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August 10, 2016

BY HAND & FEDERAL EXPRESS

The Honorable Kevin Shea
Administrator, Animal & Plant Health Inspection Service
United States Department of Agriculture
1400 Independence Ave., S.W.
Washington DC 20250

**Re: Demand That APHIS Officials Refrain From Taking Certain Actions
At The Upcoming Tennessee Walking Horse National Celebration**

Dear Administrator Shea:

This law firm represents the Tennessee Walking Horse National Celebration Association (the "Association"), on whose behalf I am writing.

The Association sponsors the annual Tennessee Walking Horse National Celebration (the "Celebration"), which this year is scheduled from August 24 through September 3, 2016 in Shelbyville, Tennessee. Hundreds of Tennessee Walking Horses ("TWHs") will be shown at this year's Celebration, and, as in years past, the Association expects that several APHIS officials, including APHIS veterinary medical officers ("VMOs"), will be present to inspect horses for compliance with the Horse Protection Act, as amended and the regulations promulgated thereunder (the "HPA").

The Association is fully supportive of all lawful measures that ensure compliance at the Celebration by those subject to the HPA. Nonetheless, the Association is constrained to draw your attention to past practices of APHIS and its officials at the Celebration that, respectfully, require reevaluation and change on APHIS' part.

Accordingly and as detailed herein, the Association respectfully demands that APHIS and its officials accede to the following:

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1. a. APHIS will not make any finding that would result in a horse being disqualified from the Celebration for non-compliance, unless APHIS provides sufficient notice and opportunity for the owner(s) of the horse to be heard (including an appeal) on that finding before the horse is disqualified;

or, alternatively,

b. APHIS will (i) refrain from making any final finding of non-compliance until after the horse is completely done showing at the Celebration; and (ii) provide sufficient notice and opportunity to be heard on any final finding that APHIS makes after the horse is completely done showing; if, after notice and opportunity to be heard and appeal the non-compliance finding is upheld, then and only then may the horse be declared to be disqualified *retroactively* (i.e., after being allowed to compete);

and,

2. APHIS will not conduct any type of unlawful inspection of a horse at the Celebration. (Examples of unlawful inspections include, without limitation, those noted in Section II below.)

APHIS's acceptance of these demands will go a long way in assuring participants in the Celebration that APHIS respects their Constitutional rights and that it will follow proper procedures in implementing the HPA, as explained in Sections I and II below.

Please confirm to me in a writing, to be received by me no later than August 19, 2016, that APHIS and its officials will comply with the above demands. If, for whatever reason, APHIS cannot or will refuse to comply with these demands, please inform me by that date so that the Association will have enough time to consider appropriate action, if any.

I. GROUNDS FOR THE ASSOCIATION'S FIRST DEMAND

At past Celebrations, the following typical scenario has unfolded.

An APHIS official inspects a horse, and finds the horse to be HPA non-compliant because (*e.g.*,) the horse allegedly is sore or in violation of the Scar Rule. Based on the official's finding, the horse immediately is disqualified from competition, despite no opportunity provided by APHIS for a hearing much less an appeal before the horse is disqualified. Moreover, the owners and trainers of the disqualified horse receive no guarantee that they will be able to challenge the finding after the disqualification; that will happen only if APHIS decides to institute a complaint proceeding against them – which seldom occurs.

The disqualification of a horse in the above instance, constitutes a violation of due process under the Fifth Amendment to the Constitution (the "Due Process Clause"), as made

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clear recently in the order granting the plaintiffs' motion for preliminary injunction in *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS (Dckt. 20), 2016 WL 4150036 (N.D. Ga. May 25, 2016) (the "McSwain Order").

