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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0072

In re: Lee Marvin Greenly, an individual;

and

Minnesota Wildlife Connection, Inc.,  
a Minnesota corporation,

Respondents

**Decision and Order**

Appearances: Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Complainant

Larry D. Perry, Esquire, Knoxville, Tennessee for the Respondents

**Preliminary Statement**

This Decision and Order involves the first of two actions filed the same day by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) alleging that the named Respondents violated the Animal Welfare Act (the Act or AWA). 7 U.S.C. §2131, *et seq.*

In this action, the Complaint filed on November 29, 2010 originally named as Respondents Lee Marvin Greenly, Sandy Greenly, Crystal Greenly, and Minnesota Wildlife Connection, Inc., a Minnesota corporation. As the proceedings against two of

individual Respondents have since been resolved by Consent Decisions, the action now involves only the two remaining Respondents named in the caption.<sup>1</sup>

On January 19, 2011, an Order was entered consolidating the two cases for the purpose of hearing, denying the Motions filed by the Respondents to dismiss three Respondents and to compel production of documents, establishing deadlines requiring the exchange of exhibits and lists of exhibits and witnesses, and setting both cases for hearing in Duluth, Minnesota on May 10, 2011.

On February 8, 2011, Complainant filed a Motion for Summary Judgment in Docket No. 11-0073 and on March 1, 2011 sought and was granted an Extension of Time in which to comply with the Order of January 19, 2011 concerning the exchange deadlines. By Order entered on March 8, 2011, the ruling on the Motion for Summary Judgment was deferred pending the hearing of the consolidated actions. On April 14, 2011, the Complainant amended its Complaint and on May 5, 2011, moved to continue the oral hearing.

By Notice of Hearing entered on April 25, 2012, the actions were rescheduled to be heard on May 1, 2012 in Minneapolis, Minnesota.<sup>2</sup> At the hearing conducted May 1 and 2, 2012, eleven witnesses testified for the Complainant, seven witnesses testified for the Respondents, fifty-one exhibits were admitted for the Complainant and forty-eight exhibits admitted for the Respondents.<sup>3</sup>

Post hearing briefs were received from both parties and the matter is now ripe for disposition.

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<sup>1</sup> Consent Decisions were entered as to Sandy Greenly on April 9, 2012 and as to Crystal Greenly on May 4, 2012.

<sup>2</sup> The actions had previously been set for hearing on May 1, 2012 in Duluth, Minnesota; however, court space was not available and the location of the hearing was moved to Minneapolis.

<sup>3</sup> Includes sub exhibits introduced by Complainant (2-2c less 2a, 16-16a, and 24-24a).

## Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats, and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in order to more appropriately reflect its broader scope.<sup>4</sup> Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.<sup>5</sup>

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).

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<sup>4</sup> The Congressional statement of policy is set forth in 7 U.S.C. §2131 which provides in pertinent part: "The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent or eliminate burdens on such commerce, in order –

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen.

<sup>5</sup> A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100<sup>th</sup> Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. Over time, the maximum civil penalty that may be assessed for each violation has been increased 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. The Act originally specified a \$2,500 maximum; however, between April 14, 2004 and June 17, 2008 the maximum for each violation was \$3,750. More recently 7 U.S.C. § 2149(b) was again amended and effective June 18, 2008 the maximum civil penalty for each violation increased to \$10,000.

The Respondent Lee Marvin Greenly is an individual who operates what he describes as a photographic educational game farm along the scenic Kettle River near Sandstone, Minnesota. CX-23, Tr. 382. He is a licensed exhibitor, holding Animal Welfare Act License Number 41-C-0122 and has worked in training animals for “close to over 28 years” with experience at a zoo in Hinckley prior to opening his own facility.<sup>6</sup> Tr. 416. The license renewal forms introduced during the hearing have listed as many as 190 animals that are maintained at his facility. CX-2.

The Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota formed on February 19, 2008 and lists its address as the same as Respondent’s Greenly’s. CX-24. Although Greenly suggests that the corporation is a “marketing company,” the record contains ample evidence that its activities and those of Mr. Greenly are essentially identical and the corporation checks

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<sup>6</sup> During questioning concerning his experience with raccoons, Greenly testified that he had worked with raccoons for 31 or 32 years. Tr. 427.

have been used to renew Greenly's AWA license. CX-2, 5, 11, 23, 39, 40, 45, 46, 52, and 75.

The Complaint, as amended,<sup>7</sup> alleges that between March 14, 2006 and October 19, 2010 the Respondents committed some thirty-seven separate violations of the Act and its Regulations.<sup>8</sup> The alleged violations cover a wide range of provisions in the Regulations, including (a) failing to provide adequate veterinary care to their animals; (b) failing to establish a mechanism for communicating with the veterinarian; (c) failing to construct structurally sound housing facilities; (d) failing to timely remove and dispose of food waste; (e) failing to appropriately store food; (f) failing to adequately enclose outdoor facilities; (g) failing to make, keep and maintain adequate and appropriate records; (h) failing to provide environmental enrichment for the animals; (i) failing to allow access for unannounced inspections of the facility, the animals and records; (j) failing to handle animals so as to avoid trauma or physical harm; and (k) failing to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public, resulting in injuries to the public on three occasions, death to a neighbor's pet, and mandatory euthanization of one of the animals following one incident. The prayer for relief seeks findings that the violations alleged were committed, a cease and desist order, a civil penalty, and the suspension or revocation of the Respondents' Animal Welfare Act license.<sup>9</sup>

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<sup>7</sup> The Complaint was amended on April 14, 2011 to add allegations of two additional violations. Docket Entry No. 16.

<sup>8</sup> One alleged violation (Paragraph 17 of the Amended Complaint) was withdrawn by the Government during the hearing. Tr. 408-409. The post hearing brief indicated that "the complainant calculates that the amended complaint alleges no fewer than 29 violations." Complainant's Post hearing Brief at p. 33.

<sup>9</sup> In her testimony, Dr. Goldentyer suggested that a cease and desist order, revocation of Respondent's license, and a \$50,000.00 fine would be appropriate. Tr. 570-577.

The Answer and Amended Answer filed by the Respondents dispute or deny the majority of the allegations, minimize the seriousness of the events underlying certain other alleged violations, and as to others indicate that any problem was corrected once it was brought to their attention. Limited staffing, the fact that the facility is open only by appointment and conflicting business appointments were offered to explain the failure to provide inspection access. Still other violations were denied on the basis that the conditions observed were temporary and caused in part by being taken away from the performance of ongoing tasks to deal with USDA personnel who had interrupted normal routines.

Of the matters alleged in the Complaint, the allegations concerning Respondent's actions on the instances in which there was risk of injury to the animals or the public, if proven, by themselves would be sufficiently serious to warrant revocation of Respondent Greenly's Animal Welfare Act license.<sup>10</sup> While no useful purpose is served by speculation concerning the need for two separate actions and the large number of alleged violations, one of which was withdrawn during the hearing and a number of others which I will find to be unfounded, it will be observed that the decision to include allegations of numerous less serious and sometimes questionable violations significantly increased the Respondents' burden and expense of defending the actions brought against them.<sup>11</sup> While I will discuss all of the allegations, discussion of the less serious allegations will be

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<sup>10</sup> As will be discussed, only four of the five instances will be found to be supported.

