

**MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES
DEPARTMENT OF AGRICULTURE (USDA) ANIMAL AND PLANT HEALTH
INSPECTION SERVICE, THE USDA OFFICE OF THE GENERAL COUNSEL, AND
THE UNITED STATES DEPARTMENT OF JUSTICE ENVIRONMENT AND
NATURAL RESOURCES DIVISION ON CIVIL JUDICIAL ENFORCEMENT OF THE
ANIMAL WELFARE ACT**

I. PURPOSE

The United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS), the USDA Office of the General Counsel (OGC), and the United States Department of Justice (DOJ) Environment and Natural Resources Division (ENRD), recognizing the importance of ensuring the humane care and treatment of animals protected by the Animal Welfare Act (AWA or Act), enter into this memorandum of understanding (MOU) to provide for coordination of matters pertaining to civil judicial enforcement of the AWA. APHIS, OGC, and ENRD further recognize that such litigation requires a close and cooperative relationship between the agencies. This MOU establishes a process and framework for notification, consultation, and coordination among APHIS, OGC, and ENRD to ensure efficient and effective implementation of the AWA.

II. BACKGROUND AND RESPONSIBILITIES

A. APHIS

The AWA vests the Secretary of Agriculture (Secretary) with authority to administer and enforce the Act. The Secretary has further delegated this authority to the Under Secretary for Marketing and Regulatory Programs, 7 C.F.R. § 2.22. The Under Secretary for Marketing and Regulatory Programs has further delegated this authority to the Administrator of APHIS, 7 C.F.R. § 2.80. The Administrator of APHIS has further delegated this authority to the Deputy Administrator of Animal Care.

APHIS has a responsibility in certain circumstances to notify the Attorney General about violations of the Act. In particular, the AWA provides:

1. “Whenever the Secretary has reason to believe that any dealer, carrier, exhibitor, or intermediate handler is dealing in stolen animals, or is placing the health of any animal in serious danger in violation of this chapter or the regulations or standards promulgated thereunder, the Secretary shall notify the Attorney General” 7 U.S.C. § 2159(a).
2. The Secretary may also refer cases to the Attorney General to enforce, and to prevent and restrain, violations of the AWA. 7 U.S.C. § 2146(c).

B. ENRD

DOJ, under the direction of the Attorney General, has the responsibility to determine whether to initiate civil judicial actions to enforce the AWA or enjoin AWA violations, and to litigate those cases once initiated. The Attorney General has delegated this authority, including responsibility for coordination of all civil enforcement cases, matters, and proceedings arising under the Act, to ENRD's Wildlife and Marine Resources Section (WMRS). Justice Manual §§ 5-10.100, 5-10.120.

The AWA vests the United States district courts and the United States courts of the other territories "with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter . . . except as provided in [7 U.S.C. § 2149(c)]." 7 U.S.C. § 2146(c). Section 2146(c)'s reference to "prevent[ing] and restrain[ing] violations" of the AWA connotes traditional civil equitable remedies and serves as authority for the United States to file a civil judicial enforcement suit. In addition, in the circumstances specified by 7 U.S.C. § 2159(a), the Attorney General may "apply to the United States district court in which such dealer, carrier, exhibitor, or intermediate handler resides or conducts business for a temporary restraining order or injunction to prevent any such person from operating in violation of this chapter or the regulations and standards prescribed under this chapter." 7 U.S.C. § 2159(a).

III. PRINCIPLES OF COORDINATION AND COOPERATION

APHIS, OGC, and ENRD recognize that the effective enforcement of the AWA requires APHIS, OGC, and ENRD to develop strategies and approaches that leverage their resources and coordinate their actions.

This MOU is designed to ensure that the parties are aligned in approach and clearly understand their roles to effectively enforce the AWA. In addition, the parties agree to cooperate in developing and carrying out training, data and information exchanges, technical and professional assistance, referrals of alleged AWA violations, and related matters concerning compliance to ensure the humane care and treatment of animals protected by the AWA.

A. COORDINATION

1. Policy Issues and General Coordination

APHIS/OGC agree to

- a. Regularly meet, no less than quarterly, with ENRD to discuss and align on policy matters regarding the enforcement of the AWA.
- b. Provide timely notification to ENRD of the following:
 - Notices of Proposed Rulemaking or other regulatory actions that propose substantive changes to the AWA regulations or standards;

- Final Rules that substantively amend the AWA regulations or standards;
- Civil lawsuits filed in federal court challenging substantive aspects of the administration or enforcement of the AWA, regulations or standards;
- Substantive changes to the Animal Care Inspection Guide; and
- Plans regarding the referral of cases to ENRD for enforcement, including any updates regarding the referral of such cases.