The Due Process Clause protects persons against the deprivation of life, liberty or property by the federal government without due process of law. *See, e.g., id.*, 2016 WL 4150036 at *4. The plaintiffs in the *McSwain* case are the owners and trainers of a TWH named "Honors" that had been disqualified from the Celebration in 2013, 2014, and 2015 in the same manner as above. They moved to preliminarily enjoin APHIS from disqualifying Honors at this year's Celebration, asserting that the procedure typically utilized by APHIS, as described above, violates their rights under the Due Process Clause. In granting the motion, the court found that they had shown a substantial likelihood that APHIS' actions and procedures violated the Constitution. *See id.* at *5.

In reaching that conclusion, the court held "that Plaintiffs *and other horse owners* have a constitutionally protected right [under the Due Process Clause] in showing their [TW] horses [at TWH shows]" and that, "[a]s [APHIS] currently enforce[s] the HPA, . . . Plaintiffs have not been provided with adequate process [through this procedure] either pre- or post-deprivation." *Id.* at *4-5 (emphasis added). The court reasoned that this procedure does not give Plaintiffs pre-disqualification process sufficient to satisfy the Due Process Clause because the only process afforded to them by this procedure "is an inspection by a VMO, a D[QP], or both," and "Plaintiffs do not have the opportunity to appeal or otherwise be heard prior to their horse's disqualification." *See id.* at *5. The post-disqualification process in this procedure is also Constitutionally deficient because, according to the court, "[i]t is only if the USDA seeks to impose a criminal or civil penalty that the owner or trainer is guaranteed notice and an opportunity to be heard" post-disqualification, and USDA is not required to institute a proceeding to seek such a penalty – "[a]s such, there is no guarantee of post-deprivation process." *Id.*

The *McSwain* court also "h[e]ld[] that if [APHIS officials] inspect Honors pre-show and find that he should be disqualified, [they] must provide Plaintiffs notice and opportunity to be heard prior to any disqualification." *Id.* at *6. The court explained that "[APHIS officials] may elect to inspect Honors post-show [under the HPA]. This would alleviate some of the logistical burden on [them] to provide Plaintiffs the opportunity to prove that the horse is not scarred prior to the permanent deprivation that is a disqualification. Regardless of the timing of any inspection, the constitutional burden is on [APHIS] to provide Plaintiffs with the process that they are due." *Id.* In its ordering clause, the court stated that APHIS officials were "enjoined from disqualifying . . . Honors, under the Scar Rule without providing Plaintiffs with adequate pre-deprivation process, including notice and the opportunity to be heard." *Id.* at *7.

While the ordering clause in the *McSwain* Order is limited by its terms to Honors and the named plaintiffs in the case and to disqualifications based on a finding of non-compliance with the Scar Rule, the rationale and dictates of the *McSwain* Order logically apply with equal force

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to every horse that an APHIS official finds to be non-compliant with any provision of the HPA at the upcoming Celebration.

Accordingly, in light of the McSwain Order, the Association respectfully demands, and fully expects, that APHIS and its officials will refrain from making any finding at this year's Celebration that would result in a horse being disqualified for non-compliance with any provision of the HPA, unless APHIS provides sufficient notice and opportunity for the owner(s) of the horse to be heard (including an appeal) on that finding before the horse is disqualified.

If, however, APHIS will not provide the requisite pre-disqualification notice and opportunity to be heard, the Association demands that APHIS and its officials: (1) refrain from making any final finding of non-compliance until after the horse is completely done showing at the Celebration; and (2) provide sufficient notice and opportunity to be heard on any final finding that APHIS makes after the horse is completely done showing; if, after notice and opportunity to be heard and appeal the non-compliance finding is upheld, then and only then may the horse be declared to be disqualified *retroactively*. This alternative would satisfy the requirements of the Due Process Clause, and would be acceptable to the Association should APHIS decline to implement a pre-disqualification notice and opportunity to be heard process.