<sup>11</sup> The pattern of including large numbers of alleged violations, many of which have since been corrected and/or are several years old has been observed in a number of recent cases. See, *In re Craig Perry, et al.*, Docket No. 05-0026, Initial Decision by Judge Bullard, *aff'd in part by the Judicial Officer*, (Date); *In re Terranova Enterprises, Inc., et al.* Docket Nos. 09-0155 and 10-0418, 70 Agric. Dec. \_\_\_\_ (December 20, 2011); and *In re Bodie Knapp*, Docket No. 09-0175, 70 Agric. Dec. \_\_\_\_ (September 27, 2011); See also, *In re Lorenza Pearson, et al.*, 68 Agric. Dec. 685 (2009). Including allegations of numerous violations, but failing to establish them has the potential to expose the Department to the award of attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504. See, *Fox v. Vice*, 131 S. Ct. 2205 (2011).

given limited treatment in view of the remedial nature of the Act and the severity of the sanction which is being imposed. As noted in Complainant's post hearing brief and in the Departmental sanction policy, the Act is a remedial statute. *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991); See also, *In re Sam Mazzola, d/b/a World Animal Studios, Inc. et al.* 68 Agric. Dec. 822, 850 (2009).

The handling violations:

The Amended Complaint alleged that Respondents not only failed to handle animals so as to avoid trauma or physical harm on five occasions in violation of 9 C.F.R. §2.131(b)(1), and on the same occasions also failed to handle animals so that there was minimal risk to the public and the animals by permitting direct contact between dangerous animals and members of the public in violation of 9 C.F.R. §2.131(c)(1).

The evidence establishes that on February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, lancinginating the animal in half. Tr. 55-56. Although Respondent Greenly indicated that he was moving his truck at the time of the incident, he accepted responsibility for the incident and attempted to make amends with the Zeiglers by purchasing a replacement animal which the Zeigler ultimately accepted. Tr. 439, 441-444.

On either August 6 or 9 of 2009,<sup>12</sup> the Amended Complainant alleged that Respondents permitted the public to have direct contact with adult bears during “Quarry Days” without having any distance or barriers between the animals and the public. No USDA employee was present on either of the dates alleged<sup>13</sup> and the evidence advanced in support of the allegation consisted only of a photocopy of a newspaper article photograph for which no foundation was provided other than it was obtained as part of the investigation. Tr. 189-190, CX-39. I find this evidence insufficient to establish a violation was committed on either August 6 or 9, 2009.

On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents’ facility, Respondents exhibited Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, as apparently is Greenly’s ill advised but frequent practice,<sup>14</sup> the students and faculty were allowed to feed the bear “Gummi Worms,” with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly’s cousin and then a school employee) who had accompanied the students.<sup>15</sup> Ms. Jenson attempted to minimize the incident during her testimony, indicating that the bite to her arm did not draw blood until later. Tr. 118. A couple of days after the bite, she began to experience pain. After being initially seen in the emergency room, she was admitted to the hospital the following day for a five day

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<sup>12</sup> Paragraph 26 of the Amended Complaint lists the August of 2009 violation as occurring on August 9, 2009; however, Paragraph 27 has the date as August 6, 2009. The newspaper article predates August 9, 2009 but does not indicate when the photograph was taken. CX-39.

<sup>13</sup> Neither IES Investigator Vissage nor VMO Sime were present. Tr. 195, 258.

<sup>14</sup> Greenly testified that the stunt had been performed “hundreds of times” without incident. Tr. 490.

<sup>15</sup> Ms. Jenson’s employment with East Range Academy of Technology and Science ceased at the end of the 2010 school year.

stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

On August 14, 2010, at the request of VMO Sime, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota. Tr. 272, 274. While at the event, she attended Respondents' show and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 275-276, CX-41. Although the show was performed from an elevated stage, there was only a short distance between the public seating area and no barrier separated the two areas. Tr. 276, CX-41. Inspector Miller also observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and two or three baby wolves were brought through the audience allowing the public to take photographs and pet the animals. Tr. 277-278. The Inspection Report was prepared the following month. CX-20.

