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March 9, 2015

BY FEDERAL EXPRESS

The Honorable Tom Vilsack
Secretary of Agriculture
United States Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Re: USDA's Unlawful Application of The Scar Rule

Dear Secretary Vilsack:

I write on behalf of the Tennessee Walking Horse industry and its owners, exhibitors and participants in connection with issues regarding the enforcement of the Horse Protection Act ("HPA") and the regulations the USDA has promulgated pursuant to the HPA.

Specifically, USDA's Animal and Plant Health Inspection Service ("APHIS"), through its Veterinary Medical Officers ("VMOs"), has been: (1) misapplying the HPA, specifically the scar rule promulgated pursuant to the HPA, and (2) failing to follow an established APHIS scar rule inspection procedure. APHIS has been engaging in one or more of these actions since at least mid-May 2009. Section II of this letter explains these APHIS actions in more detail, and that they constitute violations of the Administrative Procedure Act ("APA") and a denial of due process.

To remedy these violations of the APA, APHIS should promptly institute the relief set out in Section III of this letter.

I. BACKGROUND

A. The HPA

As APHIS has described, "soring" is the practice of "injuring [] show horses to improve their performance in the show ring. The pain caused by soring accentuates the gait of show horses." 43 Fed. Reg. 14778, 14778 (Apr. 26, 1988). In 1970, Congress passed the HPA, which, as amended, is codified at 15 U.S.C. §§ 1821-1831. Generally, the HPA prohibits the showing and sale of sored horses, among other things. *Id.* § 1824.

Hon. Tom Vilsack
March 9, 2015
Page Two

Under the HPA, “sore” means that --

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

Id. § 1821(3).

Violators of the HPA or rules promulgated pursuant to it are subject to civil and criminal penalties, including imprisonment. *Id.* § 1825.

The HPA authorizes the Secretary of Agriculture (“Secretary”) to issue rules to carry out the HPA’s provisions. *Id.* § 1824. The HPA also authorizes the Secretary, or any of the Secretary’s duly designated representatives, to inspect any horse at a horse show or horse sale for compliance with the terms of the HPA and rules issued pursuant to it. *See id.* § 1823(e). Such representatives include APHIS VMOs. In addition to conducting inspections, VMOs also train “DQPs,” *i.e.*, “designated qualified persons.” DQPs are appointed by the management of, among other things, horse shows; DQPs also have a role in inspecting horses for compliance with the HPA and rules promulgated pursuant to it. *See id.* § 1823(e).

B. The Scar Rule

In 1979, the Secretary promulgated a rule pursuant to the HPA known as the “scar rule.” 44 Fed. Reg. 25172, 25180 (Apr. 27, 1979). As amended, the scar rule 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:

Hon. Tom Vilsack
March 9, 2015
Page Three

(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 (2014). Exhibit A hereto contains several pictures which demonstrate the kinds of scarring that the USDA was facing in the 1970s when it developed and promulgated the scar rule.

1. The intent of the scar rule.

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 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).

Additionally, the anterior and anterior-lateral surface of a horse’s 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. Put another way, the scar rule was intended to treat a tissue change differently depending on whether its appears on the anterior or anterior-lateral surface of the pastern or whether it appears on the posterior surface of the pastern. Compare 9 C.F.R. § 11.3(a) with *id.* § 11.3(b). The table on the following page highlights some examples from the text of the scar rule which illustrate this point:

Hon. Tom Vilsack
March 9, 2015
Page Four

<i>Anterior or Anterior-Lateral Surface of Pastern</i>	<i>Posterior Surface of Pastern</i>
Must be free from excessive hair loss. § 11.3(a).	Presence of excessive hair loss does not constitute a violation. § 11.3(b).
Must be free of granulomas. § 11.3(a).	Presence of granulomas is not a violation. Rather, the presence of <i>proliferating</i> granuloma tissue ¹ can result in a violation. § 11.3(b).
Presence of moisture or edema does not constitute a violation. § 11.3(a).	Must be free of moisture and edema. § 11.3(b).

It is also critical to note that 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 id.* § 11.3(b). As noted in the block quotation set out above from the scar rule’s NPRM, “uniformly thickened epithelial tissue” is “much like a callous on a workman’s hands.” The scar rule does not contain a similar provision for the anterior and anterior-lateral surfaces of the pasterns. *See id.* § 11.3(a).