II. GROUNDS FOR THE ASSOCIATION'S SECOND DEMAND

The Association also demands that APHIS officials refrain from conducting unlawful inspections at the Celebration. Examples of unlawful inspections include, without limitation, the following: Inspections where an APHIS official (a) uses an unreliable examination protocol; (b) misapplies the provisions of the Scar Rule in inspecting for violations of that rule; or (c) fails to apply APHIS's established procedure for distinguishing uniformly thickened epithelial tissue on the posterior surface of a pastern, which does not violate the Scar Rule, from non-uniformly thickened epithelial tissue, which can violate the Scar Rule. I elaborate on these examples, below.

A. The Protocol That APHIS Officials Have Used, And Continue To Use, To Examine TWHs At Shows Is Unreliable And Thus Would Be Unlawful If APHIS Officials Use It At The Upcoming Celebration

The government violates a person's rights under the Due Process Clause by depriving the person of a liberty or property interest through the use of a procedure that is unreliable, such as a medical test that produces erroneous results. *See, e.g., Feliciano v. City of Cleveland*, 988 F.2d 649, 647-650 (6th Cir. 1993) (explaining that a test procedure could violate the aggrieved person's right to substantive due if the procedure were so unreliable that it was irrational or led to arbitrary or capricious results); *Higgs v. Wilson*, 615 F. Supp. 226, 231-232 (W.D. Ky. 1985) (finding on a motion for a preliminary injunction that the plaintiffs had shown a likelihood of success on their claim that a urine test was sufficiently unreliable so that use of its results against them would violate their right to due process). The examination protocol that APHIS officials

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have used, and continue to use, to examine TWHs at shows violates the Due Process Clause because the protocol is unreliable, given its subjective and unscientific nature and its high rate of error – including, particularly, the high rate of false positives that it produces.

The APHIS examination protocol is literally, a “look and feel” procedure. It requires the inspector to observe the horse walk to determine if it exhibits signs of soreness, to visually examine the horse’s limbs, and to digitally palpate the pasterns, in order to check for compliance with the HPA, including the Scar Rule. *See* USDA, *Horse Protection Training Manual – 2004*, at 31-33. The protocol’s imprecise, unscientific, and subjective nature is highlighted by its instruction to APHIS officials regarding the measure of force they are to use in palpating the pasterns, *i.e.*, “[use] [t]humb pressure . . . during palpation [that] should be just enough to flatten the flesh of the thumb or just blanch the thumbnail.” *Id.* at 33. In executing this protocol, APHIS officials have palpated the palmar digital nerve to cause the horse to “flinch,” which they treat as a “pain” response. This practice is improper, as it does not reflect if the horse is actually in pain, much less sore within the meaning of the HPA. Please see the video attached hereto as Exhibit 1. Dr. Baker was informed of this improper practice highlighted in the video, but did nothing to stop APHIS officials from engaging in it – yet it must be stopped due to its impropriety.

The subjective, unscientific nature of this examination protocol makes it highly unreliable, as the results of this type of examination turn on how each particular inspector applies the protocol procedures and individually perceives. A federal court of appeals captured the subjective, unscientific nature of this inspection protocol in describing it as being “far more art than science. In many cases, inspectors, veterinarians, and other professionals will disagree as to whether a horse is actually a sore.” *Contender Farms, LLP v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015). Further, Dr. Paul Stromberg, a professor of veterinary pathology and a diplomate in the American College of Veterinary Pathologists, criticized this protocol, particularly when used to inspect for Scar Rule violations, notably stating that:

The current method employed by [APHIS] inspectors for scar detection is subjective, clearly inaccurate and has the potential to be applied capriciously. Inspectors are attempting to detect the presence of a pathologic process far below the level of clinical significance **based on what they think they see and feel** without independent verification. They conclude from this it is proof of a scar rule violation. The result, not unexpectedly, is inconsistency in passing or disqualifying a horse for competition and many false positives. . . . The presumption that thickened skin must equal chronic inflammation and scar formation (and therefore proof of soring) ignores other possible causes and betrays a lack of understanding of basic pathologic principles. It’s not medically rational or scientifically defensible. It’s just pseudoscience and poor medical practice.