On October 19, 2010, the evidence amply established that Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. Although Respondent disputes that the wolf actually bit the child, the child's aunt, Maja Dockal testified that the wolf attacked her niece and the record contains photographs of bloodied areas on Johnny's face, scalp, and arm and what appeared to be puncture wounds on the child's face and scalp. Tr. 12,

14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

Providing adequate veterinary care and communicating information to the attending veterinarian violations:

The Amended Complaint alleges that on two occasions, Respondents failed to provide adequate veterinary care and to establish a mechanism to communicate with the attending veterinarian. The first alleged violation was reported to be observed by VMO Sime during her inspection of Respondents' facility on March 14, 2006. VMO Sime testified that because the incident was so long ago, she could not recall exactly but thought that the cougar appeared thin and surmised that the Respondents could not demonstrate to her that they had transmitted any information concerning the animal to the attending veterinarian. Tr. 203-204. In his testimony, Mr. Greenly disputed her account and testified that he had discussed the cougar with Dr. Zimpel and that worming had been suggested. Tr. 384-386. Given the equivocal nature of VMO Sime's testimony and lack of any other supporting evidence refuting Mr. Greenly's testimony, I will give credence to his testimony and decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on March 14, 2006.

On July 24, 2007, Respondent was again visited by VMO Sime who observed a raccoon with a thick mucous discharge. CX-30. Mr. Greenly testified that he had worked with raccoons for 31 or 32 years and that he had periodically observed similar conditions and that the condition usually cleared up in a day or two. Tr. 427. He also indicated that he had consulted with Dr. Jill Armstrong about the animal and that she was in agreement with waiting a couple of days before determining the need for examination by her and

medical intervention. Tr. 426-427. As the evidence is in conflict, I will again decline to find violations of sections 2.40(a) or 2.40(b)(3) of the Regulations on July 24, 2006.

Failing to construct structurally sound housing facilities:

The Amended Complaint lists six instances in which Respondent's failed to construct and maintain structurally sound housing facilities, to wit: March 14, 2006, August 23, 2006 (2 violations), July 24, 2007, November 10, 2008, and June 29, 2009.

On the first date, VMO Sime also testified that she observed a piece of wood in the fisher<sup>16</sup> enclosure "...where there was some exposed nails that must have fallen into that...." Tr. 205. Mr. Greenly testified that he remembered the situation well. He indicated that the enclosure had corner platforms designed so that the animals could climb into them for animal enrichment and to encourage exercise. By Mr. Greenly's account there were several boards on the platform which were screwed into another platform and one of the boards had split and exposed two or three screws allowing the heads to protrude maybe a half inch to an inch. When it was brought to his attention, he either screwed them back in or broke them off while VMO Sime was still there. Tr. 387-388. As the deficiency was corrected during the inspection, it would appear that any violation was abated and no further action is needed.

On August 24, 2006, VMO Sime reported two structural problems, faulting the enclosure housing five woodchucks and the bear enclosure. CX-43. Mr. Greenly testified that the boards were not broken, but rather were intentionally left in the woodchuck enclosure to provide something for the animals to gnaw on. Tr. 399. Although a

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<sup>16</sup> When asked what a fisher was, VMO Sime responded "You know that's a good question. It's an animal native to Minnesota." Tr. 205. The Amended Complaint identifies a fisher or fisher cat as *Martes pennanti*, a medium sized mammal native to North America and a member of the *Mustelid* family, commonly referred to as the weasel family. Footnote 1, paragraph 8, Amended Complaint, Docket Entry No. 16.

photograph of the structure was admitted, it does not contain sufficient detail to dispute Mr. Greenly's account. CX-44. As to the second alleged violation involving the bear enclosure, Mr. Greenly testified that the bear had not escaped as the gate was still latched. He had taken the bear out of its cage on a leash prior to the inspector's arrival and was cleaning the cage. Tr. 402-404. Examination of the photograph reflects an apparently sound chain link structure with chain securing the gate. CX-44.