In short, the foregoing references to the text of the scar rule and its NPRM demonstrate a clear, key meaning behind the scar rule, *viz.*: that the normal friction caused by use of a legal action device will cause tissue changes in the anterior and posterior surfaces of the Tennessee Walking Horse pasterns – and that such tissue changes are not to constitute a violation of the scar rule.

It is understandable that the USDA would promulgate a scar rule that treats *anterior* pastern surface tissue changes differently from *posterior* pastern surface tissue changes. Indeed, the reality of the use of action devices in training Tennessee Walking Horses and veterinarian observation underscore the logic behind treating tissue changes differently depending on whether they are on the anterior or posterior surfaces of the pasterns. On the anterior surfaces of the pasterns, which is where an action device “hits,” there could be more loss of hair than on the posterior surface of the pastern. On the posterior surface of the pastern, given how a horse strides, the action device could be involved in pinching, versus the hitting on the anterior. From discussions with numerous veterinarians, both within the Industry and in other equine-related areas, it is also clear that tissue changes from the use of an action device would differ from the anterior surface of a horse’s pasterns versus the posterior surface of the pasterns.

¹ In various operating plans between 1999 and 2009, APHIS defined “proliferating granuloma tissue” as the “[g]rowth of proud flesh that is usually the result of the body’s unsuccessful attempts to repair tissues that are injured and/or infected[;] [t]he proliferating granuloma can create wart-like growths and/or abnormal thickening where the skin is corrugated, ridged or thrown into clusters of exuberant (proud flesh) growth.” APHIS 1999, 2004-2006, and 2007-2009 op. plans, respectively). “Proud flesh” means “an *excessive growth* of granulation tissue.” <http://www.merriam-webster.com/dictionary/proud%20flesh> (emphasis added).

Hon. Tom Vilsack
March 9, 2015
Page Five

B. APHIS's Established Inspection Procedure For Determining Whether Or Not Thickened Epithelial Tissue On The Posterior Surface Of The Pasterns Is "Uniformly Thickened" And Thus Not A Violation Of The Scar Rule

For the past several years, APHIS has had in place an established inspection procedure requiring its VMOs 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 whether or not the epithelial layer is uniformly thickened. As discussed above in Section I, a uniformly thickened epithelial layer on the posterior surface of the pasterns does not constitute a violation of the scar rule, while an epithelial layer on that surface that is not uniformly thickened could indicate a violation.

In an October 12, 2012 letter, Kevin Shea, APHIS's Administrator, confirmed the existence of this inspection procedure – 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. *See* Ex. B hereto (at p. 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*["] Exhibit C hereto (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.

II. APHIS AND ITS VMOs HAVE ACTED, AND ARE ACTING, UNLAWFULLY

It is axiomatic that 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). Likewise, any agency must 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). An entity that has been prejudiced by an agency's failure to adhere to its own rules, practices or procedures has the right to assert a claim and obtain review of the agency's action by a federal court. *See, e.g., Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); *Mazaleski v. Treusdell*, 562 F.2d 701, 717-19 & n.38 (D.C. Cir. 1977).

As described below, APHIS has failed to follow its own rule, *i.e.*, the scar rule, and failed to follow its own scar rule inspection procedure.

Hon. Tom Vilsack
March 9, 2015
Page Six

**A. APHIS And Its VMOS Have Not Followed, And Are Not Following, The
 Terms of The Scar Rule**

In derogation of the terms of the scar rule, APHIS and its VMOs, when conducting investigations on horses in the Industry, have been improperly applying 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. Not only that, but APHIS and its inspectors have also been effectively ignoring the more forgiving 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. By applying a factor that is irrelevant under the scar rule with respect to the posterior pastern surface and additionally ignoring a factor that is relevant under the scar rule regarding the posterior pastern surface, APHIS and its VMOs have been violating the APA. *Accord Motor Vehicle Mfgtrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983) (providing that an agency action is arbitrary and capricious, and thus unlawful under the APA, if it is “based on factors that Congress has not intended [the agency] to consider”).

As the Industry has changed, the appearance of “proliferating granuloma” has all but disappeared. Nevertheless, APHIS and its VMOs continue to find “scars” on the posterior surfaces of unscarred pasterns like those appearing in the pictures found in Exhibit D attached hereto. Furthermore, a review of numerous alleged scar violations, as well as some biopsies of horses that were determined by VMOs to be in violation of the scar rule, does not reveal proliferating granuloma. As a matter of fact, the biopsies determined that the tissue had no “significant healing by second intention” which, as APHIS and its VMOs should recognize, would be required for proliferating granuloma to be present.