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McSwain v. Vilsack, No. 1:16-CV-01234-RWS, (N.D. Ga. Apr. 21, 2016) (Dckt. 5-3: 1st Am. Compl., Ex. A) (the “Stromberg Report”), at 3 (emphasis in original), a copy of which is attached as Exhibit 2 hereto. In a recent hearing in an HPA enforcement proceeding, a USDA administrative law judge reflected a sentiment similar to Dr. Stromberg’s in stating that “the reasons I don’t like scar rule cases is I think the determination of whether there is a scar is such an unquantified process that there is too much variety in the result, it’s not predictable, it’s not knowable how people are going to judge it.” *In re Larry Edwards*, et al., USDA Dckt. Nos. 14-0002, 14-0003, 14-0004, Hearing, (May 19, 2016), at 82:10-15.

Given the nature of this examination protocol, it is no surprise that it has a high error rate and produces numerous false positives. Dr. Stromberg’s analysis of alleged Scar Rule violations at last year’s Celebration illustrates this well. Under his auspices, biopsies were taken of eighteen horses shortly after those horses were disqualified by APHIS officials under the Scar Rule. *See* Stromberg Report at 1. The biopsies were taken of tissue from places where the APHIS official had examined the horse and found it to be non-compliant. *See id.* The biopsy results showed that none of the horses met the criteria for a Scar Rule violation. *See id.* at 1, 3. Based on this sample, the APHIS testing protocol has an accuracy rate of zero percent.

In addition, Dr. Stromberg examined biopsies of the flexor surface of the pasterns of twenty-nine TWHs that had been disqualified from shows, prior to the 2015 Celebration, for alleged violation of the Scar Rule. *See* Ex. 3 hereto at 1. He found no evidence of scar tissue prohibited by the Scar Rule in any of these biopsies. *See id.* He also conducted a gross physical exam of eight of these horses. As to this exam, he stated:

All I found [on these eight horses] was some minor folding in the skin of the flexor surface and sulcus of both pasterns. These folds could be smoothed with mild pressure applied by my fingers. A minimal to mild variable degree of alopecia [hair loss] was noted on most of the horses examined. The anterior aspect of all pasterns was normal. The skin did not feel thick nor was there any evidence of granulomatous inflammation, granulation tissue (scar tissue or proud flesh) or anything else that could be interpreted to be a scar. The mild degree of alopecia on some horses likely correlates to telogen phase follicles I observed in some of the biopsy material. This could be caused by mild chronic irritation. If these were disqualified horses based on scar rule violations, they must be considered false positives because there is no histopathological evidence to substantiate the ruling. [*Id.* at 2].

There are still other examples highlighting the inaccuracy of APHIS’s examination protocol. For instance, at a horse inspector training session in March 2007, two experienced APHIS VMOs conducting that session examined twenty-three horses. *See* Ex. 4 hereto at ¶¶ 3-9

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and exhibit one thereto. The two VMOs reached conflicting compliance findings for six of those horses – or over twenty-six percent of the time. *See id.* at exhibit 1 thereto. That means that one of the VMOs was wrong in at least each of those six instances.

In sum, should an APHIS official use the foregoing examination protocol in inspecting any horse at the Celebration, the examination would be unlawful.

B. APHIS Officials’ Failure To Properly Apply The Provisions Of The Scar Rule In Inspecting TWHs At The Celebration Would Be Unlawful

It would also be unlawful for APHIS officials to misapply the provisions of the Scar Rule in inspecting horses at the Celebration. That is because a government agency is bound to scrupulously follow its own rules. *See Service v. Dulles*, 354 U.S. 363, 372, 383-89 (1957). *See also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

The Scar Rule expressly provides in pertinent part that:

Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be “sore” and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

- (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,^[5] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
- (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or “pocket” may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

^[5] Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

9 C.F.R. § 11.3.

The Scar Rule clearly was not intended to transform all scars on a horse’s pasterns into a violation of the HPA. For example, the Notice of Proposed Rulemaking (“NPRM”) for the Scar Rule drives this point home in stating that the rule was meant to --

allow[] for normal changes in the skin that are due to friction. These changes would allow thickening of the epithelial layer of the skin in the pastern area (much like a callous on a workman's

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hands) and the moderate loss of hair in the pastern area caused by the friction generated by an action device.