Greenly acknowledged that the two juvenile woodchucks had been able to escape their enclosures on July 24, 2007, but indicated that they had not breached the perimeter fencing. Tr. 428-429. Although a violation did occur, corrective action apparently was taken as subsequent inspections contain no further mention of the enclosure.

The alleged structural violations on November 10, 2008 and June 29, 2009 relate to a wolf enclosure. CX-7 and CX-13. Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom. RX-47.

Perimeter fence violations:

The Amended Complaint includes allegations of five violations of failing to maintain an adequate perimeter fence on March 14, 2006, August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009. The perimeter fencing violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. It should be noted that the second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

It is noted that the Regulations contain no objective standard for perimeter fencing and APHIS officials when asked decline to advise license holders what is needed for compliance.<sup>17</sup> Fact finders are accordingly often faced the unfortunate situation of having to pass upon the appropriateness of the subjective opinion of an inspector as what is necessary when no objective standard exists.

Food storage and failure to remove food waste violations:

Two violations of food storage standards and one of failing to provide for the removal and disposal of food waste are alleged. VMO Sime's citation of the facility on March 14, 2006 for failing to store food supplies in a manner that adequately protects them from contamination arose out of the facility's acceptance of animal carcasses which were left on the upper hill of the facility. The VMO noted that the facility did have freezers available to store the food, but felt they "must not have been doing it in a timely fashion to get it into the freezers" and concluded that "it must have been getting excessive at that time." Tr. 205. Although she also cited the facility for leaving carcasses and carcass remnants in animal enclosures in her Inspection Report, at the hearing, she gave no testimony concerning that alleged violation so that alleged violation will be dismissed.

Mr. Greenly testified that the carcasses came from a variety of sources, including DNR, the state highway department, the city, and from local farmers needing to dispose of dead stock. He went on to say that the carcasses would be dropped off and left on the hill, but that he usually processed them by butchering them the day that they were brought in. If butchering was not done the same day, it would usually be done in less than

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<sup>17</sup> The Standards indicate that fences less than 8 feet for dangerous animals and less than six feet for other animals must be approved in writing by the Administrator. 9 C.F.R. §3.127(d).

24 hours. Some of the meat would be used right away and the rest would be placed in the two walk-in freezers that the facility has. Tr. 389-392. I find Mr. Greenly's explanation reasonable and given that the inspection was conducted in mid March when temperatures in Minnesota are seldom above the freezing point, I see little risk of carcass contamination from spoiling from being left outside until processing could be done and take notice that carnivorous animals in the wild often devour their kill over a number of days. Accordingly, while the sight of carcasses on the property may give the impression of an aceldama and not be esthetically pleasing, I decline to find violations of section 2.100(a) for failure to meet the requirements of sections 3.125(c) or 3.125(d) of the Standards on March 14, 2006.

The remaining food storage violation was alleged to have been observed on January 11, 2007. Mr. Greenly testified that the three cans were prepared that morning for the afternoon feeding. Tr. 418-419. Greenly acknowledged that the bags of food were on the floor, but noted that he had never been written up for that before and he has since stored food on pallets. Tr. 421.

Record keeping violations:

Respondent was cited on August 23, 2006, July 24, 2007, and June 29, 2009 for failing to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43. While one instance might be understandable or explainable as an excusable lapse, it is difficult at best to understand Respondents' callous indifference and continued failure to avoid recurring violations. VMO Sime's testimony concerning the deficiencies clearly establishes the violations. Tr. 211, 218 and 221-224.

Environmental enrichment violation:

This alleged violation was withdrawn by the Complainant. Tr. 408-409.

Failure to provide access for the purpose of inspecting the facility, animals and records on December 19, 2006, June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009:

On December 19, 2006, APHIS VMO Debra M. Sime attempted to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. According to the Interview Log prepared by IES Investigator Leslie Vissage who had accompanied the VMO to the site, VMO Sime "said that she would return to do the inspection another day." CX-37. As it appears that on this occasion both women agreed to return another time, I will decline to find a violation of failing to provide access for an inspection on December 19, 2006.

