occasionally compromised by mulch.
- g. Allegations of violation of 9 C.F.R. § 3.125(d) alleging sanitation violations because of the failure to remove a carcass from the lion enclosure.
- h. Allegations of violation of 9 C.F.R. § 3.127(a), alleging failure to provide shade to ferrets on June 2, 2008.
- i. Allegations of violation of 9 C.F.R. § 3.127(c), alleging failure to provide adequate drainage on May 17, 2006.
- j. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding the refrigeration and storage of food on September 3, 2007 and the failure to remove a carcass from the lion enclosure on June 2, 2008.
- k. Allegations of violations of animal husbandry standards set forth at 9 C.F.R. § 3.129(a) regarding potable water for a lion in November 20, 2009.

1. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) pertaining to the storage of food stuffs mingled with equipment and non-food stuffs in a building on June 2, 2007; the failure to dispose of trash in a non-exhibition area of the facility on August 3, 2009; and the presence of cracked concrete in the tiger enclosure.
 - m. Allegations of violations of sanitation and housekeeping standards set forth at 9 C.F.R. § 3.131(c) with respect to trash found outside of the official Zoo on August 3, 2009 and September 30, 2009.
 - n. Allegations of violations of standards for structural integrity of housing for primates set forth at 9 C.F.R. § 3.75(a) for a macaque, cited on September 7, 2006.
 - o. Allegations of violations of standards for shelter from the elements for primates set forth at 9 C.F.R. § 3.77(d) for a macaque.
 - p. Allegations of violations of requirements to develop and provide environmental enhancement to primates set forth at 9 C.F.R. § 3.81(b) and (c)(4), pertaining to a macaque, lemur and capuchin monkey.
 - q. Allegations of violations of requirements to provide an attending veterinarian pursuant to 9 C.F.R. § 2.40 for a pigtail macaque that was discovered dead one morning.
 - r. Allegations of violations of requirements to engage an attending veterinarian pursuant to 9 C.F.R. § 2.40.
4. The following violations are established by a preponderance of the evidence:

- a. On June 2, 2008, Respondents failed to handle animals (lion and tigers) in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).
- b. On September 29, 2010, Respondents failed to handle a squirrel monkey in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c).
- c. Respondents failed to provide structural integrity for their lion enclosure in violation of 9 C.F.R. § 3.125(a).
- d. On September 26, 2007 and again on May 19, 2008, Respondents failed to provide structural integrity of the enclosure housing their young cat in violation of 9 C.F.R. § 3.125(a) due to the gauge of the wire on the door to the enclosure.
- e. On September 29, 2006 and May 23, 2007, the llama and goat enclosure was in disrepair in violation of 9 C.F.R. § 3.125(a).
- f. A crack in the reptile house presented a structural defect that violated 9 C.F.R. § 3.125(a)
- g. Structural problems with a spool in the arctic fox enclosure represented a defect that posed the risk of harm to the animal in violation of 9 C.F.R. § 3.125(a).
- h. Respondents failed to dispose of waste in the agouti and fennec fox enclosure and in the tigers' pools in violation of 9 C.F.R. § 3.125(d).
- i. Respondents failed to maintain a perimeter fence that was not disrupted by gaps, which affected the serval enclosure on September 7, 2006 and the tiger and coatimundi enclosures on September 26, 2007, in violation of 9 C.F.R. § 3.127(d).
- j. Respondents' perimeter fence was defective, in that its integrity was compromised, upon inspections conducted on September 26, 2007 and August 3, 2009, in violation of 9 C.F.R. § 3.127(d).

- k. Respondents failed to remove excreta on numerous occasions in violation of 9 C.F.R. § 3.131(a)(1).
 - l. Respondents failed to establish an adequate plan for pest control, which impacted all of its animals, including primates, in violation of 9 C.F.R. § 3.131(d) and 9 C.F.R. § 3.84(d).
 - m. Respondents failed to provide for attending veterinary care for their goats in violation of 9 C.F.R. § 2.40(b).
 - n. Respondents failed to keep and provide records as required by 9 C.F.R. § 2.75(b)
 - o. Respondents failed to maintain an adequate number of sufficiently trained staff in violation of 9 C.F.R. § 3.132.
- 5. Respondents have repeatedly and willfully violated the Act and regulations.
 - 6. A sanction of the suspension of Respondents' license for a period of forty-five (45) days is appropriate.
 - 7. Further, an Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

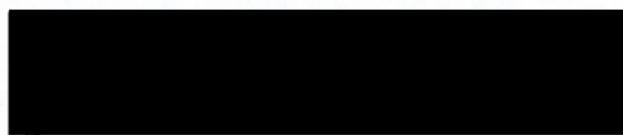
- 1. The Tri-State Zoological Park of Western Maryland, Inc., and its agents, employees, successors and assigns, directly or indirectly through any corporate or other device, including, but not limited to Robert L. Candy are hereby ORDERED to cease and desist from further violations of the Act and controlling regulations. In order to achieve compliance with the Act and regulations, Respondents should develop alternate plans for tour groups that will not expose them or animals to the risk of contact; recruit and train volunteers or employees regarding basic sanitation and maintenance of the facility, with

an emphasis on identifying conditions that could violate a regulation; consult with a specialist with animal husbandry experience to improve cleaning schedules and water sources; implement a plan for maintenance of goats' hooves; to identify a suitable location to store records on-site; and consult with APHIS specialists regarding the structural integrity of new enclosures and make suggested alterations.

2. AWA license number 51-C-0064 is hereby suspended for a period of forty-five (45) days.
3. This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 1st day of August at Washington, DC.



Administrative Law Judge