43 Fed. Reg. 18514, 18519 (Apr. 28, 1978) (emphasis added). Furthermore, the plain language of the Scar Rule makes clear that the anterior and anterior-lateral surface of the pasterns clearly were not intended to be treated under the Scar Rule in the same manner when assessing whether a tissue change constitutes a violation of the Scar Rule for the tissue on the posterior of the pasterns. Compare 9 C.F.R. § 11.3(a) with *id.* § 11.3(b).

However, the Association understands that, at past shows, APHIS officials have misapplied the “must be free of . . . granulomas” factor from part (a) of the Scar Rule, which applies only to *the anterior and anterior-lateral* surfaces of the pasterns, to find violations for tissue changes *on the posterior* surface of the pasterns. In addition, the Association understands that APHIS officials have wrongly ignored the factor governing granulation tissue for the posterior surface of the pasterns: that the posterior surface only needs to be free of “proliferating granuloma tissue,” *i.e.*, that the posterior surface be free of proud flesh.

The Association also is led to the conclusion that APHIS officials have misapplied these provisions of the Scar Rule given how APHIS defined “proliferating granuloma tissue” in one of its 2015 inspection training presentations. In that presentation, APHIS defined “proliferating granuloma tissue” as “lesions formed as a result of inflammatory reactions.” Ex. 5 hereto. That definition is different from, and more expansive than, the definition for “proliferating granuloma tissue” that APHIS used in earlier operating plans from APHIS. Moreover, APHIS’s definition for “proliferating granuloma tissue” in its 2015 presentation does not follow the terms of the Scar Rule because it effectively reads out “proliferating” from “proliferating granuloma tissue.” “Proliferating” means “grow[ing] by rapid production of new parts, cells, buds, or offspring.” www.merriam-webster.com/dictionary/profligate. The definition used in APHIS’s 2015 presentation also does not follow the terms of the Scar Rule because the definition is substantially the same as the definition that the Scar Rule gives for “granuloma,” which pertains only to tissue changes on the anterior and anterior-lateral surfaces of the pasterns. Compare 9 C.F.R. § 11.3(a) n.5.

It is also evident that APHIS officials have been improperly applying the “must be free of . . . excessive loss of hair” factor of the Scar Rule – a factor which applies only to the anterior surface of the pastern – to find violations based on the appearance of the *posterior* surface of the pastern. APHIS’s website provides evidence of its misapplication of the Scar Rule in this regard because an APHIS presentation on the website identifies “excessive hair loss” on pictures of scar violations of the *posterior* surfaces of pasterns.¹

¹ See slides 17-19, 21-23, 29-30, 32, 33 & 34 at https://www.aphis.usda.gov/animal_welfare/hp/downloads/scar_rule_violations_2007.pdf

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Any inspection at the upcoming Celebration in which an APHIS official misapplies the provisions of the Scar Rule along the foregoing lines would be unlawful. Furthermore, this is not the first time that APHIS has been advised that inspections which misapply the provisions of the Scar Rule along the foregoing lines are unlawful.²

C. APHIS Officials' Failure To Apply Its Established Procedure To Distinguish Uniformly From Non-Uniformly Thickened Epithelial Tissue In Inspecting Horses At The Celebration Would Be Unlawful

The law requires that a federal agency assiduously follow its own practices and procedures. *See, e.g., U.S. v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) (agency's failure to follow procedures and instructions in memo it issued was denial of due process); *Fausto v. Gearan*, No. Civ. A. 93-1863, 1997 WL 540809, at *11-12 (D.D.C. Aug. 21, 1977) (agency's failure to follow provisions in its manual violated the APA).