Although her testimony consisted of little more than identifying the inspection report made on each occasion, VMO Sime visited Respondent's facility on four other occasions but was unsuccessful in conducting an inspection. Those record establishes that unsuccessful attempts were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

Mr. Greenly testified that on the later occasions it never was a question of denying VMO Sime access, but rather was because he was likely not present at the facility. He went on to explain that he was a sole proprietor and had neither the staff nor the funds to have someone in the office from 9:00 to 5:00. He also indicated that he was frequently out of town, that he had given APHIS inspectors his cell phone number so they

could get hold of him and that in the past some inspectors had called to make sure that someone would be present at the facility.<sup>18</sup> Tr. 413-416.

As the requirement to allow USDA access for the purpose of inspecting the facility, the animals and the records during normal business hours is unqualified and contains no exemptions or allowances for sole proprietors, the record supports violations of section 2.126 of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

#### The Sanction

The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

*In re S.S. Farms Linn County, Inc. supra.*

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.<sup>19</sup> In the actions before me here, the Administrator has recommended that a civil penalty of \$50,000.00 be imposed.

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<sup>18</sup> VMO Sime made it clear that her inspections were unannounced. Tr. 226-227. Dr. Goldentyer affirmed that was consistent with Department policy. Tr. 569. Although Dr. Hovancsak was not available for cross examination, the record contains a memorandum from her indicating she did not call Mr. Greenly in advance of her inspections. CX-12.

<sup>19</sup> *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77,89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams*, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re George A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), appeal dismissed, No. 03-4008 (8<sup>th</sup> Cir. Aug 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), enforced as modified,

It is well established that correction of violations does not eliminate the fact that a violation may have occurred,<sup>20</sup> however, it is also clear that such corrective action may be taken into account in fashioning the sanction imposed. *In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm*, 68 Agric. Dec. 685, 726-27 (2009). Aside from handling violations, record keeping, and inspection access violations, it appears that most, if not all of the other violations that I have found to have occurred were corrected.<sup>21</sup> As I find that Mr. Greenly's handling violations to be repeated and serious, I am revoking the Respondents' Animal Welfare Act license, but decline to impose a civil penalty in light of the significant financial impact of the revocation.

On the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

1. Respondent Lee Marvin Greenly is an individual residing in the State of Minnesota who holds Animal Welfare Act license number 41-C-0122 as an exhibitor in his own name. CX-2. Greenly exhibits wild and exotic animals to the public both at traveling locations and operates what he refers to as a photographic educational game farm on property that he owns on the Kettle River near Sandstone, Minnesota. Tr. 382-383. On various occasions, he also provides animals for photographic opportunities at other locations on nearby private or public land that he does not own. Tr. 439-440

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<sup>20</sup> 397 F. 3d 1285 (10<sup>th</sup> Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

<sup>21</sup> *In re Jewel Bond*, 65 Agric. Dec. 92, 109, (2006), *aff'd per curiam* 275 F. App'x 547 (8<sup>th</sup> Cir. 2008); *In re Eric Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5<sup>th</sup> Cir. 2001)(Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n. 12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n. 6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

<sup>21</sup> Dr. Goldentyer noted that the more recent inspections had noted improvement in the condition of the facility. Tr. 574.

2. Respondent Minnesota Wildlife Connection, Inc. is a corporation organized and existing under the laws of Minnesota having the same address for its registered office as that of Mr. Greenly. The affairs of the corporation and Greenly are sufficiently intertwined that they cannot be separated. CX-2, 5, 11, 23, 39, 40, 45, 46, 52 and 75.