Finally, and perhaps most damning for APHIS, is the fact that APHIS’s 2015 training presentation for DQPs contains no definition for proliferating granuloma in discussing the scar rule with respect to the posterior surface of the pasterns, and, furthermore, contains *a different, more expansive* definition of “proliferating granuloma tissue” than APHIS had used in its operating plans mentioned in footnote 1, *infra*. See Exhibit E hereto (at slide 31). The definition of “proliferating granuloma tissue” in this 2015 training presentation is “lesions formed as a result of inflammatory reactions.” *Id.* However, that definition does not follow the terms of the scar rule – and is thus problematic under the law – in at least two respects. First, that definition is substantially the same as the definition that the scar rule gives for “granuloma” in the portion of the rule that 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. Second, the definition in the training presentation effectively reads out the “proliferating” aspect from the term “proliferating granuloma tissue.”

In similar fashion, it is evident that APHIS has also been improperly applying the “must be free of . . . excessive loss of hair” factor from part (a) of the scar rule to find violations for purported tissue changes on the *posterior* surface of the pasterns. Under the scar rule, however, that factor applies only to the *anterior and anterior-lateral* surfaces of the pasterns. In this

Hon. Tom Vilsack
March 9, 2015
Page Seven

regard, it is notable that APHIS's website identifies "excessive hair loss" on pictures of scar violations of the *posterior* surfaces of pasterns. *E.g.*, Ex. F hereto (slides 17-19, 21-23, 29-30, 32, 33 & 34 in "*Violations Seen By USDA [VMOs] At Inspected Shows In 2007*," found at http://www.aphis.usda.gov/Animal_Welfare/Hp/Downloads/Scar_Rule_Violations_2007.pdf).

B. APHIS And Its VMOs Are Failing To Apply APHIS's Own Long-Established Inspection Procedure Pertaining To The Scar Rule

As discussed above in Section I, for the past several years, APHIS has had an established inspection procedure for determining whether or not thickened epithelial tissue on the posterior surface of the pasterns is uniformly thickened and thus not a violation of the scar rule. However, it is clear that APHIS and its inspectors have not applied this established procedure – and, indeed, seem to have been willfully refusing to apply it. Notably in this regard, Dr. Jeff Baker, an APHIS VMO, stated at a scar clinic in Rockwall, Texas in 2009 that APHIS and VMOs 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 statements made by Dr. Baker and other VMOs more recently. The failure of APHIS and its inspectors to follow its own inspection procedure in this regard constitutes a clear violation of the APA and denial of due process. *See, e.g., Heffner*, 420 F.2d at 811-12; *Fausto* 1997 WL 540809 at *11-12.

III. REQUESTED AGENCY ACTION

In light of the failure by APHIS and its VMOs to follow the plain terms of the scar rule and to follow APHIS's own established inspection procedure, my client and many others in the Industry are entitled to relief. To that end, APHIS should promptly take all of the actions listed below. Specifically, my client requests that APHIS promptly:

1. withdraw all scar violations issued since May 2009;
2. command that VMOs and DQPs immediately cease and desist from applying the factors in part (a) to the scar rule when examining the posterior surface of pasterns for compliance with the scar rule;
3. develop new scar rule training materials and inspection protocols based on accepted principles of veterinary science that address the proper posterior surface tissue changes that the scar rule permits and does not permit, paying special attention to allowed uniformly thickened epithelial including callouses, wrinkles and other tissue changes associated with the natural friction of the action device, as well as the natural movement of the Tennessee Walking Horse, and those tissue changes that are not allowed (specifically proliferating granuloma);

KELLEY DRYE & WARREN LLP

Hon. Tom Vilsack
March 9, 2015
Page Eight

4. begin using those new scar rule training materials and protocols to train VMOs only after those materials and protocols have been reviewed and approved by the USDA, Industry leaders and independent veterinarians;
5. require VMOs and DQPs to adhere to the requirements and procedures of the new training materials and inspection protocols or face dismissal; and, finally,
6. refrain from establishing any different or additional inspection protocols regarding posterior scars until the above-noted new scar rule training materials and inspection protocols have been put in place.

You may contact me should you have any questions or wish to discuss these matters.

Sincerely,

/s/ Joseph D. Wilson

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

Enclosures (6 exhibits)

cc: Kevin Shea,
Administrator, APHIS

Phyllis K. Fong,
Inspector General, USDA

Jeffrey Prieto,
Acting General Counsel, USDA