ENRD agrees to

- a. Regularly meet, no less than quarterly, with APHIS and OGC to discuss and align on policy matters regarding the enforcement of the AWA.
- b. Provide timely notification to APHIS/OGC of plans regarding the filing of litigation to enforce the AWA.

2. Press Releases/Communications

a. Press Releases or Press Statements

If either USDA or DOJ intends to issue a press release or make a press statement involving imminent or pending civil judicial enforcement proceedings referred to ENRD, the issuing entity will notify the Points of Contact in this MOU at least three business days before the date the press release or statement is to be issued to allow for proper notification and opportunity to comment before release. If both parties intend to issue a press release, the parties agree to collaborate as far in advance as possible on the content and timing of the press releases.

b. Communications

In the interests of transparent and collaborative communication between the parties to this MOU, APHIS, OGC, and ENRD shall provide copies of substantive written correspondence, complaints, or communications from outside stakeholders to the other parties when that communication is reasonably likely to relate to or result in litigation or issues of policy regarding enforcement of the AWA and give the other parties reasonable time to provide input regarding a response. The parties to this MOU will also endeavor to notify each other of any such oral communications, including threats of potential litigation, and provide an opportunity for each party to provide input regarding a potential response.

Within 30 days of the date when this MOU goes into effect, APHIS and ENRD will develop and agree to talking points on responses by USDA and DOJ to general inquiries regarding AWA enforcement issues. APHIS and ENRD agree to

continuously update these talking points and to not provide information to outside stakeholders regarding subjects of a disagreement that has not been resolved pursuant to the procedures specified in the preceding paragraph.

APHIS/OGC and ENRD also agree to consult with each other before engaging in any communications with Congress, States, or other outside groups about a matter that has been referred to DOJ.

The parties to this MOU agree it is critical that USDA/DOJ communications to outside parties regarding enforcement of the AWA, especially stakeholders, are consistent and coordinated to ensure effective enforcement of the AWA.

3. Pre-referral Coordination

As a part of, or in addition to, the policy meetings discussed in paragraph A.1. above, representatives of APHIS/OGC and ENRD shall discuss periodically, but not less than once every three months, matters that may be appropriate for referral for civil judicial enforcement of the AWA to ENRD (including United States Attorneys' Offices). To ensure that both USDA's and ENRD's enforcement resources are focused on the matters that are most likely to make a positive impact on the welfare of animals and otherwise further the purposes of the AWA, APHIS/OGC and ENRD agree during these meetings to prioritize their attention on those facilities or activities that are considered the most egregious potential violators based on the following criteria:

- a. Licensees who have been cited multiple times under 9 C.F.R. § 2.4 for interference with APHIS officials establishing a pattern or practice of interference;
- b. Licensees who have received four or more inspection reports within the past 18 months containing serious noncompliant items, including direct and/or critical noncompliant items;
- c. Licensees who have had animals confiscated by APHIS or who have one or more animals that APHIS is considering confiscating;
- d. Licensees to whom APHIS is considering issuing a 21-day suspension or who have recently completed a 21-day suspension and there is still APHIS concern about the health and welfare of the animals;
- e. Licensees who have repeatedly denied APHIS inspectors access to inspect the facility;
- f. Unlicensed exhibitors who are chronically engaging in licensed activity, or who are circumventing an administrative cease and desist order;

- g. Licensees who APHIS believes may be engaging in possible Lacey Act or Endangered Species Act violations;
- h. Any facility or entity that APHIS/OGC anticipates being the subject of a referral to ENRD; and
- i. Other instances where a licensee is engaging in neglect, such as instances of missing animals, suspected illegal sales, or provision by licensees of serious false information or statements.

APHIS/OGC and ENRD acknowledge that when such conditions are present, there is a greater chance that the matter will need to be referred to ENRD and may require ENRD to engage in emergency motions practice. Thus, promptly identifying such licensees is critical to the efficient and effective enforcement of the AWA. Notwithstanding as much, these criteria are only intended as a guide, and nothing precludes USDA and ENRD from discussing and considering alleged violations that do not meet these criteria. Similarly, even if a facility or activity meets one or more of the criteria, this does not mean APHIS must refer a case to ENRD or that ENRD must bring a case for any such referral. Any such determinations necessarily will be made on a case-by-case basis after consideration of all relevant factors and circumstances.

4. Referrals From APHIS for Civil Judicial Enforcement Under the AWA

APHIS/OGC will notify ENRD as soon as possible after APHIS identifies a matter for referral to ENRD pursuant to the requirements of the AWA. OGC and ENRD will each assign an attorney to the matter. Promptly thereafter, OGC shall provide a referral memorandum and recommendation to ENRD.