3. On February 12, 2009, Respondents allowed two wolves to run free during a photo shoot on acreage owned by Leo Gardner following which the wolves went onto residential property belonging to Linda and Carlyle Zeigler and attacked and killed the Zeigler's dachshund that had been let out "to go to the bathroom." Tr. 52, 439-440. As Mrs. Zeigler watched, one wolf scooped the dog up and the two wolves then proceeded to play tug of war with the pet, tearing and ripping the animal in half. Tr. 55-56.

4. On August 14, 2009, Kimberly Miller, an Animal Care Inspector, was present at the Quarry Days celebration in Sandstone, Minnesota and observed the public having direct contact with and handling raccoons, a possum, and some foxes during photography sessions without any distance or barriers between the animals and the public. Tr. 272, 274-276, CX-41. The show was performed from an elevated stage with chairs for the public in front of the stage a short distance away, but without any barrier between the stage and the chairs. Tr. 276. Inspector Miller later observed Greenly standing in front of the area between the stage and the chairs with a mountain lion or cougar in his arms. Tr. 276-279, CX-41. An adult wolf was exhibited on the stage by two young adolescent girls and there were two or three baby wolves that were brought through the audience allowing the public to take photographs or pet the animals. Tr. 277-278.

5. On April 22, 2010, during a work study outing for students from East Range Academy of Technology and Science at Respondents' facility, Respondents exhibited

Blue, a 19 or 20 year old bear. Tr. 488-491. During the exhibition, the students and faculty were allowed to feed the bear "Gummi Worms," with the students putting the candy in their mouth and letting the bear then take the candy from their mouths. Tr. 490. During the feeding session, Blue bit Denise Jenson, (Lee Greenly's cousin and then a school employee) who had accompanied the students. A couple of days after the bite, she began to experience pain and after being initially seen in the emergency room was admitted to the hospital the following day for a five day stay. Tr. 120-121. As she declined to have the bear euthanized and tested for rabies, she later underwent the prophylactic series of inoculations for rabies. Tr. 122.

6. Twenty-two months after the previous unleashed wolf incident on October 19, 2010 Respondents were at or near Banning State Park for a photo shoot with a couple of photographers when an unleashed adult wolf came into contact with and injured five year old Johnna "Johnny" Mae Kenowski. Tr. 10-16, 478, 522, CX-45, 46. The child's aunt, Maja Dockal observed the wolf attacking her niece and photographs of bloodied areas on Johnny's face, scalp and arm reflect what appeared to be puncture wounds on the child's face and scalp. Tr. 12, 14, 19, 24-25, 478-480, CX-45. As a result of the incident, it was necessary to euthanize the wolf to verify that it did not have rabies. Tr. 47.

7. On March 14, 2006 and on July 24, 2007, Respondents were cited for failing to provide adequate veterinary care and failing to have a mechanism in place to communicate information to the facility's attending veterinarian; however on both occasions, Respondents had communicated with the veterinarian and immediate intervention had not been considered necessary by the veterinarian.

8. On July 24, 2007 the two juvenile woodchucks escaped their enclosure, but were unable to breach the perimeter fencing. Tr. 428-429. Corrective action was taken and subsequent inspections contain no further mention of the enclosure.

9. On March 14, 2006 and August 23, 2006 (2 violations), November 10, 2008 and June 29, 2009, Respondents were cited for perimeter fencing violations. The violation was first noted on the March 14, 2006 Inspection Report and Mr. Greenly was given until September 14, 2006 in which to correct the deficiency. CX-25. The second citation was written within the period specified for corrective action to be taken; however, both Mr. Greenly's testimony and the absence of further such citations after the deadline indicate that any deficiency was corrected. Tr. 208, 394, CX-21.

10. On November 10, 2008 and June 29, 2009 Respondents were cited for perimeter fencing violations relating to a wolf enclosure (CX-7 and CX-13); however. Respondents' photographs of the enclosure refute the alleged violations reflecting a thick concrete slab with a sound chain link fence with a clearance of less than three inches at the bottom. RX-47.