The Scar Rule expressly provides that "uniformly thickened epithelial tissue" does not constitute a violation if such tissue is found on the posterior surface of a horse's pastern. *See* 9 C.F.R. § 11.3(b). As noted in the block quotation above from the Scar Rule's NPRM, "uniformly thickened epithelial tissue" is "much like a callous on a workman's hands." For the past several years, APHIS has had in place an established inspection procedure requiring its officials (and other inspectors) to spread the skin of what may appear to be scar on the posterior surface of a horse's pastern in order to determine if the epithelial layer is uniformly thickened.

In an October 12, 2012 letter, you described this inspection procedure and confirmed its existence – and that it had been in place for some time – by stating:

As the 2009 email you reference mentions – and as Animal Care inspectors have clarified many times – inspectors are instructed to spread the skin on the pastern to determine if what appears to be a scar is uniformly thickened epithelium.

Ex. 6 hereto at 2. Similarly, slide 35 of an APHIS training presentation entitled "2013 DQP Training, USDA-APHIS Animal Care, Horse Protection Program" explains that, to avoid violating the Scar Rule, there must not be "non-uniformly thickened epithelial tissue on the posterior surfaces of the pasterns (flexor surface) ***which cannot be flattened or smoothed out***[" (Emphasis added). Whether the thickened epithelial tissue "cannot be flattened or smoothed out" necessarily requires one to attempt to manually flatten or smooth out the tissue.

However, the Association believes that APHIS officials have refused to apply this established APHIS procedure to distinguish between uniformly thickened and non-uniformly thickened epithelial tissue in conducting inspections. Notably in this regard, Dr. Jeff Baker, an

² *See, e.g.,* my March 8, 2015 letter on behalf of the Association to Secy. Vilsack, with a cc: to you.

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APHIS VMO, stated at a scar clinic in Rockwall, Texas in 2009 that APHIS will no longer attempt to flatten out thickened epithelial tissue on the posterior surface of the pasterns to assess whether it is uniformly thickened, and thus not a violation of the Scar Rule. There are several other similar, more recent statements made by Dr. Baker and other VMOs.

Should an APHIS official not apply this procedure in inspecting any horse at the Celebration to determine if it complies with the Scar Rule, the examination would be unlawful. Nor is this the first time that APHIS has been advised that it would be unlawful for its officials not to apply APHIS's established procedure to distinguish uniformly thickened epithelial tissue from non-uniformly thickened epithelial tissue in conducting inspections for violation of the Scar Rule. *See note 2, supra.*

* * * * *

The foregoing does not necessarily constitute a complete recitation of the Constitutional and other violations by APHIS should it adhere to the types of conduct and practices in which it has indulged at past Celebrations and shows. Nor does this letter contain a full listing of all the available evidence proving APHIS's transgressions, such as its misapplication of the Scar Rule or other regulations. Nonetheless, I have attempted to include enough significant and relevant information that the Association hopes will lead APHIS *voluntarily* to reevaluate its past approach to horse inspections at the upcoming Celebration.

The Association is willing and able to work with APHIS to assist the agency in satisfying its obligations under the HPA in a positive, lawful and Constitutional manner. I reiterate that the Association is committed to ensuring, to the best of its ability, that all horses that show at the Celebration comply with the dictates of the HPA. The Association, therefore, looks forward to working with APHIS to achieve this goal and to a positive reply to this letter.

Thank you for your time and consideration. You may contact me should you have any questions or wish to discuss this letter in greater detail.

Sincerely,

/s/ Joseph D. Wilson

Joseph D. Wilson
*Counsel To The Tennessee Walking Horse
National Celebration Association*

Enclosures (6)

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ccs (by Federal Express only):

Thomas Vilsack,
Secretary of Agriculture, USDA

Jeffrey Prieto,
General Counsel, USDA

Bernadette Juarez,
Deputy Administrator
Animal Care Program, APHIS