After reviewing a referral and conferring with USDA, ENRD, in its discretion, may initiate a civil action to enforce the AWA. If a civil action is initiated, the DOJ attorney assigned to the matter will confer with the OGC attorney assigned to the matter on issues related to the litigation. After such consultation, DOJ will provide timely information and updates regarding the status of the civil enforcement action to APHIS/OGC. If ENRD declines to file a civil enforcement action based on an APHIS/OGC referral, ENRD will timely notify APHIS/OGC of its decision. ENRD commits to consulting with OGC prior to any decision to decline to file a civil enforcement action based on an APHIS/OGC referral or any proposed settlement of any case in which DOJ represents USDA.

If there exists a disagreement among the parties regarding the interpretations of policies or regulations, or the policies and regulations themselves, that implicates a potential enforcement action and that cannot be resolved at the staff levels of ENRD and APHIS/OGC, the parties to this MOU agree that such disagreements shall be elevated and resolved through appropriate channels within each organization before

USDA or DOJ takes any enforcement actions that are the subject of such disagreements.

5. Evidence Sharing

Consistent with the language of the AWA and ENRD's need for timely access to evidence necessary to initiate AWA civil judicial enforcement cases, following a referral, APHIS commits to robust information sharing, including making its files, including but not limited to all inspection reports, photographs, videos, and relevant memoranda, available in a timely manner to ENRD upon request as needed for case development and litigation purposes. Once a matter has been identified for referral for civil judicial enforcement, APHIS/OGC and ENRD commit to regular and frequent communication, especially regarding any new facts and developments, such as the scheduling of any inspections or renewal of any licenses. APHIS/OGC commits to engaging with ENRD regarding any actions the agency is considering taking that could affect matters referred for civil judicial enforcement and to receive legal advice from ENRD on the same. If, as a result of any development, the practicability of civil judicial enforcement is affected, the parties commit to promptly discussing enforcement options for the referred matters with each other.

APHIS shall provide all information that is required to satisfy ENRD's duties under the Federal Rules of Civil Procedure, including the provisions governing discovery. APHIS also acknowledges that, to satisfy ENRD's duties under the Federal Rules of Civil Procedure and an ENRD attorney's duties under the applicable Rules of Professional Conduct, APHIS/OGC must make available APHIS/OGC employees who may have personal knowledge, evidence, or expertise relevant to the matter for individual interviews with ENRD.

B. TRAINING

Mutually understanding the process, policies, and approaches of the parties to this agreement is critical to effective enforcement of the AWA. APHIS/OGC and ENRD will cooperate in developing and conducting periodic training programs for each other's personnel regarding the AWA, and its implementing regulations and standards, to ensure that referrals are made as appropriate pursuant to 7 U.S.C. §§ 2146(c) and 2159. Within 90 days of the date this MOU takes effect, APHIS/OGC will provide to ENRD a proposed training plan involving the training of APHIS/OGC and appropriate ENRD and other DOJ staff and other officials on each other's process, policies, and approaches to enforcement of the AWA.

Within 120 days of the date of the MOU, the training plan will be approved by the parties to the agreement and put into effect.

IV. IMPLEMENTATION

This MOU is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather is a statement of understanding between the parties of the matters described herein. Expenditures by each of the parties are to be subject to their respective budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this MOU in no way implies that funds will be made available for such expenditures.

This MOU is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural, enforceable at law by a party, individual, or entity against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, including any party to litigation arising out of any investigation conducted pursuant to this MOU. This MOU shall not be used as evidence in any legal or administrative proceeding, including as evidence of any action or inaction by any party to this MOU or evidence of the proper interpretation of the AWA.

Nothing in this MOU commits DOJ to initiate any particular civil enforcement action. Nothing in this MOU commits USDA to take any particular regulatory action.

In order to effectively implement the terms of this MOU, the USDA and DOJ points of contact will transmit copies to all personnel affected by its provisions.

V. POINTS OF CONTACT

The following personnel are designated as the principal points of contact between the parties in the performance of this MOU:

OGC: Assistant General Counsel for the Marketing, Regulatory and Food Safety Programs Division or delegate.

APHIS: Deputy Administrator for Animal Care

DOJ: Section Chief, ENRD-WMRS, or delegate.

VI. DURATION, MODIFICATION AND TERMINATION

This MOU supersedes any previous MOUs or agreements between the parties on the subject of civil enforcement of the AWA. This MOU is effective when signed by both parties. This MOU will be reviewed annually by the parties and shall remain in effect until cancelled in writing, by either party with at least sixty days' advance notice.

Mary Beth Schultz

MARY BETH SCHULTZ
Principal Deputy General Counsel
United States Department of Agriculture

Dated: 3/5/2024

Michael Watson

MICHAEL WATSON
Administrator
Animal and Plant Health Inspection Service
United States Department of Agriculture

Dated: _____

Todd Kim

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

Dated: 3/6/2024