11. On January 11, 2007, Respondents were cited for a food storage violation. Three open cans of food had been prepared that morning for the afternoon feeding (Tr. 418-419) and bags of food were observed on the floor. After receiving the citation, the facility has since stored food on pallets. Tr. 421.

12. On August 23, 2006, July 24, 2007, and June 29, 2009 Respondent failed to make, keep and maintain adequate and accurate records of the acquisition and disposition of the animals at the facility. CX-7, 30 and 43, Tr. 211, 218 and 221-224.

13. On December 19, 2006, APHIS VMO Debra M. Sime appeared at Respondents' facility to conduct an unannounced inspection at Respondent's Sandstone property. She met briefly with Mr. Greenly who informed them that he was ill and had to leave for a doctor's appointment. Tr. 413. The Interview Log prepared by IES Investigator Leslie Vissage who had accompanied the VMO to the site, VMO Sime "said that she would return to do the inspection another day." CX-37.

14. Unsuccessful attempts to inspect Respondents' facility were made on June 12, 2007 (Tr. 200, CX-28), two different times on February 13, 2008 (Tr. 201, CX-10), February 23, 2009 (Tr. 201, CX-3), and May 13, 2009 (Tr. 202, CX-14).

#### Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. On February 12, 2009, August 14, 2009, October 19, 2010, and October 22, 2010, Respondents willfully violated 9 C.F.R. §2.131(b)(1) of the Regulations by failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm.
3. On February 12, 2009, August 14, 2009, April 22, 2010, and October 19, 2010, Respondents willfully violated 9 C.F.R. §2.131(c)(1) of the Regulations by failing to handle animals during public exhibition so that there was minimal risk of harm to the animals and the public, with sufficient distance or barriers between the animals and the public so as to assure the safety of the animals and the public.
4. The evidence is insufficient to establish violations of 9 C.F.R. §2.40(a) or 2.40(b)(3) of the Regulations on either March 14, 2006 or July 24, 2007.

5. The evidence is insufficient to establish violations of 9 C.F.R. §2.131(b)(1) and §2.131(c)(1) of the Regulations on August 6, 2009.

6. The structural deficiencies cited on March 14, 2006 and July 24, 2007 have since been corrected and no further action is required.

7. The evidence was insufficient to establish a structurally sound housing facilities violations on August 23, 2006, November 10, 2008 and June 29, 2009.

8. The perimeter fence violations cited on March 14, 2006, August 23, 2006 (2 alleged violations), November 10, 2008 and June 29, 2009 have since been corrected and no further action is required.

9. The evidence is insufficient to establish violations of 9 C.F.R. §2.100(a), 3.125(c), or 3.125(d) of the Regulations and Standards on March 14, 2006.

10. Respondents willfully violated 9 C.F.R. §2.100(a) and 3.125(c) of the Regulations and Standards by having three bags of uncovered canine food stored on the floor.

11. The evidence is insufficient to establish a violation of 9 C.F.R. §2.100(a) and 3.125(c) of the Regulations and Standards for having uncovered buckets or cans of food prepared for and intended for use that day.

12. Respondents willfully violated 9 C.F.R. §2.75(b)(1) of the Regulations on August 23, 2006, July 24, 2007, and June 29, 2009 by failing to make, keep and maintain adequate records of the acquisition and disposition of animals at the facility.

13. The evidence is insufficient to establish a violation of 9 C.F.R. §2.126(a) of the Regulations on December 19, 2006.

14. Respondents willfully violated 9 C.F.R. §2.126(a) of the Regulations on June 12, 2007, February 13, 2008, February 23, 2009 and May 13, 2009.

**Order**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act or the Regulations and Standards issued thereunder.
2. AWA License Number 41-C-0122 is revoked.
3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. §1.145.

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

August 22, 2012



Copies to: Colleen A. Carroll, Esquire  
Larry D. Perry, Esquire

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